# 21-1498

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALEXANDER BELYA,
*Plaintiff-Appellee*,

v.

HILARION KAPRAL, ET AL.,
*Defendants-Appellants*.

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

**BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF APPELLANTS' ARGUMENT FOR INTERLOCUTORY REVIEW**

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## BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF APPELLANTS' ARGUMENT FOR INTERLOCUTORY REVIEW

*Amici curiae* constitutional law scholars respectfully submit that this Court should conclude that it has jurisdiction to hear Appellants' appeal under the collateral-order doctrine.

## INTEREST OF *AMICI CURIAE*[1]

*Amici* are constitutional law scholars whose scholarship and teaching have a particular focus on the First Amendment Free Exercise and Establishment clauses. For decades, these professors have closely studied constitutional law and religious liberty, published numerous books and scholarly articles on the topic, and addressed it in litigation. The *amici* bring to this case a deep theoretical and practical understanding of the Supreme Court's First Amendment jurisprudence that may help the Court resolve the parties' competing claims. In particular, *amici* share an interest in advancing the understanding of how courts should handle ministerial-exception arguments as a matter of civil and appellate procedure.

Thomas C. Berg is the James L. Oberstar Professor of Law and Public Policy at the University of St. Thomas School of Law (Minnesota). Professor Berg

[1] Pursuant to this Court's Rule 29(a)(2) and (4)(E), *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

directs the law school's Religious Liberty Appellate Clinic, and has himself drafted nearly 60 briefs on issues of religious liberty and free speech in the Supreme Court and lower courts. He is the author of six books including *Religion and the Constitution*, as well as numerous articles.

Elizabeth A. Clark is Associate Director of the International Center for Law and Religion Studies at the J. Reuben Clark Law School at Brigham Young University. Professor Clark has spoken worldwide and written extensively on church-state issues and is the editor of several books on U.S. and comparative law and religion issues. She has testified before the U.S. Congress on religious-freedom issues, taken part in drafting legal analyses of pending legislation affecting religious freedom in over a dozen countries, and has written *amicus* briefs on religious-freedom issues for the U.S. Supreme Court.

Robert F. Cochran Jr. is Professor Emeritus at Pepperdine University's Caruso School of Law, and the founder of Pepperdine's Herbert and Elinor Nootbaar Institute on Law, Religion and Ethics. Professor Cochran has lectured around the world on religion and the law, and has co-authored or co-edited numerous books on the same topic.

Carl H. Esbeck is the R.B. Price Emeritus Professor and Isabelle Wade & Paul C. Lyda Emeritus Professor of Law at the University of Missouri. He has published widely in the area of religious liberty, church-state relations, and federal

civil-rights litigation, including authoring articles discussing the ministerial exception and the principles of church autonomy. In 2019, the University of Missouri published Professor Esbeck's *Disestablishment and Religious Dissent: Church-State Relations in the New American States, 1776-1833*.

Richard W. Garnett is the Paul J. Schierl/Fort Howard Corporation Professor at Notre Dame Law School. He teaches and writes about the freedoms of speech, association, and religion, and constitutional law more generally. He is a leading authority on the role of religious believers and beliefs in politics and society. He has published widely on these matters, and is the author of dozens of law review articles and book chapters. He is the founding director of Notre Dame Law School's Program on Church, State, and Society, an interdisciplinary project that focuses on the role of religious institutions, communities, and authorities in the social order.

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

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The ministerial exception raises many challenging issues for courts on which the *amici* law professors have a range of views, including some disagreements. But *amici* all agree that the First Amendment supports early resolution of the ministerial exception as a threshold legal issue, subject to interlocutory appeal.

