DENNY CHIN, *Circuit Judge*, statement in support of denial of rehearing *en banc*:[1]

In this case, defendants-appellants are individuals and entities affiliated with the Russian Orthodox Church Outside Russia ("ROCOR" and, collectively, "Defendants"). They appealed from three interlocutory orders of the district court: orders denying motions to dismiss, for reconsideration, and to bifurcate discovery or otherwise stay proceedings. Defendants argued that we had appellate jurisdiction over the interlocutory orders based on the collateral order doctrine, which allows for appellate review of an interlocutory order in certain limited circumstances. We disagreed, and held that the collateral order doctrine does not apply in the circumstances here. Accordingly, we dismissed the appeal. *See Belya v. Kapral*, 45 F.4th 621, 625 (2d Cir. 2022). A petition for rehearing *en banc* followed, and the Court now denies the petition.

For the reasons set forth in the panel decision and in Judge Lohier's concurrence in the denial of the petition (the "Concurrence"), I believe the Court has correctly denied the petition. I write to address certain arguments raised in Judge Park's dissent to the denial of rehearing *en banc* (the "Dissent").

[1] As a senior judge, I have no vote on whether to rehear a case *en banc*. See 28 U.S.C. 46(c); Fed. R. App. P. 35(a). As a member of the panel that decided the case that is the subject of the *en banc* order, however, I may file a statement expressing my views in the circumstances here, where an active judge has filed an opinion addressing that order.

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First, the Dissent writes that "[t]his case arises from a minister's suspension by his church," and that the lawsuit "is styled as a defamation claim." Dissent at 1. The suggestion is that this case is not really a defamation case, but instead seeks to intrude on a church's autonomy by subjecting Defendants "to litigation over religious matters." *Id.* at 10. In fact, this is a defamation case and not a case over religious matters. If Belya's allegations are true -- and we must assume they are for now -- this is, as the first amended complaint (the "Complaint") declares, "a case of egregious defamation." J. App'x at 87. If the allegations are true, Defendants made public accusations that Belya forged and fabricated certain documents, including accusations that Belya forged the signature of the "ruling bishop" of ROCOR onto two letters, that he fabricated or otherwise improperly obtained official letterhead, and that he falsely affixed to the letters what appeared to be the ruling bishop's official seal. *See id.* at 95-97. The allegation that Belya committed forgery was posted on the church's social media site by one or more of the Defendants and was re-posted and circulated by religious news outlets and publications. *Id.* at 98.

Simple, non-ecclesiastical factual questions are presented: Did Belya forge the letters in question? Or did the ruling bishop actually sign the letters? Were the letters on the ruling bishop's official letterhead? Were the letters stamped with the purported signatory's official seal? Or were the purported letterhead and stamps a fabrication? These are factual questions that a fact-finder could answer without delving into matters of faith and doctrine.

Significantly, the Complaint seeks only damages (and attorney's fees and costs) and not injunctive or declaratory relief. The Complaint does not seek an order declaring that Belya was in fact elected to the position of Bishop of Miami or an injunction requiring Defendants to install him into that or any other position; nor does it seek to vacate Belya's suspension from the church. *See Belya v. Hilarion*, No. 20-CV-6597, 2021 WL 1997547, at *4 (S.D.N.Y. May 19, 2021) (district court noting 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"). Rather, the Complaint asserts only three defamation claims and a fourth claim for vicarious liability related to the defamation claims, and it seeks only damages. This is, indeed, a defamation case.

Second, the Dissent refers to "the district court's denials of Defendants' church autonomy defenses." Dissent at 9-10. The district court has not, however, denied Defendants' religious autonomy defenses and it has not rejected the application of the church autonomy doctrine. To the contrary, the district court specifically recognized that issues could arise that it "would not consider" under the doctrine. *Belya*, 2021 WL 1997547, at *4. Indeed, the district court explicitly stated that under the doctrine of ecclesiastical abstention it would not consider a request to install Belya as the Bishop of Miami. *Id.*

