No. 22-824

In the Supreme Court of the United States

THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, ET AL.,

Petitioners,

v.

ALEXANDER BELYA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND 18 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Constitutional Provisions

Cases

Other Authorities

INTERESTS OF *AMICI CURIAE* [1]

Amici curiae are the Commonwealth of Virginia, the State of Alabama, the State of Alaska, the State of Arkansas, the State of Georgia, the State of Idaho, the State of Iowa, the State of Kansas, the Commonwealth of Kentucky, the State of Louisiana, the State of Mississippi, the State of Missouri, the State of Montana, the State of Nebraska, the State of Oklahoma, the State of South Carolina, the State of Texas, the State of Utah, and the State of West Virginia (collectively, the *Amici* States). *Amici* States submit this brief in support of the church officials' petition for a writ of certiorari.

Amici States are home to thousands of religious organizations, with millions of adherents. *Amici* States have a compelling interest in protecting the constitutional rights of these organizations, including churches, synagogues, and mosques, to be free to communicate about their current and former leaders without fear that secular courts will punish them or otherwise interfere with their decision-making. The ruling below exposes religious organizations to years-long litigation and intrusive discovery into their leadership decisions with no appellate review until final judgments are entered. This would deprive religious institutions residing in *Amici* States (and their faithful adherents) of the protection that the First Amendment promises them.

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[1] Under Supreme Court Rule 37.2(a), *amici curiae* notified counsel of record of their intent to file this brief at least 10 days prior to the due date for the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For at least one hundred and fifty years, this Court has recognized that the question of who should serve as a religious organization's spiritual leader is a question far beyond the reach of secular courts. *Watson* v. *Jones*, 80 U.S. 679, 727 (1871) ("[W]henever the questions of . . . ecclesiastical rule . . . have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final."). Consistent with that principle, religious organizations must be free to communicate about their leadership decisions without fear that secular courts will punish them or otherwise interfere with their decision-making.

This case presents a religious dispute between a minister and a church over matters of internal religious governance and leadership. Respondent Father Alexander Belya seeks to use the courts to challenge internal church communications that kept him from becoming the Bishop of Miami. Because those communications directly related to the church's internal choice of its own ministers, the First Amendment bars secular courts from adjudicating such matters. The lower court's holding to the contrary is thus enormously consequential, injecting courts into disputes between ministers and religious organizations concerning church governance and leadership decisions, and denying religious groups the special solicitude the First Amendment affords them.

Next, the lower court incorrectly held that Father Alexander's defamation claim could proceed because it could be resolved based on "neutral principles of law." This conclusion was wrong because the neutral-principles rule does not extend beyond church-

property disputes. The lower court's invocation of "neutral principles of law" to decide an ecclesiastical dispute concerning church policy and control conflicts with the reasoning of this Court's decisions dating back more than a century that treat ecclesiastical disputes as categorically exempt from adjudication by secular courts.

Finally, by holding that the collateral-order doctrine does not apply here, the Second Circuit exacerbated the problems of church-state entanglement. It did so by preventing religious organizations from appealing erroneous denials of church-autonomy defenses before final judgment. A church would therefore be forced to undergo discovery and trial before obtaining appellate review of the purely legal question of church autonomy. The discovery process and trial would violate the prohibition on church-state entanglement in a way that appellate review after final judgment could not remedy. By then, the damage is done.

As multiple judges have remarked, these issues are of exceptional importance and should be reviewed by this Court. See, *e.g.*, Pet. App. 63a (Cabranes, J., dissenting from the order denying rehearing *en banc*) (arguing that "the issues at hand are of exceptional importance and surely deserve further appellate review," and "that the matter can and should be reviewed by the Supreme Court" (quotation marks omitted)); *McRaney* v. *North Am. Mission Board of S. Baptist Convention, Inc.*, 980 F.3d 1066, 1082 (5th Cir. 2020) (Oldham, J., dissenting from the denial of rehearing *en banc*) (calling the application of the church-autonomy doctrine to "certain torts, like defamation" a "question[] of exceptional importance"). This Court should grant the writ of certiorari.