## SUMMARY OF THE ARGUMENT

The church-autonomy doctrine (sometimes referred to as ecclesiastical abstention) and the associated ministerial exception exist to protect the fundamental right against governmental establishment of religion. The church-autonomy doctrine provides for religious entities' "independence in matters of faith and doctrine in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020). The ministerial exception is a component of the church-autonomy doctrine. It prevents the government from interfering with the internal governance of the church by "depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

The church-autonomy doctrine and ministerial exception protect the independence of religious entities and serve a structural function of protecting courts from becoming entangled in religious controversies that courts are simply not competent to resolve. Because these complementary interests are irreparably harmed by unnecessary judicial proceedings, the denial of a motion to dismiss that credibly raises the church-autonomy doctrine or ministerial exception is immediately appealable under the collateral-order doctrine. Indeed, unlike many other orders that are immediately appealable under the collateral-order doctrine, an

appeal in this context directly serves to protect against the violation of the First Amendment.

Applying the collateral-order doctrine to allow interlocutory appeals to address the denial of a defense against suit is normal in immunity cases. It is the same approach courts take when determining the application of absolute and qualified immunity for public officials. A government official who is immune from suit is harmed by the very act of being sued. So too, a religious entity being sued for exercising its right to determine who its ministers are, or for defamation that arose in the context of church governance, is harmed by being dragged into the secular courts to answer for its decision. A trial court's decision to continue litigation that should have been barred by the church-autonomy doctrine perpetuates the very harm the doctrine seeks to avoid.

This case illustrates the harms that occur when these rules are not heeded. Here, the district court has rejected the Russian Orthodox Church Outside Russia's ("the Church") argument that Father Alexander's claims must be dismissed because they arise from the Church's decision regarding whether Father Alexander is properly a bishop in the Church. The district court later rejected the Church's motion to stay the case while this Court hears the appeal, or bifurcate discovery. Instead, the court has plowed ahead with merits discovery set to conclude in December. The district court's actions impose harm to the Church from judicial

interference in church governance *and* the structural harm against separation of church and state which the First Amendment protects. If the Church is right that the church-autonomy doctrine bars suit in this case, all of this upcoming discovery and litigation enmeshes the federal court in a dispute it cannot constitutionally resolve, ringing a bell that cannot be unrung. Accordingly, this Court should conclude that it has jurisdiction to hear the appeal under the collateral-order doctrine.

## ARGUMENT

### I. The application of the church-autonomy doctrine and the ministerial exception should be resolved early in the litigation.

The rationale for the church-autonomy doctrine and the associated ministerial exception has important procedural implications for how courts administer cases in which church autonomy or the ministerial exception is credibly raised as a defense. The church-autonomy doctrine and the ministerial exception serve to protect the First Amendment religious rights of individuals and entities as well as the structural interest in avoiding entangling the government, including the judiciary, in religious disputes. Because the church-autonomy doctrine or the ministerial exception protects structural interests, the question of whether the church-autonomy doctrine applies should be determined at the outset of a case. Failure to correctly answer this question at the beginning of a case causes the very

harms the doctrine is intended to prevent and in so doing unconstitutionally entangles the courts in religious questions.

### A. The church-autonomy doctrine provides a structural protection for the separation of church and state for the judiciary.

Church-autonomy doctrine and the related ministerial exception exist to ensure that the government does not trespass across the boundary between the secular and the religious. *See Demkovich v. St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (en banc). Within our constitutional government, the people have determined that government cannot interfere with the internal governance of religious organizations, including matters of "faith, doctrine, church governance, and polity." *Bryce v. Episcopal Church in the Diocese of Co.*, 289 F.3d 648, 655 (10th Cir. 2002). This idea is frequently part of what people mean when they invoke the phrase, "separation of church and state." Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U.L. Rev. Colloquy 175, 177–79 (2011). The church-autonomy doctrine enforces this separation between church and state, protecting both religious institutions *and* the courts.

