Nos. 19-267 & 19-348

In the Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,
v.
AGNES MORRISSEY-BERRU,
Respondent.

ST. JAMES SCHOOL,
Petitioner,
v.
DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF COLUMBIA INTERNATIONAL UNIVERSITY AND SIXTH MOUNT ZION MISSIONARY BAPTIST CHURCH IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions.

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INTEREST OF THE *AMICUS*[1]

The amicus parties are religious entities with first-hand experience litigating the nature and protection of the ministerial exception and seek to represent the interests of similarly situated entities to ensure that they are protected by the ministerial exception and also protected from the burden of unchecked litigation of the ministerial exception. Through their own experience, the amicus parties understand what courts should and should not do to ensure the proper adjudication of ministerial exception defenses.

Amicus Sixth Mount Zion Missionary Baptist Church is a historic African-American church located in an impoverished area of Pittsburgh, Pennsylvania. When it terminated the employment of its head pastor, the pastor sued the church and 11 of its deacons for breach of employment contract, contending he was terminated without cause and seeking $2,600,000 in damages. The district court *sua sponte* raised the ministerial exception, required the parties to brief the issues, and granted summary judgment to the church, which judgment the Third Circuit affirmed on appeal.

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution toward its preparation or submission. Both parties to this appeal have consented in writing to the filing of this amicus brief.

Amicus Columbia International University is a Christian university in South Carolina that was sued by its former Director of the Teaching English to Speakers of Other Languages Program for employment discrimination and retaliation. CIU argued that the plaintiff played an integral role in its religious mission and programming, and asserted the ministerial exception as a defense. The court denied CIU's motion to dismiss, but appropriately restricted discovery to the ministerial exception and later entered summary judgment for CIU based on the ministerial exception.

Representing common forms of religious institutions entitled to the protection of the ministerial exception—houses of worship and religious educational institutions—the amicus parties argue that the ministerial exception deserves priority treatment in litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutionally derived "ministerial exception" recognized by this Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is a limitation on the authority of the courts and a form of immunity from suit enjoyed by religious entities with respect to the selection and retention of those who serve as their leaders and message-bearers. Because of the constitutional and immunity-like protection offered by the ministerial exception, the adjudication of such protection must take center stage in litigation, so that at each phase courts are addressing first what is necessary to ensure that the ministerial exception is honored. At the motion to dismiss stage, this means considering both the allegations of the plaintiff's complaint and all other evidence permissibly considered under Federal Rule of Civil Procedure 12. If the case cannot be decided on a motion to dismiss, the district court must focus discovery on adjudication of the ministerial exception, with a view to deciding its applicability on a dispositive motion or through an evidentiary hearing, before permitting full discovery on the merits. District courts that take the typical path in employment discrimination cases of leaving issues of "pretext" for the jury eviscerate the protection of the ministerial exception. When district courts stray outside these constitutional boundaries, interlocutory appeal should be readily available because the immunity offered by the ministerial exception is irreparably harmed and effectively unreviewable if review awaits final judgment on the merits.

The Ninth Circuit's decisions in *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 Fed. App'x 460 (9th Cir. 2019), and *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), are not only wrong on the application of the ministerial exception but portend further constitutional violations on remand if those decisions are not reversed.

ARGUMENT

I. The Ministerial Exception Is a Threshold Issue That District Courts Must Adjudicate at the Earliest Possible Stage.

A. The Ministerial Exception Is Rooted in Constitutional Principles That Limit the Authority of the Courts.

The "ministerial exception," unanimously recognized by this Court in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012), emanates from both the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution. *Id.* at 188. The Free Exercise Clause ensures that religious groups maintain control over "the selection of those who will personify its beliefs" and "protects a religious group's right to shape its own faith and mission through its appointments." *Id.* The Establishment Clause "prohibits government involvement in such ecclesiastical decisions." *Id.* These protections are not just rights and prohibitions to be enforced by the courts as between litigants; they impose structural limitations on the courts and the adjudicatory process.

Consider first the closely related (and similarly constitutionally derived) religious-autonomy doctrines. Bearing labels such as "ecclesiastical abstention," the "church-autonomy doctrine," and the "deference rule," these principles have consistently been held by the courts to limit the very power of the courts to consider matters touching on religious expression, including the selection, discipline, and termination of those employed as leaders or message-