ARGUMENT

I. The church-autonomy doctrine bars Father Alexander's defamation suit

First, the church-autonomy doctrine clearly bars this defamation suit. The Russian Orthodox Church Outside of Russia (ROCOR) and its leaders sought to bring to light allegations against Father Alexander that they believed should preclude him from serving as the Bishop of Miami. Judicial involvement in this case would punish the church for its communications about its leadership decisions. The church-autonomy doctrine is not limited to employment-discrimination claims. Rather, as a number of courts have held, the same principles recognized by this Court in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), and *Our Lady of Guadalupe School* v. *Morrissey-Berru*, 140 S. Ct. 2049 (2020), apply equally to other claims that would force courts to interject themselves into questions of who should serve as a church's ministers or leaders, including defamation claims.

1. The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. "[R]adiat[ing]" from this language is "a spirit of freedom for religious organizations" that protects their "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186; *Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). A "component" of this "general principle of church autonomy" is the autonomy of religious institutions in "the selection of the individuals who play

certain key roles." *Our Lady*, 140 S. Ct. at 2060–61. Under this church-autonomy doctrine, legal claims concerning matters of church governance and leadership are, as a category, wholly excluded from judicial review by secular courts.

Applying these general principles of church autonomy, this Court recognized in *Hosanna-Tabor* a "'ministerial exception' grounded in the First Amendment, that precludes application of [federal employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." 565 U.S. at 188; see also Pet. App. 21a n.9 ("[T]he ministerial exception is one component of church autonomy."). As this Court explained, "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision"; indeed, "[s]uch action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. Thus, under the First Amendment, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady*, 140 S. Ct. at 2060.

Although *Hosanna-Tabor* addressed the application of the First Amendment's church-autonomy doctrine only to federal employment-discrimination laws, the reasoning in this Court's precedents makes clear that the doctrine applies with equal force to state-law tort claims. The "ministerial exception" acknowledged in *Hosanna-Tabor* was not derived from the text of the federal employment discrimination statutes at issue there, but rather was "grounded" in the First Amendment's imperative of church autonomy. 565 U.S. at

188. The constitutional concerns arising from the application of federal employment-discrimination laws to ministerial employment apply equally to state-law tort claims like defamation. Both Religion Clauses require courts to protect the autonomy of religious organizations by abstaining from adjudicating internal governance disputes. See *Our Lady*, 140 S. Ct. at 2060 (holding that state interference in matters of faith and doctrine "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"). Allowing secular courts to punish religious organizations with a damages award for defamation related to a minister's employment with the organization infringes on "a religious group's right to shape its own faith and mission through its appointments," in violation of the Free Exercise Clause. *Hosanna-Tabor*, 565 U.S. at 188–89. And damages awards to clergy contesting ministerial employment decisions, in effect, accord "the state the power to determine which individuals will minister to the faithful," in violation of the Establishment Clause. *Ibid.*

Put simply, the application of the church-autonomy doctrine does not turn on the particular claim brought, but rather on whether the lawsuit requires adjudication of "internal management decisions that are essential to the institution's central mission." *Our Lady*, 140 S. Ct. at 2060. Indeed, this Court has been clear that the type of claim is irrelevant; what matters is whether the dispute centers around "matters of church government" or "faith and doctrine." *Kedroff*, 344 U.S. at 116–17. Courts are "bound to stay out of" church employment disputes because judicial intervention in the disputes "threaten[s] the [church's]

independence in a way that the First Amendment does not allow." *Our Lady*, 140 S. Ct. at 2060, 2069.

Just recently, for example, the *en banc* Seventh Circuit applied the ministerial exception to dismiss a minister's hostile-work-environment claim that involved comments made to him by another minister. *Demkovich* v. *St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 973 (7th Cir. 2021). The court there recognized two key principles from this Court's precedents. First, the rationale of *Hosanna-Tabor* and *Our Lady* "is not limited" to "allegations of discrimination in termination" because "[t]he protected interest of a religious organization in its ministers covers the entire employment relationship." *Id.* at 976. Second, the ministerial exception aims to prevent two specific harms—"civil intrusion and excessive entanglement"—that arise outside of the specific fact patterns in *Hosanna-Tabor* and *Our Lady*. *Id.* at 977.