The church-autonomy doctrine and the ministerial exception protect the separation of church and state in the courts for multiple reasons. One of the *amici* has explained the policy underlying the church-autonomy doctrine as follows:

> Well understood, "separation of church and state" would seem to denote a structural arrangement involving institutions, a constitutional order in which the institutions of religion—not "faith," "religion," or "spirituality," but the "church"—are distinct from, other than, and meaningfully independent of, the institutions of government. What is "at stake", then, with separation is not so much—or, not only—the perceptions, feelings, immunities, and even the consciences of individuals, but a distinction between spheres, the independence of institutions, and the "freedom of the church." [Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 St. John's J. Legal Comment 515, 523 (2007).]

By injecting themselves into religious questions, courts undermine their own credibility and authority. Courts are not competent to answer religious questions—a quality that has long been recognized in American jurisprudence. As this Court acknowledged: "The notion of judicial incompetence with respect to strictly ecclesiastical matters can be traced at least as far back as James Madison, the leading architect of the religious clauses of the First Amendment." *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017). Indeed, the church-autonomy doctrine and the ministerial exception "impose[] a disability on civil government with respect to specific religious questions." Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1867 (2018).

This Court has recognized the structural concerns protected by the Religion Clauses. The Court has explained that the Free Exercise Clause "protects a

church's right to decide matters of governance and internal organization." *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (cleaned up). Additionally, the Establishment Clause prevents the court from getting entangled in doctrinal disputes. *Id.* (citing *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1577 (1st Cir. 1989)).

Together, the Religion Clauses give rise to the church-autonomy doctrine which guarantees the independence of religious entities such as churches from government interference with matters of faith, doctrine, polity, church governance, and the decisions regarding who will carry out the church's vision. *See Bryce*, 289 F.3d at 655. A claim of church autonomy "is a claim to autonomous management of a religious organization's internal affairs." Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J.L. & Pub. Pol'y 253, 254 (2009). "The essence of church autonomy is that [a church] should be run by duly constituted [religious] authorities and not by legislators, administrative agencies, labor unions, disgruntled lay people, or other actors lacking authority under church law." *Id.*

### B. The ministerial exception is an application of the church-autonomy doctrine.

The Supreme Court's decisions addressing the so-called ministerial exception show that it is a specific application of the overall church-autonomy doctrine. *See, e.g.*, *Our Lady*, 140 S. Ct. at 2060 (stating that the "'ministerial

exception' is based on the 'insight' that the First Amendment protects churches' "autonomy with respect to their internal management"). For example, in *Our Lady*, the Court explained that the selection and supervision of teachers at religious schools are off limits to judicial review under the ministerial exception. "Religious education and formation of students is the very reason for the existence of most private religious schools." *Id.* at 2055 (cleaned up). "Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.* This Court has acknowledged the ministerial exception as an application of the church-autonomy doctrine, holding, for instance, "those properly characterized as 'ministers' are flatly barred from bringing employment-discrimination claims against the religious groups that employ or formerly employed them." *Fratello*, 863 F.3d at 202–03.

Ultimately, the church-autonomy doctrine is rooted in the structural concern for ensuring that courts do not become entangled in resolving religious disputes as to which they have no constitutional power. In *Hosanna-Tabor*, a decision holding that the ministerial exception required dismissal of an employment-discrimination suit brought against a religious employer, the Supreme Court rooted its analysis in safeguarding the boundary between the secular and the religious by tracing the history of legal protections for religion in America. 565 U.S. at 182–87. The Court

focused on three cases dating back nearly 150 years, all involving property disputes, and all of which recognized that the government is categorically prohibited from contradicting ecclesiastical decisions. *Id*. at 185–87.

In the first case, *Watson v. Jones*, 80 U.S. 679 (1871), the Supreme Court declined to interfere with a denomination's determination as to which faction of a church rightly controlled the church's property. There the Court stated:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. [*Id.* at 728–29.]

Accordingly, the Court adopted the common-law rule that courts could not review or overturn decisions by religious bodies on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 727.