bearers of a religious body or ministry. *See Watson v. Jones*, 80 U.S. 679, 714, 733 (1871) (secular courts are prevented from reviewing disputes that would require an analysis of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required"); *Korte v. Sebelius*, 735 F.3d 654, 677-78 (7th Cir. 2013) (reversing the denial of preliminary injunctions sought under the Religious Freedom Restoration Act; "where it applies, the church-autonomy principle operates as a complete immunity, or very nearly so"); *Lee v. Sixth Mount Zion Baptist Church*, No. 15-1599, 2017 WL 3608140, at *30-35 (W.D. Pa. Aug. 22, 2017) (the "deference rule" and ministerial exception barred court from considering pastor's claims that he was terminated without "cause" under his employment agreement; "the very process of inquiry into church motives and good faith as it relates to the mission of the church can impinge on rights guaranteed by the First Amendment" [p. *35]), *aff'd,* 903 F.3d 113 (3d Cir. 2018); *Hubbard v. J Message Group Corp.*, No. 17-763 KK/JHR, 2018 WL 3377706 (D.N.M. July 11, 2018) (church-autonomy and ecclesiastical-abstention doctrines barred plaintiff's tort claims, which were based on her wrongful expulsion from the religious group and the religious group leader's defamatory statements about her); *Warnick v. All Saints Episcopal Church*, No. 01539, 2014 WL 11210513, at *10 (Pa. Com. Pl. Apr. 15, 2014) (the "deference rule" and ministerial exception barred breach-of-contract claim by pastor over demotion to part-time ministry), *aff'd*, 116 A.3d 684 (Pa. Super. Ct. 2014). Under these religious-autonomy doctrines, the courts have

no authority to adjudicate matters relating to religious doctrine, the termination of employees based on matters of religious belief, the reasons for the separation of a religious organization's leaders and message-bearers, or allegations that a religious group's stated reason for an employment action was instead a pretextual reason disguising unlawful discrimination. *See, e.g.*, *Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 Fed. App'x 926, 927-29 (11th Cir. 2018) (former employee's breach-of-contract claim against church denomination for terminated retirement benefits was properly dismissed for lack of subject matter jurisdiction because ecclesiastical abstention doctrine prevented court from evaluating denomination's view of the propriety of plaintiff"s conduct); *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241 (S.D.N.Y. 2014) (priest's libel per se claim over press release stating that he engaged in sexual abuse as determined by church court dismissed for lack of subject matter jurisdiction based on ecclesiastical abstention doctrine; adjudicating claim would require evaluation of church's decisions regarding matter of church discipline); *Nevius v. Africa Inland Mission Int'l,* 511 F. Supp. 2d 114, 120 (D.D.C. 2007) (dismissing for lack of subject matter jurisdiction missionary's breach-of-contract claim because "[d]etermining whether [the religious organization's] termination of [plaintiff] fell within the[] contractually-permitted parameters—or whether, as [plaintiff] alleges, her termination was motivated by other concerns—would involve inquiring into a core matter of ecclesiastical self-governance not subject to interference by a state").

The nearly 50-year history of the ministerial exception is based on the same foundation as these religious-autonomy doctrines in holding that the Free Exercise Clause and the Establishment Clause set limits on what the courts may properly review. Indeed, until this Court decided in *Hosanna-Tabor* that the ministerial exception was not specifically a limitation on the subject matter jurisdiction of the federal courts, *see* 565 U.S. at 195 n.4, many courts had held that the exception was a true jurisdictional constraint. *See, e.g.*, *Friedlander v. Port Jewish Ctr.*, 347 Fed. App'x 654, 655 (2d Cir. 2009) (affirming grant of 12(b)(1) dismissal for lack of subject matter jurisdiction of rabbi's claim that his Jewish temple breached his employment contract, as barred by the ministerial exception); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (ministerial exception deprives a court of jurisdiction and the defense should be raised under Fed. R. Civ. P. 12(b)(1)); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038-39 (7th Cir. 2006) (ministerial exception is a jurisdictional limitation); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (affirming Rule 12(b)(1) dismissal based on ministerial exception). The present amicus parties write to emphasize that even if the ministerial exception is not a pure jurisdictional bar, the exception is owed courts' priority attention at each step of any necessary litigation.

B. The Ministerial Exception Is Akin to a Qualified Immunity, Which Warrants Priority Treatment.

Notwithstanding this Court's determination that the ministerial exception is an affirmative defense

and not specifically a jurisdictional bar, the exception is no ordinary defense. In a typical litigation practice, almost no affirmative defenses have a constitutional basis or import. For example, when Rule 8 of the Federal Rules of Civil Procedure lists 18 common defenses that must be raised affirmatively, none is of constitutional origin. *See* Fed. R. Civ. P. 8(c)(1). By contrast, the ministerial exception has qualities that plainly circumscribe the authority of the courts, providing "structural" limitations on the courts' power that can rarely be waived. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) ("Although the District Court, not the Church, first raised the ministerial exception, the Church is not deemed to have waived it because the exception is rooted in constitutional limits on judicial authority."); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 581-82 (6th Cir. 2018) (a defendant cannot waive the protection of the ministerial exception by failing to raise it because the "constitutional protection is . . . structural"), *cert granted*, 139 S. Ct. 1599 (2019); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) ("[t]he constitutional protection [provided by the ministerial exception] 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").