In other words, the Dissent's assertion that "the panel decision categorically denies immediate appealability of any church autonomy defense, no matter what the facts might be," Dissent at 17 n. 3, is simply not correct. Where a district court in fact rejects the church autonomy defense and injects itself into matters of church governance, such an order might indeed be immediately appealable. But that is not the situation before us. Rather, as we recognized, the district court here did not rule on the merits of the church autonomy defense or preclude its future invocation. *See Belya*, 45 F.4th at 631; *see also* Concurrence at 2-3. Instead, as further explained in the district court's order entered July 27, 2021, denying Defendants' request to bifurcate discovery or otherwise stay proceedings, the

district court ruled that it would "not pass judgment on the internal policies and or determinations of [ROCOR]," and recognized that it would not "be able to under the doctrine of ecclesiastical abstention." J. App'x at 147. As the district court's orders make clear, Defendants may indeed invoke the defense at a later point in the litigation if it becomes apparent that further inquiry and litigation will implicate church autonomy. At that point, the scope of Belya's claims and discovery might have to be limited and dismissal of the lawsuit might even be warranted. The rulings do not bar or decide the merits of the church autonomy defense, and they are not a final rejection of the defense because Defendants may assert it during discovery or later in the course of the lawsuit. *Cf. Abney v. United States*, 431 U.S. 651, 659 (1977) (holding that an order denying a motion to dismiss an indictment on double jeopardy grounds could be appealed under the collateral order doctrine because such an order constitutes "a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim").[2]

[2] For example, if, as the litigation proceeds, Belya is unable to prove the falsity of the accusations, the Complaint will be dismissed without any inquiry into church doctrine or governance. If he does prove the falsity of the accusations, the district court at that point will determine whether Belya's claims can be further litigated without intrusion into the church's autonomy.

In similar circumstances, the Seventh Circuit also declined to find appellate jurisdiction under the collateral order doctrine. When the diocese in that case sought appellate review of the district court's order denying summary judgment for the diocese on a sex-discrimination claim, the Seventh Circuit dismissed the appeal for lack of jurisdiction. *See Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1091-92 (7th Cir. 2014). The Seventh Circuit reasoned that it did not have appellate jurisdiction because the district court "ha[d] not ordered a religious question submitted to the jury for decision," and in fact the district court "promised to instruct the jury *not* to weigh or evaluate the Church's doctrine." *Id.* at 1091; *cf. McCarthy v. Fuller*, 714 F.3d 971, 975-76 (7th Cir. 2013) (holding that an order was collaterally appealable because it sent the religious question of whether party was a nun to the jury). Here, the district court has made clear that it will not pass judgment on religious questions or submit them to the jury should the case get that far. *See Belya*, 2021 WL 1997547, at *4.

Third, it is apparent that the Dissent's view is that churches are generally immune from the litigation process. But the church autonomy doctrine does not go that far. While the church autonomy doctrine provides religious associations with "independence in matters of faith and doctrine and in closely linked matters

of internal government," *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061 (2020), it does not provide them with "a general immunity from secular laws," *id*. at 2060. To the contrary, "[t]he church autonomy doctrine is not without limits . . . and does not apply to purely secular decisions, even when made by churches." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002). Rather, the church autonomy doctrine relates to matters of "religious doctrine," *McCarthy*, 714 F.3d at 975, or "religious belief," *Bryce*, 289 F.3d at 657 ("Before the church autonomy doctrine is implicated, a threshold inquiry is whether the alleged misconduct is 'rooted in religious belief.'" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972))).

The church autonomy doctrine is a defense and it does not provide a general immunity that serves as a jurisdictional bar to suit. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012) ("[T]he [ministerial] exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar."); *cf. Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1036-47 (10th Cir. 2022) (dismissing an interlocutory appeal for lack of jurisdiction and rejecting the argument that the ministerial exception "immunizes a religious employer *from suit* on employment discrimination claims"). The church

autonomy doctrine surely does not give church officials free rein to falsely accuse someone of forgery and fraud. The district court's rulings allow discovery to proceed into secular components of Belya's claims of defamation, and they allow the litigation to proceed with respect to non-ecclesiastical factual questions that would not require a fact-finder to consider matters of faith or internal church government. *See generally Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (noting that "we have generally denied review of pretrial discovery orders," and holding that the collateral order doctrine did not permit appeal of disclosure orders adverse to attorney-client privilege) (internal quotation marks omitted). And, although the "interlocutory posture" of this appeal "complicate[s] our review, nothing "would preclude [ROCOR] from . . . seeking review in this Court when the decision is actually final." *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 955 (2022) (Alito, J., concurring in denial of certiorari) (denying certiorari and permitting a case to go forward to discovery and trial, notwithstanding defendant's invocation of the church autonomy doctrine).

