No. 22-741

In the Supreme Court of the United States

FAITH BIBLE CHAPEL INTERNATIONAL,
Petitioner,

v.

GREGORY TUCKER,
Respondent.

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

BRIEF OF *AMICI CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, COLORADO CATHOLIC CONFERENCE, CHRISTIAN LEGAL SOCIETY, CARDINAL NEWMAN SOCIETY, AND BENEDICTINE COLLEGE IN SUPPORT OF PETITIONER

CHRISTIAN M. POLAND
Counsel of Record
ANDREA R. BUTLER
BRYAN CAVE LEIGHTON PAISNER LLP
161 N. Clark St., Suite 3400
Chicago, IL 60601
312-602-5085
christian.poland@bclplaw.com
Attorneys for Amicus Curiae

March 10, 2023

QUESTIONS PRESENTED

I. Whether the First Amendment's "ministerial exception" should be understood as an immunity from judicial interference in church employment decisions falling within the exception, or instead as a mere defense against liability. This overarching question controls the answer to three sub-questions:

   A. Whether the ministerial exception protects churches against merits discovery and trial;

   B. Whether ministerial status is a legal question for the court or a fact question for the jury; and

   C. Whether denial of a dispositive motion to invoke the ministerial exception is appealable on an interlocutory basis.

II. Whether the ministerial exception applies here to bar employment discrimination claims by a school chaplain who led chapel services, taught in the Bible department, and provided spiritual guidance and counseling to students.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iv

INTERESTS OF AMICI CURIAE.....1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Court Should Grant the Petition to Determine Whether Denial of a Ministerial Exception Defense Is Appealable Under the Collateral Order Doctrine.....6

A. The Church Autonomy Doctrine and Ministerial Exception Provide Immunity From the Travails of Litigation, Not Just a Defense to Liability 6

B. The Collateral Order Doctrine Allows For Immediate Review of the Denial of Church Autonomy Defenses.....11

C. The Decision Below Departs from Established Precedent That a Denial of the Ministerial Exception Justifies Immediate Appeal.....17

II. Without the Availability of Immediate Appeal in Ministerial Exception Cases, Religious Entities Face Impermissible Burdens on Their Religious Exercise 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 14

Belya v. Kapral,
59 F.4th 570 (2d Cir. 2023) 8, 11

Belya v. Kapral,
45 F.4th 621 (2d Cir. 2022) 4, 8, 10

Brandon v. Blech,
560 F.3d 536 (6th Cir. 2009) 16

Bryce v. Episcopal Church in the Diocese of Colorado,
289 F.3d 648 (10th Cir. 2002) 14

Callahan v. United Network for Organ Sharing,
17 F.4th 1356 (11th Cir. 2021) 16

Celnik v. Congregation B'Nai Israel,
131 P.3d 102 (N.M. 2009)..... 19

Conlon v. InterVarsity Christian Fellowship,
777 F.3d 829 (6th Cir. 2015) 7

Copeland v. Ryan,
852 F.3d 900 (7th Cir. 2017) 16

Dayner v. Archdiocese of Hartford,
23 A.3d 1192 (Conn. 2011) 18

Demkovich v. St. Andrew the Apostle Par.,
3 F.4th 968 (7th Cir. 2021) 9

Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 15

Doe v. Coll. of New Jersey,
997 F.3d 489 (3d Cir. 2021) 15

Doe v. Vill. of Deerfield,
819 F.3d 372 (7th Cir. 2016) 15

Duquesne Univ. of the Holy Spirit v. NLRB,
947 F.3d 824 (D.C. Cir. 2020) 9

EEOC v. Cath. Univ. of Am.,
83 F.3d 455 (D.C. Cir. 1996) 9, 22

Harris v. Matthews,
643 S.E.2d 566 (N.C. 2007) 18

Heard v. Johnson,
810 A.2d 871 (D.C. 2002) 18

Hope Int'l Univ. v. Superior Ct.,
119 Cal App. 4th 719 (2004) 19

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,
565 U.S. 171 (2012) 7, 8, 13, 23, 25

Kelsey v. Ray,
719 A.2d 1248 (D.C. 1998) 18

Kirby v. Lexington Theological Seminary,
426 S.W.3d 597 (Ky. 2014) 18, 19

Lieberman v. Polytop Corp.,
2 F.App'x 37 (1st Cir. 2001) 16

In re Looney,
823 F.2d 788 (4th Cir. 1987) 15

In re Lubbock,
624 S.W.3d 506 (Tex. 2021) 19

Lugosch v. Pyramid Co. of Onondaga,
435 F.3d 110 (2d Cir. 2006) 15

Marceaux v. Lafayette City-Par. Consol. Gov't,
731 F.3d 488 (5th Cir. 2013) 15

McCarthy v. Fuller,
714 F.3d 971 (7th Cir. 2013)
..... 12, 13, 16, 17

McClure v. Salvation Army,
460 F.2d 553 (5th Cir. 1972) 9

Mitchell v. Forsyth,
472 U.S. 511 (1985) 14, 16

N.L.R.B. v. Cath. Bishop of Chi.,
440 U.S. 490 (1979) 7

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
591 U.S. ___, 140 S. Ct. 2049 (2020)..... 3, 6, 23, 25