Some 80 years later, the Supreme Court declared that the decision in *Watson* "radiate[d] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, *free from state interference*, matters of church government as well as those of faith and

doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (emphasis added). In *Kedroff*, the Court applied the First Amendment to an ecclesiastical question for the first time. *See Hosanna-Tabor*, 565 U.S. at 186. There, the Court struck down a New York law that purported to decide which Russian Orthodox faction was entitled to control a cathedral because the issue was "strictly a matter of ecclesiastical government." *Kedroff*, 344 U.S. at 115–19. Such issues, the Court declared, are "forbidden" to the "power of the state." *Id.* at 119.

The Supreme Court returned to the harm caused by the interjection of the courts into ecclesiastical or religious questions in *Serbian Eastern Orthodox Diocese for United States of America & Canada v. Milivojevich*, 426 U.S. 696 (1976). There, the Court determined that courts cannot "delve into the various church constitutional provisions" because to do so would repeat the lower court's error of involving itself in "internal church government, an issue at the core of ecclesiastical affairs." *Id.* at 721. The Court explained that the First Amendment allows "religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters." *Id.* at 724. Courts must accept the decisions of religious tribunals on these matters. *Id.* at 725.

These cases animated the Supreme Court's recognition of the ministerial exception in *Hosanna-Tabor*, where the Court emphasized that courts are categorically forbidden from resolving religious disputes. And in *Our Lady*, the Supreme Court further clarified that this is a structural concern that protects the autonomy of churches *and* courts—and extends beyond decisions about ministers. "The Religion Clauses protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady*, 140 S. Ct. at 2060 (cleaned up). And under the ministerial exception "courts are *bound* to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* (emphasis added). The Court further explained that "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. The First Amendment outlaws such intrusion." *Id.*

Accordingly, courts have identified the ministerial exception as a structural limitation on government action. *See Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118, n.4 (3d Cir. 2018). And that makes sense because the ministerial exception protects religious entities' autonomy in internal

operations and governance, not just the right to hire co-religionists. *See Our Lady*, 140 S. Ct. at 2060–61.

### C. Because the church-autonomy doctrine provides structural protections, questions regarding its application should be resolved expeditiously.

The structural interest in avoiding the establishment of religion means the church-autonomy doctrine and the ministerial exception are unlike most other defenses. Courts have no intrinsic interest in whether a party's claims are barred by a statute of limitations, contributory negligence, duress, or other common affirmative defenses. But, as discussed above, the "constitutional protection" implicated by the church-autonomy doctrine "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*, 777 F.3d at 836 (emphasis added).

Because of the structural limitation imposed by the church-autonomy doctrine on the exercise of judicial authority, courts do have an interest in ensuring that the exception is applied even where the parties fail to raise the doctrine or where someone claims that a defendant has affirmatively waived the defense. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (Courts "have an interest independent of party preference for not being asked to decide" religious issues); *abrogated on other grounds*, *Hosanna-Tabor*, 565 U.S. 171; *see, e.g.*, *Lee*, 903 F.3d at 117–18 & n.4 (upholding application of the ministerial

exception where trial court raised the issue *sua sponte*; concluding that church had not waived the ministerial exception because it "is rooted in constitutional limits on judicial authority"); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018) (stating that "a religious institution does not waive the ministerial exception by representing itself to be an equal-opportunity employer"), *cert. denied*, 139 S. Ct. 456 (2018).

The categorical nature of the prohibition against the state enmeshing itself in religious controversies requires courts to determine whether the church-autonomy doctrine bars a case or part of a case before considering the merits of the plaintiff's claims. In cases where it may apply, the church-autonomy doctrine has practical implications for discovery, the possible need to try disputed factual issues related to the church-autonomy doctrine, and interlocutory appeals. All of those issues have arisen in this case. In other words, "it is important that these questions be framed as legal questions and resolved expeditiously at the beginning of litigation to minimize the possibility of constitutional injury. . . ." Mark E. Chopko, Marissa Parker, *Still A Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 First Amend. L. Rev. 233, 292 (2012).