The ministerial exception's priority status in litigation has led several courts to analogize the exception to a qualified immunity. Qualified immunity ensures that the fear of litigation and the burden of litigating cannot be used to upset the balance of important rights. For example,

government actors are provided qualified immunity for a variety of official actions. In this setting, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity helps to reduce the social costs of litigation against the protected, costs which include not only "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," but also "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (internal quotations omitted). When qualified immunity applies, courts process the protected party's defenses with enhanced priority and focus, to ensure that the burden of litigation does not itself deter action and the reasonable exercise of judgment. *See id.* at 818 ("Until this threshold [qualified] immunity question is resolved, discovery should not be allowed.").

It is for similar reasons that courts have treated the application of the ministerial exception and other religious-autonomy doctrines as a form of immunity. For example, in the district court decision reviewed in *McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013), the district court had ruled that a federal jury must decide whether Defendant Patricia Fuller was a member of a Roman Catholic religious order, which,

if answered in the affirmative, would be "rejecting the contrary ruling of the religious body (the Holy See) authorized by the Church to decide such matters." *Id.* at 976. The Seventh Circuit granted interlocutory review: "The conditions for collateral order review are satisfied . . . , the district judge's ruling challenged by the plaintiffs being closely akin to a denial of official immunity. A secular court may not take sides on issues of religious doctrine." *Id.* at 975 (citing *Hosanna–Tabor*). The court explained:

> [T]he immunity conferred by the doctrine of official immunity is immunity from the travails of a trial and not just from an adverse judgment. If the defense of immunity is erroneously denied and the defendant has to undergo the trial before the error is corrected he has been irrevocably deprived of one of the benefits—freedom from having to undergo a trial—that his immunity was intended to give him.

Id. The Seventh Circuit went on to reverse the district court's holding, finding that the federal judiciary has no authority to review, and instead must accept, a ruling by a religious body as to whether a person is a member of its religious order. *Id.* at 976-79.

Similarly, the Supreme Court of Kentucky has explicitly analogized the ministerial exception to qualified immunity:

> "If the church autonomy doctrine applies to the statements and materials on which plaintiffs have based their claims, then the plaintiffs have no claim for which relief may

> be granted." [quoting *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002)] That is, "[t]he exception may serve as a barrier to the success of a plaintiff's claims, but it does not affect the court's authority to consider them." [quoting *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006)] Viewing the ministerial exception this way, it becomes apparent that procedurally speaking, in Kentucky jurisprudence, a government official's defense of qualified immunity is analogous. And qualified immunity, as a type of pleading dealing in confession and avoidance, i.e., pleading "more or less to admit the general complaint and yet to suggest some other reason why there was no right," [quoting *Gomez v. Toledo*, 446 U.S. 635, 641 n. 8 (1980)] must be specifically pleaded in the answer. We see no reason why the ministerial exception would operate different procedurally. The Seminary admits it terminated Kirby's tenure but simply argues it had the right to do so under the ministerial exception.

Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 608 (Ky. 2014) (footnotes providing citations omitted, but citations included in brackets). Based on this reasoning, the *Kirby* court ruled that the applicability of the ministerial exception "is a question of law for the trial court to be handled as a threshold matter" and "resolved expeditiously at the beginning of litigation" to avoid "constitutional injury." *Id.* at 609.

The very burden of litigating the issues raised by the ministerial exception can itself be an unconstitutional imposition of governmental authority over the religious person. Concurring in *Hosanna-Tabor*, Justice Alito (joined by Justice Kagan) explained that subjecting a religious body's decisionmaking process with respect to the employment status of one of its leaders to court scrutiny would be an unconstitutional inquiry: "Hosanna–Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution . . . and the civil courts are in no position to second-guess that assessment"; "a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees." 565 U.S. at 206 (Alito, J., concurring). And it does not matter that a plaintiff contends that the religious organization's stated reason for its employment action is pretextual, which is a typical route for an employment discrimination plaintiff to survive summary judgment and get a jury trial on her claims, for that "misses the point of the ministerial exception." 565 U.S. at 194. "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical,"—is the church's alone." *Id*. at 194-95 (citation omitted).

Just last month the District of Columbia Circuit again emphasized the preeminent status of religious autonomy and the courts' (and the executive

branch's) strictly circumscribed authority to adjudicate matters involving religious entities. In *Duquesne Univ. of the Holy Spirit v. NLRB*, No. 18-1063, ___ F.3d ___, 2020 WL 425053 (D.C. Cir. Jan. 28, 2020), the court rejected the National Labor Relations Board's assertion of jurisdiction over Duquesne University, a Catholic University. Even the acts of attempting to determine whether the university was "sufficiently" religious to be exempt from NLRB jurisdiction or whether the adjunct faculty members who sought to form a union played an important role in the university's religious mission were issues too intrusive to permit the inquiry: "The very process of such an inquiry by the Board, as well as the Board's conclusions, would impinge on rights guaranteed by the Religion Clauses." *Id.* at *8 (internal quotations omitted); *see also NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) (rejecting NLRB's claim of jurisdiction over church-operated schools; given the essential role played by teachers of any level or subject matter at the Catholic schools, exercising jurisdiction over labor disputes involving such teachers "impinge[d] on rights guaranteed by the Religion Clauses").