Petruska v. Gannon Univ.,
462 F.3d 294 (3d Cir. 2006)..... 14

Presbyterian Church (U.S.A.) v. Edwards,
566 S.W.3d 175 (Ky. 2018)..... 19

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,
506 U.S. 139 (1993)..... 11

Rayburn v. Gen. Conf. of Seventh-Day Adventists,
772 F.2d 1164 (4th Cir. 1985)..... 22

Sanford v. Maid-Rite Corp.,
816 F.3d 546 (8th Cir. 2016)..... 15

Shoop v. Twyford,
596 U.S. ___, 142 S. Ct. 2037 (2022)..... 12

St. Joseph Cath. Orphan Soc'y v. Edwards,
449 S.W.3d 727 (Ky. 2014)..... 19

Sterlinski v. Cath. Bishop of Chi.,
934 F.3d 568 (7th Cir. 2019)..... 9

Tucker v. Faith Bible Chapel Int'l,
53 F.4th 620 (10th Cir. 2022)..... 10

Tucker v. Faith Bible Chapel Int'l,
36 F.4th 1021 (10th Cir. 2022) 10, 23

Tucker v. Faith Bible Chapel Int'l,
No. 19-cv-01652-RBJ,
2020 WL 2526798 (D. Colo. 2020) 24

United Methodist Church v. Baltimore Ann. Conf. v. White,
571 A.2d 790,792 (D.C. 1990) 18

United States v. Graham,
257 F.3d 143 (2d Cir. 2001)..... 15

Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.,
913 F.3d 443 (5th Cir. 2019) 16

Whole Woman's Health v. Smith,
896 F.3d 362 (5th Cir. 2018) 8, 13, 17, 22, 23

Will v. Hallock,
546 U.S. 345 (2006) 14

INTERESTS OF AMICI CURIAE

Amici[1] are the Association of Christian Schools International, Colorado Catholic Conference, Christian Legal Society, Cardinal Newman Society, and Benedictine College. They seek to represent the interests of religious educational institutions, and religious institutions generally, that may face claims similar to those brought against Petitioner Faith Bible Chapel International d/b/a Faith Christian Academy ("Faith Bible"), to ensure that such institutions are protected from intrusive litigation that violates the First Amendment's Religion Clauses. Through their own experiences, amici understand the importance of the proper application of the ministerial exception and the requirement that courts avoid improper entanglement in the decisions of religious employers as to those who carry out their religious mission.

Amicus Association of Christian Schools International ("ACSI") is a Christian educational organization that exists to strengthen Christian schools and equip Christian educators to provide an academically rigorous and explicitly Christian education. ACSI provides support services to over 23,000 schools in over 100 countries, serving over five million students.

Amicus Colorado Catholic Conference is composed of the Archdiocese of Denver and the

---

[1] No counsel for a party authored any portion of this brief, and no person or entity other than amici or its counsel made any monetary contribution to its preparation or submission. Both parties were timely notified in advance of the filing of this brief.

dioceses of Pueblo and Colorado Springs. Together they oversee 54 Catholic elementary and secondary educational institutions with a total enrollment of approximately 14,400 students. They also oversee hundreds of other Catholic employers. The three dioceses employ over 4,500 seminary, parish, and other pastoral and ministerial workers.

Amicus Christian Legal Society ("CLS") is an association of Christian attorneys, law students, and law professors, founded in 1961. CLS operates the Center for Law & Religious Freedom (the "Center"), the nation's oldest organization committed exclusively to the protection of religious freedom. For decades, CLS has sought to protect all citizens' free exercise and free speech rights in the federal and state courts and legislatures. CLS was instrumental in passage of landmark federal legislation to protect persons of all faiths. Through the Center, CLS has served as amicus or counsel to amici in numerous cases, and has filed amicus briefs in key cases defending the autonomy of religious organizations in making employment decisions.

Amicus Cardinal Newman Society promotes and defends faithful Catholic education by advocating and supporting fidelity to the Catholic Church's teaching across all levels of Catholic education, and by identifying and promoting clear standards of Catholic identity and best practices in Catholic education.

Amicus Benedictine College is a four-year college whose mission as a Catholic, Benedictine, Liberal Arts college is the education of men and

women within a community of faith and scholarship. Benedictine College was founded in 1858 in Atchison, Kansas.