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

The structural nature of the church-autonomy doctrine has practical implications for appeals as well. Interlocutory trial-court decisions that the church-autonomy doctrine or ministerial exception do not apply should generally be immediately appealable. There is simply no putting the genie back in the bottle after the courts have become excessively entangled in a religious controversy because they erred in failing to dismiss the case at the outset under the church-autonomy doctrine.

This is precisely the sort of interlocutory orders to which the collateral-order doctrine applies. As this Court has explained, interlocutory appeal is appropriate where a pleadings-stage denial turns on a legal question and not a factual dispute. *Britt v. Garcia*, 457 F.3d 264, 271–72 (2d Cir. 2006). For this Court to have appellate jurisdiction over a collateral-order appeal, a district court's order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Liberty Synergistics Inc. v. Microflo Ltd.*, 718 F.3d 138, 146 (2d Cir. 2013) (citing *Will v. Hallock*, 546 U.S. 345, 349 (2006)).

With respect to the last of these factors, this Court has stated: "Immediate review must further some particular value of a high order in support of the interest in avoiding trial. That is, it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest." *Id.* at 150 (cleaned up). It is hard to imagine an interest more important than the vindication of the First Amendment. This Court has regularly held as much, reaffirming in a recent Free Exercise Clause case that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020).

In recent years, courts have repeatedly entertained appeals from interlocutory orders that intrude upon the structural separation between internal church governance and the state. *See, e.g.*, *Roman Catholic Archdiocese of San Juan P.R. v. Feliciano*, 140 S. Ct. 696 (2020) (interlocutory appeal in a church-autonomy case arising under 28 U.S.C. § 1258); *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 974 (7th Cir. 2021) (resolving the ministerial exception on a certified interlocutory appeal); *Whole Woman's Health v. Smith*, 896 F.3d 362, 367–68, 373 (5th Cir. 2018) (requirements of collateral-order doctrine met with regard to discovery order that infringed upon autonomy of religious body).

The treatment of interlocutory appeals from the denial of qualified immunity provides a useful analog. *See Skrzypczak v. Roman Catholic Diocese*, 611 F.3d

1238, 1242 (10th Cir. 2010) ("The ministerial exception, like the broader church autonomy doctrine, can be likened to a government official's defense of qualified immunity." (cleaned up)); *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). The doctrine of qualified immunity arises from the common law, *see, e.g.*, *Owen v. City of Independence, Mo.*, 445 U.S. 622, 637 (1980) (recognizing that Section 1983 did not abolish common-law immunities), but has a structural justification arising from the separation of powers. *See McMellon v. United States*, 387 F.3d 329, 350 n.1 (4th Cir. 2004) (Wilkinson, J., concurring) ("Of course, qualified immunity is an example of 'reading into' a statute a degree of immunity in order to satisfy, among other things, separation-of-powers concerns."); Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 Mich. L. Rev. 1405 (2019) (discussing the structural basis of the qualified-immunity doctrine). Qualified immunity, if applicable, means that the defendant is not subject to suit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). For this reason, qualified immunity is "effectively lost if a case is erroneously permitted to go to trial." *Id.* A decision denying qualified immunity *is* effectively unreviewable after a final judgment. *Id.* at 527. For that reason, orders denying qualified immunity are immediately appealable final orders under the collateral-order doctrine notwithstanding the fact that they do not finally resolve a case. *Id.* at 530. Moreover, in allowing immediate appeal under the collateral-order doctrine, federal courts have implicitly

recognized that the right to appeal decisions denying qualified immunity should not be subject to—and thus possibly thwarted by—the discretion of the trial court to certify a question for permissive interlocutory appeal.