In summary, the ministerial exception must be viewed as an immunity-conferring defense, not just one of several run-of-the-mill defenses that an employer could raise in defending claims brought by a former employee.

C. If a District Court Does Not Grant a Motion to Dismiss Raising the Ministerial Exception, the Court Should Bifurcate Discovery to First Address the Ministerial Exception Issues.

If a case raising the ministerial exception survives a motion to dismiss, the district court must focus discovery on the ministerial exception (and any other religious-autonomy defenses) in light of the constitutional issues at stake. Although a district court generally has discretion to manage the scope and sequencing of discovery, such authority is circumscribed when the rights of a party—especially the constitutional rights of a party—would be violated or irreparably harmed if certain discovery is conducted. In almost every ministerial exception case, this obligation requires the trial court to limit discovery to that which is relevant to the ministerial exception, with a view to hearing a dispositive motion, or holding an evidentiary hearing, on the application of the exception. Many district courts have honored the protection provided by the exception, bifurcating discovery and then entertaining motions for summary judgment targeted to the ministerial exception and other constitutional doctrines. The following cases illustrate the point (cases listed alphabetically):

> *Collette v. Archdiocese of Chicago*, 200 F. Supp. 3d 730, 735 (N.D. Ill. 2016) (after determining that ministerial exception could not be decided on a Rule 12(b)(6) motion, court "set [matter] for status to set a limited discovery and dispositive motion schedule on Defendants' ministerial-exception defense, in order to resolve that issue

at the earliest opportunity," noting that "the scope of the issue subject to discovery is narrow [because] there is no dispute that Defendants are religious institutions, [so] the only remaining question is whether [plaintiff's] employment with them was ministerial")

Demkovich v. St. Andrew the Apostle Parish, 343 F. Supp. 3d 772, 786-87 (N.D. Ill. 2018) (noting a variety of ways in which adjudicating the plaintiff's claims against a Catholic church would require "intrusive discovery" and "impermissible entanglement" and dismissing such claims)

Fassl v. Our Lady of Perpetual Help Roman Catholic Church, No. CIV.A. 05-CV-0404, 2005 WL 2455253, at *1 (E.D. Pa. Oct. 5, 2005) (court authorized "very limited discovery" as to whether job functions were ministerial in nature)

Grussgott v. Milwaukee Jewish Day Sch. Inc., 260 F. Supp. 3d 1052, 1053 (E.D. Wis. 2017) ("Plaintiff was permitted to conduct limited discovery" on the ministerial exception defense), *aff'd*, 882 F.3d 655 (7th Cir. 2018)

Herzog v. St. Peter Lutheran Church, 884 F. Supp. 2d 668 (N.D. Ill. 2012) (court "limited discovery to determine whether the ministerial exception applies," then entertained Rule 12(b)(1) motion on the ministerial exception, converted it to a motion for summary judgment, and granted the religious employer's motion for summary judgment)

Miller v. Intervarsity Christian Fellowship/USA, No. 09-CV-680-SLC, 2010 WL 2803123, at *2

(W.D. Wis. July 14, 2010) (court previously allowed "limited discovery" to resolve dispute as to the nature of position sought)

Stabler v. Congregation Emanu-El of the City of New York, No. 16 CIV.9601 (RWS), 2017 WL 3268201, at *7 (S.D.N.Y. July 28, 2017) (authorizing discovery "limited to the ministerial exception defense" and specifically whether plaintiff performed religious functions)

Sterlinski v. Catholic Bishop of Chicago, No. 16 C 00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017) (noting that it is standard practice to "limit discovery to the applicability of the ministerial exception"; "Before launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid—it is sensible to limit discovery to the applicability of the ministerial exception.")

Yin v. Columbia Int'l Univ., No. 3:15-cv-03656-JMC-PJG, 2017 WL 4296428, at *4 (D.S.C. Sept. 28, 2017) (limiting the scope of discovery to the applicability of the ministerial exception after denying the religious employer's motion to dismiss)

The federal courts of appeal have reinforced that focused discovery is not only proper but necessary to honor the protection provided by the ministerial exception and other religious-autonomy doctrines (cases listed alphabetically):

EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (noting that being "deposed,

interrogated, and haled into court" would "inevitably affect" how a religious school defines its teacher criteria)

Fratello v. Archdiocese of N.Y., 863 F.3d 190, 198 (2d Cir. 2017) (stating that the district court "appropriately ordered discovery limited to whether [the plaintiff] was a minister")

McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (a court's "investigation and review" of "matters of church administration and government" relating to a religious organization's relationship with one of its ministers naturally produces an improper "coercive effect" on that organization's governance)

Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) (if religious organizations face the possibility of "subpoena, discovery, cross-examination, [and] the full panoply of legal process" whenever they decline to hire or discharge a minister, they will inevitably "make [those choices] with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members")