Fourth, the Dissent likens the church autonomy doctrine to the qualified immunity defense applicable to § 1983 claims. We agree, as the Dissent observes, that "both are rooted in foundational constitutional interests," and that "both are

protections against the burdens of litigation itself." Dissent at 15. But qualified immunity is not a general immunity, and it does not insulate government officials from discovery and trial in every instance. Qualified immunity is an immediately appealable collateral order *only* "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Where there is a factual dispute, "an appellate court lacks jurisdiction to review a denial of qualified immunity," *Franco v. Gunsalus*, 972 F.3d 170, 174 (2d Cir. 2020), and, as happens every day of the week, government officials in many § 1983 cases are subject to discovery and even trial.

This case does not yet present any factual questions that implicate church doctrine, and thus this interlocutory appeal is not properly before this Court. *See McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 347, 349 (5th Cir. 2020) (reversing district court's order dismissing case under the ecclesiastical abstention doctrine because the district court's finding that "it would need to resolve ecclesiastical questions in order to resolve [plaintiff's] claims . . . was premature," as "it is not clear that any of [the anticipated factual] determinations will require the court to address purely ecclesiastical questions"), *cert. denied*, 141 S. Ct. 2852 (2021). Defendants have not stipulated, even for

purposes of appellate review, to the facts alleged by Belya; they have not admitted, for example, that Belya was falsely accused of forgery. Hence, we do not have appellate jurisdiction.

Finally, the Dissent argues that the panel's decision results in a "novel extension of the 'neutral principles' approach [that] is inconsistent with precedent and threatens to eviscerate the church autonomy doctrine." Dissent at 17. Under the "neutral principles" approach, so long as a court relies "exclusively on objective, well-established [legal] concepts," it may resolve a dispute even when parties are religious bodies. *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979). The panel decision does not extend the law or deviate from precedent. Although the neutral principles of law approach was established in a church property case, *see id.*, we (and other courts) have applied it in other types of disputes. Indeed, in a copyright case involving dissemination of "a prayerbook widely used within the Lubavitch movement of Hasidic Judaism," we rejected the argument that the courts lacked jurisdiction over the dispute because of the church autonomy doctrine and held that:

> Courts may decide disputes that implicate religious interests as long as they can do so based on 'neutral principles' of secular law without undue entanglement in issues of religious doctrine.

Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F.3d 94, 99 (2d Cir. 2002) (citing *Jones*, 443 U.S. at 604); *see also, e.g.*, *Moon v. Moon*, 833 F. App'x 876, 880 (2d Cir. 2020) (summary order) (applying the neutral principles of law approach to plaintiff's defamation claim against a religious organization), *cert. denied*, 141 S. Ct. 2757 (2021); *McRaney*, 966 F.3d at 349 (holding that plaintiff's defamation claim against a church organization allows the court to "apply neutral principles of tort law" and is thus not barred by the ecclesiastical abstention doctrine).

Using neutral principles of law to resolve secular components of a dispute involving religious parties does not infringe on religious parties' independence. Indeed, the Supreme Court stated in *Jones* that it could not agree "that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority . . . even where no issue of doctrinal controversy is involved." 443 U.S. at 605.

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The collateral order doctrine allows for appellate review of interlocutory orders if the ruling (1) is conclusive; (2) resolves important questions separate from the merits; and (3) is effectively unreviewable on appeal from the final judgment

in the underlying action. *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The Supreme Court has admonished that the class of collaterally appealable orders must remain "narrow and selective." *Will v. Hallock*, 546 U.S. 345, 350 (2006). Here, as we explained in the panel opinion, the district court's rulings are not conclusive, do not involve claims of right separate from the merits of the case, and would not be unreviewable on appeal after final judgment.

Therefore, the panel correctly held that this Court lacks jurisdiction to hear the appeal.