Given the breadth of these principles, adjudicating allegations concerning "what one minister . . . said to another" would both "undercut a religious organization's constitutionally protected relationship with its ministers" and "cause civil intrusion into, and excessive entanglement with, the religious sphere." *Demkovich*, 3 F.4th at 977–78. "Avoidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance." *Id.* at 975.

2. Here, Father Alexander attempts to avoid the ministerial exception and the church-autonomy doctrine by bringing a defamation claim "alleging a false campaign by church leaders to remove him." Pet. App. 80a (Park, J., dissenting from denial of rehearing *en banc*). But the same principles that would have barred judicial resolution had Father Alexander filed an

employment-discrimination claim similarly preclude his defamation claim. Indeed, "it is difficult to see how a court could assess [Father Alexander's] claim without considering the reasons for the church's decisions, including whether Defendants correctly determined that [Father Alexander] was never elected Bishop of Miami and whether they acted in good faith—all matters of 'internal church procedures.'" *Ibid.* (quoting *Serbian E. Orthodox Diocese for U.S. of Am. & Canada* v. *Milivojevich*, 426 U.S. 696, 718 (1976)).

Unsurprisingly, then, courts have applied the church-autonomy doctrine to defamation claims no differently than employment-law claims, given that defamation claims are regularly advanced by ministers in religious employment disputes. Courts have routinely held that the church-autonomy doctrine requires dismissal of ministers' defamation claims against their religious organizations. See, *e.g.*, *Ex parte Bole*, 103 So.3d 40, 72 (Ala. 2012) (holding that minister's employment-related defamation claim was barred by the First Amendment); *Heard* v. *Johnson*, 810 A.2d 871, 883 (D.C. 2002) (holding that "[w]hen a defamation claim arises entirely out of a church's relationship with its pastor, the claim is almost always deemed to be beyond the reach of civil courts"); *Cha* v. *Korean Presbyterian Church of Wash.*, 553 S.E.2d 511, 515–16 (Va. 2001) (noting that "most courts that have considered the question whether the Free Exercise Clause divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials have answered that question in the affirmative" (collecting cases)); *Yaggie* v. *Indiana-Kentucky Synod Evangelical Lutheran Church in Am.*, 860 F. Supp. 1194, 1198 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995) (dismissing a defamation claim because "all matters touching" the relationship

between a church and its minister "are of ecclesiastical concern"); see also Pet. App. 80a–81a n.8 (Park, J., dissenting from denial of rehearing *en banc*) (collecting cases).

This case is, at bottom, a dispute over the process ROCOR's governing ecclesiastical body used to choose the next bishop of Miami. After Father Alexander claimed that ROCOR's Synod of Bishops had elected him to that office, the defendants who authored the allegedly defamatory statements disclosed serious allegations regarding the canonical regularity of that election, and Father Alexander's actions as a minister to his congregation and a representative of ROCOR. They were speaking solely about internal church matters.

The First Amendment requires ROCOR be free to communicate internally about these matters without fear of government interference. See *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring) (recognizing a religious body's "freedom to speak in its own voice . . . to its own members"). A defamation claim for speaking out against someone seeking to gain a position of leadership in the church "punish[es] [the] church for failing" "to accept or retain an unwanted minister." *Id.* at 188. This is "precisely" the type of suit "that is barred by the ministerial exception." *Id.* at 194. Indeed, as Judge Park wrote in his *en banc* dissent, "[a]lmost any ministerial dispute could be pled to avoid questions of religious doctrine"; taken to its "logical endpoint," the lower court's approach "would eviscerate the church autonomy doctrine." Pet. App. 81a. This Court should grant the petition to ensure that the lower courts are not eviscerating this core protection for religious organizations throughout this country.