Skrzypczak v. Roman Catholic Diocese, 611 F.3d 1238, 1245 (10th Cir. 2010) ("The types of investigations a court would be required to conduct in deciding Title VII claims brought by a minister 'could only produce by [their] coercive effect the very opposite of that separation of church and State contemplated by the First

> Amendment.'" [quoting *McClure*, 460 F.2d at 560])
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> *Sterlinski v. Catholic Bishop of Chicago*, 934 F.3d 568, 569-72 (7th Cir. 2019) (ministerial exception is not just as an affirmative defense to liability, but also a limitation on discovery, because the ministerial exception exists "precisely to avoid . . . judicial entanglement in, and second-guessing of, religious matters"—including by "subjecting religious doctrine to discovery")

Last, and of course not least, this Court's decisions require that parameters be set on discovery in line with the Religion Clauses. As Justice Alito (joined by Justice Kagan) noted in his concurrence in *Hosanna-Tabor*, "the mere adjudication of" factual questions about church teaching can "pose grave problems for religious autonomy." 565 U.S. at 205-06. And in rejecting the NLRB's assertion of jurisdiction over certain Catholic secondary schools, the Court noted that it is not just a finding of liability that can "impinge on rights guaranteed by the Religion Clauses," but also the "very process of inquiry." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979); *cf. Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696, 718 (1976) (a court's "detailed review of the evidence" regarding internal church procedures is "impermissible" under the First Amendment).

Thus, there is little dispute that the ministerial exception requires a district court's focused attention and vigilant protection during the pre-trial and discovery processes.[2]

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[2] State courts have reached similar conclusions. *See, e.g.*, *Presbyterian Church (U.S.A.) v. Edwards*, 566 S.W.3d 175, 179 (Ky. 2018) (reversing discovery order because church "should not be subjected to the broad-reaching discovery allowed under the trial court's order"; allowing merits discovery before resolving a church's ministerial exception defense "would result in a substantial miscarriage of justice" since the defense "includes protection against the cost of trial and the burdens of broad-reaching discovery" (citations and internal quotation marks omitted)); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1198-200 (Conn. 2011) ("[w]hen the ministerial exception applies, it provides the defendant with immunity from suit" because "the very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy, making the discovery and trial process itself a first amendment violation"); *Harris v. Matthews*, 643 S.E.2d 566, 570 (N.C. 2007) (permitting interlocutory appeal of denied motion to dismiss because ministerial exception rights "will be impaired or lost and defendant will be irreparably injured if the trial court becomes entangled in ecclesiastical matters from which it should have abstained"); *Heard v. Johnson*, 810 A.2d 871, 876-77 (D.C. 2002) (the ministerial exception is a "claim of immunity from suit under the First Amendment" that is "effectively lost if a case is erroneously permitted to go to trial"; ministerial exception defense includes "protection of immunity from suit," which is an "entitlement not to stand trial or face the other burdens of litigation" unnecessarily); *United Methodist Church, Baltimore Annual Conference v. White*, 571 A.2d 790, 792 (D.C. 1990) ("The First Amendment's Establishment Clause and Free

Exercise Clause grant churches an immunity from civil discovery . . . under certain circumstances").

Legal scholars are also of the view that discovery must be limited and focused on the ministerial exception. *See, e.g.,* J. Gregory Grisham and Daniel Blomberg, *The Ministerial Exception After* Hosanna-Tabor*: Firmly Founded, Increasingly Refined*, 20 Federalist Soc'y Rev. 80, 88 (2019); Peter Smith and Robert Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1878 (2018) ("if a religious organization is a defendant and raises the ministerial exception," trial courts should "initially limit[] discovery only to facts relevant to the ministerial exception," as is "typical in cases involving qualified immunity"); Mark E. Chopko, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 First Amend. L. Rev. 233, 293 (2012) ("discovery should be directed towards" resolving the ministerial exception defense and "should not encompass the entire merits of [a plaintiff's] claim").

D. After Focused Discovery Has Been Taken on Ministerial Exception Issues, District Courts Should Resolve the Ministerial Exception Issues as Expediently as Possible, Either Through Summary Judgment or an Evidentiary Hearing to Adjudicate the Application of the Ministerial Exception.

Once the litigants in the district court have concluded an appropriately tailored discovery process, permitting summary judgment practice on the topic of the ministerial exception—without foreclosing a later motion for summary judgment on the "merits," if the merits are reached—is the proper course of action. This two-stage process (adjudication of constitution defenses first, then all remaining merits issues) preserves the constitutional protection of the ministerial exception. Through summary judgment, the vast majority of ministerial exception cases have been resolved, most of them in favor of the religious employers.