Qualified immunity is not the only analog. A pretrial order denying a motion to dismiss an indictment on double-jeopardy grounds is another. *See Abney v. United States*, 431 U.S. 651, 659 (1977) (double-jeopardy issue was collateral and thus immediately appealable precisely because defendant was "contesting the very authority of the Government to hale him into court to face trial on the charge against him"). The denial of Eleventh Amendment state immunity and foreign-sovereign immunity are two others. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (order denying a motion to dismiss on Eleventh Amendment grounds is a final decision appealable under the collateral-order doctrine); *Bolmer v. Oliveira*, 594 F.3d 134, 140 (2d Cir. 2010) (order denying summary judgment appealable under the same); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (denial of a claim to foreign-sovereign immunity is immediately appealable under the collateral-order doctrine). In all of these cases, courts recognize the harm simply being haled into court causes. Immediate appeal is necessary if courts are to unwind that harm before it is irreparable.

The same should be true of the church-autonomy doctrine. Indeed, the harm to the parties and the courts is much worse when the church-autonomy doctrine or ministerial exception are not applied. Not only does the defendant lose constitutional rights, like in the context of double jeopardy and sovereign immunity, but because the church-autonomy doctrine also protects against the government's intrusion into quintessential religious questions, the constitutional harm occurs *because* of the judicial proceedings. And the harm is not just to the religious entity. The harm is also to the state because the court has entangled itself impermissibly with religion.

It is well established that courts must "refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (cleaned up). In the absence of an interlocutory appeal from an order denying the application of the church-autonomy doctrine or the ministerial exception, this trolling will occur. Accordingly, such orders should be immediately appealable under the collateral-order doctrine.

## III. Collateral-order appeal is appropriate in this case.

*Amici* contend that this Court should consider this appeal as a properly raised collateral order. Such a threshold determination of the legal question would properly respect the constitutional rights and immunities underlying the ministerial exception.

This Court regularly conducts interlocutory review of immunity denials at the motion-to-dismiss stage where the cases "present 'a legal issue that [could] be decided with reference only to undisputed facts'," because immunity is a "shield from litigation in the first instance" that will be "destroyed" if the case proceeds. *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 267 & n.3 (2d Cir. 1999). The same logic supports exercising appellate jurisdiction in this case. There are no factual issues to resolve, but early resolution of the legal issue is critical. As the district court recognized, this Court need only determine if the ministerial exception applies on the face of the complaint. *See Belya v. Kapral*, No. 20 CIV. 6597(VM), 2021 WL 2809604, at *2 (S.D.N.Y. July 6, 2021) (correctly framing the question for appeal as "whether the factual situation presented fits into the ministerial exception or ecclesiastical abstention"). The district court asserted that the factual situation is not sufficiently developed to apply the ministerial exception (*id.*)—but the court had it right the first time, the doctrine applies based on the facts alleged in the complaint. If it applies, it merits immediate application to avoid "the prejudicial effects" of "protracted" and "incremental litigation," and to prevent the "impermissible intrusion into, and excessive entanglement with, the religious sphere." *Demkovich*, 3 F.4th at 981–82 (applying the ministerial exception on interlocutory review); *see also Skrzypczak*, 611 F.3d at 1242 (ministerial exception is similar to defense of qualified immunity because it "bars" claims regardless of

their merits). This Court should therefore exercise jurisdiction over this appeal, consistent with its practice in immunity disputes.

## CONCLUSION AND REQUESTED RELIEF

For all of the reasons stated above, the *amici curiae* urge this Court to conclude that it has jurisdiction to hear the Defendants-Appellants' appeal of the district court's refusal to dismiss the case.

Dated: September 2, 2021

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## CERTIFICATE OF COMPLIANCE

This document complies with the word limit of 2d Cir. L.R. 29.1(c), 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App P. 32(f), this document contains 4,891 words.

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Dated: September 2, 2021

*s/ Matthew T. Nelson*
Matthew T. Nelson

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Appellate CM/ECF system on September 2, 2021.

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

September 2, 2021

*s/ Matthew T. Nelson*
Matthew T. Nelson