II. The lower court's reliance on the neutral-principles approach conflicts with this Court's precedent

The lower court rested its collateral-order analysis on a flawed view of the applicable church-autonomy principles. See Pet. App. 15a–16a. It held that the church-autonomy doctrine does not apply if courts may use "neutral principles of law" to resolve a plaintiff's claims. *Ibid*. But this approach misses the mark for two reasons. First, this Court has never applied the neutral-principles rule beyond the context of a church-property dispute—nor would it make sense to do so. Second, when the church-autonomy doctrine applies, as it does here, it precludes courts from employing the neutral-principles approach. The lower court's expansion of the neutral-principles rule threatens to swallow whole the First Amendment's protection of church autonomy.

1. As the Second Circuit recognized, this Court first established the neutral-principles rule in *Jones* v. *Wolf*, 443 U.S. 595 (1979). See Pet. App. 16a. There, the Court recognized that States have "an obvious and legitimate interest in the peaceful resolution of property disputes." *Jones*, 443 U.S. at 602. It held that secular courts may decide a church-property dispute without violating the First Amendment if they base their decision solely on "neutral principles of law." *Id.* at 604. But in so holding, *Jones* did not approve of judicial interference in religious disputes. In fact, this Court has never extended the neutral-principles rule "beyond the context of church-property disputes." *McRaney*, 980 F.3d at 1072 (Ho, J., dissenting from denial of rehearing *en banc*) (recognizing that this Court has "intimated that the church autonomy doctrine cannot be brushed aside as irrelevant or

controlled by the neutral-principles rule of *Jones* v. *Wolf* merely because it is raised in defense to common law claims" (quotation marks omitted)). The lower court's extension of this neutral-principles rule "from an entirely different line of cases involving church property disputes" will "invite courts to wade into the details of ecclesiastical matters." Pet. App. 64a (Park, J., dissenting from the order denying rehearing *en banc*).

The neutral-principles approach "does not make sense for disputes about church governance." Pet. App. 78a (Park, J., dissenting from denial of rehearing *en banc*). Indeed, as Judge Park explained below, this Court "has already rejected" the neutral-principles approach "in the context of church employment disputes." Pet. App. 78a; see also *ibid.* ("Even 'valid and neutral' employment discrimination laws cannot apply to 'an internal church decision that affects the faith and mission of the church itself.'" (quoting *Hosanna-Tabor*, 565 U.S. at 190)). Take *Our Lady* as an example. The employer there offered a performance-based reason—not a religious reason—for the termination. 140 S. Ct. at 2058–59. Accordingly, the employment dispute could, theoretically, have been decided on neutral principles, without analysis of any church doctrine. The Court nevertheless held that the employment decision was off limits for the courts, *id.* at 2055—not because there was no neutral principle to apply, but because court interference in the employment decision would violate the religious institution's autonomy, *id.* at 2061.

This Court should not reverse course and extend the neutral-principles rule to this (or any other) context outside of property disputes. Almost "any cause of action has secular components that can be resolved

using some facially neutral principles." Pet. App. 79a (Park, J., dissenting from denial of rehearing *en banc*). Rather than limit application of the neutral-principles rule as this Court has—to a subset of church-property disputes—the lower court treated it as an invitation to adjudicate disputes regarding the internal affairs and decisions of religious institutions through state-law tort claims. But certain decisions and actions of religious institutions are off limits for courts. An expansion of the neutral-principles rule threatens to undermine that crucial constitutional protection for religious institutions and religious believers.

2. Even if the neutral-principles rule could be extended beyond church-property disputes, it cannot override the church-autonomy doctrine or its related ministerial exception. This Court has already rejected the argument that neutral laws may trump a church's authority to select its ministers. The plaintiffs in *Hosanna-Tabor* argued that this Court's earlier decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which interpreted the First Amendment to allow governments to apply neutral rules to infringe religious liberty, precluded application of the ministerial exception. 565 U.S. at 189–90. This Court rejected the argument unanimously. Although it recognized that *Smith* permitted enforcement of neutral laws against a religious entity's outward physical acts, the Court held that there was "no merit" to the argument that neutral laws could allow "government interference with . . . internal church decision[s] that affect[] the faith and mission of the church itself." *Id.* at 190. Similarly, here, the lower court's view that courts can apply neutral principles of law to punish church leadership for their comments addressing internal matters of church government is deeply flawed and an affront

to the First Amendment protection accorded religious institutions.