But the amicus parties wish to identify an additional path to resolution that does not appear to have been pursued in the district courts. The amicus parties believe that it may be time for the Court to affirmatively hold that the application of the ministerial exception is primarily a question of law that should be decided by the trial judge through motion practice or an evidentiary hearing at the first reasonable opportunity, and not by jury trial. At least two courts have made statements heading in this direction. The Kentucky Supreme Court in *Kirby* decided:

> [W]e hold the determination of whether an employee of a religious institution is a ministerial employee is a question of law for the trial court, to be handled as a threshold matter. Certainly, 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" and provide the litigants with a clear understanding of the litigation's track.

Kirby v. Lexington Theological Seminary, 426 S.W.3d 597, 608-09 (Ky. 2014) (footnotes omitted). Similarly, the Sixth Circuit in *Conlon* introduced its discussion by noting that "whether the [ministerial] exception attaches at all [to the facts alleged] is a pure question of law which this court must determine for itself." *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015).

Early adjudication of ministerial exception issues by the court would protect the importance of the exception and would go hand in hand with the common vehicle for adjudicating other religious-autonomy defenses, namely, under Federal Rule of Civil Procedure 12(b)(1). A Rule 12(b)(1) motion challenging a court's subject matter jurisdiction is appropriate at any time, as lack of subject matter jurisdiction cannot be waived. *See Ft. Bend County, Tex. v. Davis*, ___ U.S. ___, 139 S. Ct. 1843, 1849 (2019) ("challenges to subject-matter jurisdiction may be raised by the defendant at any point in the litigation, and courts must consider them *sua sponte*" [internal quotations omitted]). And such motions can be resolved through pre-trial evidentiary hearings in

which the court (rather than a jury) decides any disputed issues of fact, because the core inquiry is a question of law, namely, whether the court has authority to hear the case. *Cf. Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) (ministerial exception barred claims of "ordained" Salvation Army "ministers" for minimum wage and overtime violations; although the district court should not have dismissed the claims under Rule 12(b)(1) because the ministerial exception is not purely a jurisdictional issue, the error was harmless because the district court held an evidentiary hearing at which the plaintiff could have presented rebuttal evidence).

In sum, the district courts have the appropriate tools to adjudicate the application of the ministerial exception in the early stages of a case, without imposing an expensive and intrusive jury trial on religious employer defendants.

E. District Courts that Take the Typical Path in Employment Discrimination Cases of Leaving Issues of "Pretext" for the Jury Eviscerate the Protection of the Ministerial Exception.

With the above principles in mind, the amicus parties point out the grave danger of proceeding in a ministerial exception case as if it is a typical employment discrimination case. In the ordinary case, an employment discrimination plaintiff may assert that her employer's stated "legitimate, nondiscriminatory reason" for the adverse employment action is "pretextual," that is, "a lie, specifically a phony reason for some action," which is

designed to cloak the employer's true and unlawful reason for taking the adverse employment action. *See, e.g., Graham v. Arctic Zone Iceplex, LLC*, 930 F. 3d 926, 929 (7th Cir. 2019). Discovery is then required on a variety of matters such as the factual support for the employer's stated reason for the action, similarly situated employees and the employer's treatment of them compared to the plaintiff, and evidence potentially supporting the Plaintiff's claimed discriminatory reasons for the action. Then, if there exists a genuine issue of material fact as to whether the employer's stated reason is the "true" reason or the reason is instead the alternative discriminatory reason presented by the plaintiff, a jury trial must be held.

In the context of a religious employer's decisions relating to an employee who carries out the employer's religious mission (i.e., one of its "ministers"), this motive-probing discovery and ultimate jury trial are precisely the sort of intrusive inquiries that are prohibited by the Religion Clauses. This Court called out this issue in *Hosanna-Tabor*:

> The EEOC and Perich suggest that Hosanna–Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will

> minister to the faithful—a matter strictly ecclesiastical—is the church's alone.

565 U.S. at 194-95 (citation omitted); *see also id.* at 205 (Alito, J., concurring) ("For civil courts to engage in the pretext inquiry that respondent and the Solicitor General urge us to sanction would dangerously undermine the religious autonomy that lower court case law has now protected for nearly four decades.").

Unfortunately, courts have not always heeded this Court's guidance. Centrally here, the Ninth Circuit's decision in *Biel v. St. James School*, swung the door to pretext inquiries wide open, stating that on remand (following its reversal of summary judgment for St. James School), "St. James may of course argue that it did not violate the ADA because its stated pedagogical and classroom management concerns—not Biel's medical condition—were the basis for its decision not to renew Biel's contract." *Biel v. St. James School*, 911 F.3d 603, 611 n.6 (9th Cir. 2018). While phrased as a benefit to St. James School (as to what it could permissibly argue), with the denial of summary judgment, this meant that the school was required to face an expensive and intrusive jury trial over the reasons for the religious teacher's discharge. The Ninth Circuit went even further to say that if the school "asserted a religious justification for terminating Biel," the jury question would then be "whether the proffered justification was the actual motivation for termination, or whether not wanting to accommodate Biel's disability was the motivation." *Id.* This is dead-center the very pretext issue that this Court said in *Hosanna-Tabor* was off limits. *See* 565 U.S. at 194-95.

