RAYMOND J. LOHIER, JR., *Circuit Judge*, joined by EUNICE C. LEE, BETH ROBINSON, ALISON J. NATHAN, and SARAH A. L. MERRIAM, *Circuit Judges*, concurring in the order denying rehearing *en banc*:

I concur fully in the decision to deny in banc rehearing in this case for the reasons stated in the panel opinion, *see Belya v. Kapral*, 45 F.4th 621 (2d. Cir. 2022), as well as for the reasons contained in the excellent statement of my colleague, Senior Judge Chin, in support of denial. I add only a few observations.

First, there is no circuit split on the extremely narrow procedural issue presented in this case. The panel opinion avoids generating one, and the dissents from the denial of rehearing in banc identify none. Judge Park's dissent, by contrast, proposes a significant judicial expansion of the collateral order doctrine and the circumstances under which application of the doctrine is warranted under *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 545-46 (1949), and it does so without offering any limiting principle. Nothing in the dissent's approach would prevent a further expansion of the collateral order doctrine to include virtually every other "liberty"-based right. And the approach runs head-long into the Supreme Court's admonition that "the class of collaterally appealable orders must remain 'narrow and selective in its membership,'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (quoting *Will v. Hallock*, 546 U.S. 345, 350

(2006)), even if that means litigants are "require[d] . . . to wait until after final judgment to vindicate valuable rights," *id.* at 108-09. "This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, not expansion by court decision, as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Id.* at 113 (quotation marks omitted).

Second, even a casual reader will notice the total mismatch between the dissent's description of Belya's lawsuit and the lawsuit itself. It bears repeating Judge Chin's observation that there is no basis *whatsoever* to second-guess the nature of Belya's defamation claim or to suspect that his lawsuit is not what it purports to be. The dissent insinuates that it is merely "styl[ed]" as a defamation claim to avoid the church autonomy doctrine and "questions of religious doctrine." Dissent at 21-22. But at this stage, Belya's claim *is* a genuine defamation claim that, as the dissent's refusal to take it at face value suggests, would not implicate church autonomy.

Third, by comparing the "[d]enial of a church autonomy defense . . . to qualified immunity," the dissent unfortunately distorts the panel opinion's holding that the defense is premature rather than unavailable. Dissent at 15; *see*

Belya, 45 F.4th at 631 ("It is possible that at some stage Defendants' church autonomy defenses will require limiting the scope of Belya's suit, or the extent of discovery, or even dismissal of the suit in its entirety. But we cannot and do not prematurely jump into the fray."). And even if the comparison were meaningful, the panel opinion employs essentially the same order of analysis that applies in appeals from denials of qualified immunity. A defendant who claims qualified immunity must fully stipulate to the plaintiff's recitation of facts and show her entitlement to qualified immunity as a matter of law before a court of appeals can have jurisdiction over the claim. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Any dispute of fact, no jurisdiction. Here, of course, the church disputes the facts relevant to Belya's defamation claim. *See Belya*, 45 F.4th at 634 ("The[r]e are outstanding secular fact questions that are not properly before us – and would not require a fact-finder to delve into matters of faith and doctrine.").

Finally, the panel's decision regarding appellate jurisdiction at this stage in the case poses no threat to the church autonomy doctrine, which has thrived without help from the expansion of the collateral order doctrine that the dissent proposes. We can agree on the narrow procedural issue before us without disagreeing about the vital importance of church autonomy and governance.