More generally, this Court has made clear that the church-autonomy doctrine applies regardless of whether the plaintiff's claim directly implicates religious doctrine or policy. See *Hosanna-Tabor*, 565 U.S. at 179 (declining to adjudicate a claim under the Americans with Disabilities Act); *Our Lady*, 140 S. Ct. at 2058–59 (declining to adjudicate a claim under the Age Discrimination in Employment Act). Matters of church government—including "internal management decisions that are essential to the institution's central mission"—are ecclesiastical questions categorically beyond the reach of secular courts. *Our Lady*, 140 S. Ct. at 2060. And this is true regardless of the reasons raised by the religious organization in support of its governance decisions. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 194 (rejecting argument that the constitutional protection of a religious organization's decision applies "only when it is made for a religious reason"). Rather, secular courts may not delve into religious institutions' critical internal management decisions such as the "selection of individuals who play key roles" regardless of the reasons underlying those governance decisions. See *id.* at 195; *Our Lady*, 140 S. Ct. at 2060.

The lower court readily acknowledged that "[m]ost cases applying the 'neutral principles of law' approach have resolved disputes over church property." Pet. App. 16a n.8. But instead of exploring why this doctrine has been reserved for property cases, it invoked one of its own unpublished summary orders as precedent for applying the rule outside the property-dispute context. *Ibid.* The lower court gave short shrift to the church-autonomy doctrine, and its reasoning

could open the door to judicial intervention in ecclesiastical decision-making for almost any claim premised on a "neutral" principle of law. This Court should not stand by while the principles of *Hosanna-Tabor* and *Our Lady* are disregarded on so flimsy a basis.

3. The lower court's misapplication of the neutral-principles rule infected its collateral-order analysis. Notably, the panel concluded that ROCOR failed to satisfy a requirement of the collateral-order doctrine—that ROCOR's claim of right be separable from the merits of the underlying defamation action—because it was impossible to assess the church-autonomy question without also considering the merits of Father Alexander's claims. Pet. App. 20a–21a. But "[w]hether the church autonomy defense applies is a separate—and important—question from the merits of a defamation claim." Pet. App. 74a (Park, J., dissenting from the order denying rehearing *en banc*). Indeed, if the court determines at the threshold step that the church-autonomy doctrine applies, the court is "bound to stay out of" the employment dispute irrespective of the merits of the underlying claim or claims. *Our Lady*, 140 S. Ct. at 2060. Because the lower court's deeply mistaken view of the church-autonomy doctrine permeated its collateral-order analysis, this Court should grant the petition.

III. The lower court's ruling would excessively entangle courts in the leadership decisions of religious entities

The lower court's ruling impermissibly entangles courts with religious questions, doctrine, and dogma. The First Amendment forbids such "judicial entanglement in religious issues." *Our Lady*, 140 S. Ct. at 2069; see also *id.* at 2070 (Thomas, J., concurring) (noting that this Court "goes to great lengths to avoid

governmental entanglement with religion" (quotation marks omitted)); *Jones*, 443 U.S. at 603 (reciting the goal of "free[ing] civil courts completely from entanglement in questions of religious doctrine, polity, and practice"). And this Court has recognized that "[i]t is not only the [legal] conclusions" in cases like this that "may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Indeed, subjecting a religious organization to the discovery process to substantiate its religious reasons for the termination of a minister's employment to the satisfaction of a secular court is itself an impermissible intrusion into the organization's affairs.

Thus, these kinds of suits risk church-state entanglement in two ways. First, they require courts to assess liability based on their evaluation of internal church decisions and communications, which often puts judges in the difficult position of scrutinizing religious doctrine, policy, and practice. Second, these types of cases force courts to oversee discovery and compel religious institutions to submit to probing discovery demands.