In contrast to the Ninth Circuit's erroneous decision in *Biel*, most courts have heeded this Court's directive that when the ministerial exception applies, pretext arguments are off the table. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113 (3d Cir. 2018) (holding that the ministerial exception barred the court from considering the pastor plaintiff's claim that the church breached his written employment agreement, because a component of the analysis would be the church's reasons for terminating the pastor's employment and whether such reasons amounted to "cause"; "parsing the precise reasons for [plaintiff] Lee's termination is akin to determining whether a church's proffered religious-based reason for discharging a church leader is mere pretext, an inquiry the Supreme Court has explicitly said is forbidden by the First Amendment's ministerial exception" [citing *Hosanna-Tabor*, 565 U.S. at 194-95]); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 197, n.15, 202, n.25, 203 (2d Cir. 2017) (if a religious employer offers a religious reason for the employment decision, courts may not adjudicate the matter because courts have no authority to evaluate the genuineness of religious reasons or pretext; dismissal of claims brought by Catholic school principal affirmed); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (affirming Rule 12(b)(6) dismissal, under the ministerial exception, of Title VII claims of gender discrimination and retaliation of female Catholic university chaplain following reorganization of the chaplain's office; plaintiff argued that the university's decision was "merely pretext for gender discrimination," but the court held that adjudicating

the university's reasons for its decisions would be to impermissibly evaluate its decisions as to ministerial functions); *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980) (if the religious organization presents a plausible case that the adverse employment action was religiously motivated, the EEOC is constitutionally prohibited from investigating whether the decision is pretext for gender or race discrimination); *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) (the reasons for the religious employer's adverse action are immaterial if the ministerial exception applies, so the plaintiff is not permitted to argue that the employer's reason is "pretextual").

Therefore, this Court should reaffirm its holding in *Hosanna-Tabor* that pretext inquiries are foreclosed when the ministerial exception applies.

II. Immediate Appellate Review Is Available and Should Be Endorsed When District Court Decisions Reject a Claim for Application of the Ministerial Exception or Fail to Limit the Scope of Discovery to that Necessary to Decide Ministerial Exception Issues.

When district courts do not heed the appropriate discovery (and other) limitations arising out of the ministerial exception and related religious-autonomy doctrines, there are two possible appellate avenues to set the district courts back on the constitutionally delimited path: the collateral-order doctrine and certified questions under 28 U.S.C. § 1292(b).

While federal courts of appeal generally only hear appeals from "final judgments" under 28 U.S.C.

§ 1291, the "collateral order doctrine" allows for appeal of certain judicial decisions that "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Denial of an invocation of the ministerial exception or the failure to limit discovery to that necessary to resolve the application of the ministerial exception will often meet these criteria. First, rejection of the ministerial exception as a matter of law may be "law of the case," conclusively determining the question. Second, the application of the ministerial exception, as an affirmative defense that negates liability, will often be separate from the merits of the case. The ministerial exception enquiry will focus on the religious nature of the employer and the employee's role in the employer's religious ministry, whereas the merits issues will involve typical issues of anti-discrimination or contract law. The third element is plainly satisfied when a court proceeds beyond the ministerial exception to full-blown discovery, summary judgment on the merits, and trial. "The decisive consideration . . . is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)). As explained above, the constitutional protection offered by the ministerial exception is not just a defense to liability but a form

of immunity from the burdens of litigation. *See* Part I.B *supra*. And courts have consistently allowed for collateral-order appeals when one party claims an immunity that is constitutionally derived. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (approving interlocutory appeal of decision regarding qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (approving interlocutory appeal of decision regarding absolute immunity); *Abney v. United States*, 431 U.S. 651 (1977) (approving interlocutory appeal of decision regarding double jeopardy immunity); *Puerto Rico Aqueduct*, 506 U.S. 139 (1993) (approving interlocutory appeal of decision regarding Eleventh Amendment immunity).

State appellate courts have regularly permitted ministerial exception arguments to be raised on interlocutory appeal. The reasoning given is that discussed at length above—the constitutional rights as stake warrant priority attention, because the mere exposure to court adjudication may violate the Religion Clauses. *See, e.g.*, *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1198-200 (Conn. 2011) (approving interlocutory appeal of the denial of motion to dismiss based on the ministerial exception; "[w]hen the ministerial exception applies, it provides the defendant with immunity from suit" because "the very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy, making the discovery and trial process itself a first amendment violation"); *Harris v. Matthews*, 643 S.E.2d 566, 568-70 (N.C. 2007) (permitting interlocutory appeal of denied motion to dismiss because ministerial exception rights "will be

impaired or lost and defendant will be irreparably injured if the trial court becomes entangled in ecclesiastical matters from which it should have abstained"); *Heard v. Johnson*, 810 A.2d 871, 876–77 (D.C. 2002) (permitting interlocutory appeal under the collateral order doctrine of rejection of the ministerial exception; the ministerial exception is a "claim of immunity from suit under the First Amendment" that is "effectively lost if a case is erroneously permitted to go to trial"; ministerial exception defense includes "protection of immunity from suit," which is an "entitlement not to stand trial or face the other burdens of litigation" unnecessarily); *United Methodist Church, Baltimore Annual Conference v. White*, 571 A.2d 790, 792-93 (D.C. 1990) (permitting interlocutory appeal under the collateral order doctrine of the denial of a motion to dismiss based on the ministerial exception; "The First Amendment's Establishment Clause and Free Exercise Clause grant churches an immunity from civil discovery and trial under certain circumstances").

While not specifically in the ministerial exception context, the Seventh Circuit allowed a collateral-order-doctrine appeal to review a claimed violation of the Establishment Clause arising out of a district court decision that a case involving certain religious questions should go to trial. *See McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013). The court explained that that interlocutory review was proper because of the constitutional issues at stake, citing *Hosanna-Tabor* and liking the matter to collateral order review of denials of official immunity. *Id.* at 975. Although theoretically a jury verdict rejecting (or adopting) the

religious judgments of the religious order could have been appealed upon final judgment and reversed, the Seventh Circuit found this result impermissible:

> Then there would be a final judgment of a secular court resolving a religious issue. Such a judgment could cause confusion, consternation, and dismay in religious circles. The commingling of religious and secular justice would violate not only the injunction in Matthew 22:21 to "render unto Caesar the things which are Caesar's, and unto God the things that are God's," but also the First Amendment, which forbids the government to make religious judgments. The harm of such a governmental intrusion into religious affairs would be irreparable, just as in the other types of case in which the collateral order doctrine allows interlocutory appeals.

Id. at 976.

The decision in *Whole Woman's Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1170 (2019), is also supportive of interlocutory review. There, the court took up interlocutory appeal under the collateral order doctrine of a district court order requiring certain Catholic bishops to turn over internal church communications related to abortion providers and the bishops' offer to provide a proper burial to the aborted fetuses. The court held that it had jurisdiction to hear the appeal because "the consequence of forced discovery" on rights that "go to the heart of the constitutional protection of religious belief and practice" would be "effectively unreviewable" without an interlocutory appeal. *Id*.

at 367-68. The court relied on *Hosanna-Tabor* in stating that "religious organizations" have a strong interest in "maintain[ing] their internal organizational autonomy intact from ordinary discovery." *Id.* at 374. The principles in *Whole Woman's Health* are transferrable to the ministerial exception insofar as the application of the exception provides similar discovery protections, particularly with regard to the religious organization's decisionmaking processes, which are factually irrelevant if the exception applies. *See Hosanna-Tabor*, 565 U.S. at 194-95 (noting that to inquire into the motives of a ministerial firing decision would be to "miss[] the point of the ministerial exception").

Hearing an appeal of a certified question under 28 U.S.C. § 1292(b) is another available approach—to the extent the district court will agree to certify its ruling for interlocutory appeal and the court of appeals will accept it. Section 1292(b) was the vehicle for interlocutory review in *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 191-92 (4th Cir. 2011), in which the court accepted an interlocutory appeal to review the denial of the religious employer's motion for summary judgment, which argued that the statutory religious-employer exemption under Title VII of the Civil Rights Act of 1964 barred the plaintiff's claims. The Fourth Circuit went on to reverse the denial of summary judgment and direct entry of judgment in the religious employer's favor. Pending in the Seventh Circuit is another interlocutory appeal accepted under § 1292(b). In the district court, the judge granted in large part the religious defendant's motion to dismiss based on the ministerial exception, but

denied the motion as to the plaintiff's disability-related hostile environment claim. *See Demkovich v. St. Andrew the Apostle Parish*, 343 F. Supp. 3d 772 (N.D. Ill. 2018). The parish sought § 1292(b) certification on whether a religious employer is exempt under the ministerial exception from a disability-related hostile environment claim brought by a plaintiff who qualifies as a minister, and the district court certified the question for interlocutory review. *See Demkovich v. St. Andrew the Apostle Parish*, No. 1:16-cv-11576, Dkt. 73 (N.D. Ill. May 5, 2019). (The district court also appropriately stayed discovery until after the Seventh Circuit decided the matter. *See id.*) The Seventh Circuit accepted the appeal and heard oral argument on November 5, 2019. *See Demkovich v. St. Andrew the Apostle Parish*, No. 19-2142 (7th Cir.).

In conclusion, courts cannot protect the foundational interests of the ministerial exception without interlocutory review of misguided lower court determinations. When district courts stray into unconstitutional adjudication of religious disputes, leaving correction of such errors until after final judgment is to deprive the religious defendant of the immunity to which it is entitled. As the Court said in *Hosanna-Tabor*, the ministerial exception is a context in which the Religion Clauses support judicial abstention. *See* 565 U.S. at 181.

CONCLUSION

The Ninth Circuit's decisions should be reversed.

Respectfully submitted,

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