1. Inquiring into the merits of Father Alexander's defamation claim would impermissibly interject secular judges into ROCOR's internal governance. As Father Alexander stated in his amended complaint, "[t]he threshold issue" on the merits "is whether the documents [he] is alleged to have forged"—documents which he alleges "evidenced his appointment to the position of Bishop of Miami"—"are in fact genuine." Pet. App. 101a–02a. In effect, then, by requesting that the district court declare the documents genuine, Father Alexander is asking the court to declare his

election valid. No matter how he frames it, this suit is not an ordinary defamation action. Ultimately, Father Alexander asks a federal court to probe ROCOR's ecclesiastical processes for appointing its leaders, and to reach an assessment about whether Father Alexander's putative election was canonically valid. It is difficult to imagine a thornier church-state entanglement than this.

2. The discovery process further enmeshes courts in the internal governance of religious groups. See *Demkovich*, 3 F.4th at 982 (expressing concern about "the prejudicial effects of incremental litigation"). The discovery in a case like this will subject ROCOR's "personnel and records" "to subpoena, discovery, cross-examination," and "the full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn* v. *General Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). Intrusions like these are unacceptable because they pressure churches to make decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than" basing those decisions on "their own . . . doctrinal assessments." *Ibid.*

Indeed, such entanglement raises the "danger of chilling religious activity." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring). The mere "prospect[] of litigation," as Justices Brennan and Marshall observed in *Amos*, may even force religious communities to alter their "self-definition." *Ibid.* That is to say, government intrusion

into church leadership decision-making is innately coercive, in a manner that restricts religious freedom.[2]

Because discovery imposes this inherent risk of excessive entanglement, courts should dismiss cases like this in their infancy. Recognizing this, courts have rightly compared church-autonomy defenses to qualified-immunity defenses, explaining that courts must dismiss claims precluded by the ministerial exception "early in litigation" to "avoid excessive entanglement in church matters." *Bryce* v. *Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 n.1 (10th Cir. 2002).

The lower court here acknowledged this analogy between qualified immunity and church autonomy. Pet. App. 22a–23a. But the panel determined that the analogy did not help the church officials because qualified-immunity denials are immediately appealable only when they "turn[] on an issue of law" and the church-autonomy question here supposedly implicates "disputed fact questions." Pet. App. 23a. Yet the circuits have widely recognized that applying the ministerial exception is a pure question of law. See *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015) ("whether the exception attaches at all is a pure question of law"); *Skrzypczak* v. *Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1244 (10th Cir. 2010) ("the ministerial exception's application" is a

[2] Of course, "criminal conduct is not protected by the church-autonomy doctrine." *Payne-Elliott* v. *Roman Cath. Archdiocese of Indianapolis, Inc.*, 193 N.E.3d 1009, 1014 (Ind. 2022). The church-autonomy doctrine does not, for instance, preclude the enforcement of a State's subpoena in a criminal investigation. See *Society of Jesus of New Eng.* v. *Commonwealth*, 808 N.E.2d 272 (Mass. 2004) (enforcing a subpoena in a criminal investigation); *People* v. *Campobello*, 810 N.E.2d 307 (Ill. Ct. App. 2004) (similar).

"legal conclusion"); *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (similar). The ministerial-exception question presented in this appeal thus fits comfortably within the collateral-order doctrine.

The panel also relied on this Court's statement in footnote four of *Hosanna-Tabor* that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." Pet. App. 21a (quoting *Hosanna-Tabor*, 565 U.S. at 195 n.4). But "that does not resolve the issue because affirmative defenses, such as qualified immunity, may still be immediately appealable." Pet. App. 74a (Park, J., dissenting from the order denying rehearing *en banc*); see also, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982) (qualified immunity "is an affirmative defense"); *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985) (holding that denials of qualified immunity are appealable under the collateral order doctrine). Likewise, religious organizations should not be forced to undergo burdensome and intrusive discovery and trials before they may challenge erroneous denials of the church-autonomy defense.

CONCLUSION

This Court should grant the petition.

March 31, 2023

Respectfully submitted,

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