Amici have a strong interest in ensuring religious schools and institutions of all types remain protected from government interference in internal religious decision-making, including regarding who carries forward their religious mission and who serves as "ministers" within their institutions. The Tenth Circuit's holding that the ministerial exception does not provide a shield from government entanglement through litigation and discovery will have potentially devastating religious and financial consequences for religious groups who face employment litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a court rejects a religious entity's invocation of a church autonomy defense, including the ministerial exception, that decision should be immediately reviewable under the collateral order doctrine. The Religion Clauses grant religious entities "freedom to decide matters of faith and doctrine without government intrusion" and prevent judicial influence over those decisions. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049, 2060 (2020). These First Amendment protections confer an immunity from intrusive litigation and discovery, not just a defense to liability. When a court does not respect these First Amendment limits, its invasion and interference cannot be undone, nor can it be remedied by review after a final judgment. Thus, a wrongful rejection of a church

autonomy defense, such as the denial of the application of the ministerial exception, is (1) a determination that is conclusive on the issue of whether the religious body must face merits discovery or trial, (2) nearly always separate from the merits of the claims asserted, because it involves the nature of the religious defendant and its expectations of the plaintiff employee, not the rationale of the adverse employment action or the supporting evidence on which the employee relies, and (3) an irreparable harm that is effectively unreviewable upon final judgment, because the intrusion on religious authority (and the imposition of existence-threating legal costs) cannot be restored to its pre-suit state. For these reasons, a court's denial of a dispositive motion on a church autonomy defense, or a court's failure to focus initial discovery solely on that defense for an early decision on such a motion, warrants interlocutory appellate review, both under the collateral order doctrine and other avenues for interlocutory appeal.

The Tenth Circuit's decision rejected these principles, as did the Second Circuit's recent decision in *Belya v. Kapral*, 45 F.4th 621 (2d Cir. 2022). These decisions depart from a broad consensus among other circuit courts, district courts, and state courts that denials of the ministerial exception harm religious entities' rights to be free from intrusive merits discovery and trial. This Court should grant the petition for writ of certiorari to resolve the lower court split, and ensure that religious entities are uniformly protected across the United States.

The Tenth Circuit's decision leaves Faith Bible without recourse as to the district court's rejection of its ministerial exception defense. Despite the absence of any genuine issue of material fact that Faith Christian Academy was a religious body, that Tucker's contract specified he served as a minister for the school, that he agreed to provide students mentoring and encouragement in their Christian faith, and that he planned explicitly religious Chapel Meetings, the district court held that Tucker's mischaracterization of his job duties as Chaplain was enough to deny summary judgment and force Faith Bible to trial. The Tenth Circuit thereafter perpetuated the error, holding that collateral order review is never available to correct a district court's improper rejection of a ministerial exception defense.

This Court has recognized that the threat of, and certainly the burden of, mounting a full and costly legal defense to justify a challenged religious decision will itself impair religious freedom, for religious bodies must take into account the possibility of judicial scrutiny and crushing litigation costs for what should otherwise be independent and protected religious decision-making. Frequently, religions espouse viewpoints and call for actions based on moral standards that differ from secular culture. While these religious beliefs are fully protected by the First Amendment, they are ripe for challenge by those who disagree, and the use of the secular court system as a tool to compel a more culturally approved viewpoint has become popular. Religious entities, which often operate on tight, donor-reliant budgets, are ill-equipped to face prolonged legal battles over these

issues, and are likely to forgo their First Amendment rights when faced with the specter of litigating them through trial.

This Court should grant the petition for writ of certiorari, reverse the Tenth Circuit's decision, and establish that collateral order doctrine review is available for denials of church autonomy defenses, all of which will help ensure that religious entities are not forced to choose between their First Amendment rights and continued financial viability.

ARGUMENT

I. The Court Should Grant the Petition to Determine Whether Denial of a Ministerial Exception Defense Is Appealable Under the Collateral Order Doctrine

A. The Church Autonomy Doctrine and Ministerial Exception Provide Immunity From the Travails of Litigation, Not Just a Defense to Liability

Church autonomy defenses, including the ministerial exception at issue here, implicate both the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution, which together "protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady*, 140 S. Ct. at 2060 (cleaned up). The Free Exercise Clause ensures, *inter alia*, 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." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 188 (2012). The Establishment Clause, in turn, "prohibits government involvement in such ecclesiastical decisions." *Id.* These protections not only provide religious entities with affirmative, enforceable rights, but also impose structural limitations on the courts and the adjudicatory process.

Importantly, church autonomy does not mean only that religious entities cannot be held liable under secular laws for decisions and conduct the First Amendment places off limits. Rather, this Court has endorsed "a spirit of freedom for religious organizations, *an independence from secular control or manipulation*—in short, power to decide for themselves, *free from state interference,* matters of church government as well as those of faith and doctrine." *Id.* at 186 (emphases added; cleaned up). The "very process of inquiry" stemming from government adjudications "may impinge on rights guaranteed by the Religion Clauses." *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979). As several lower courts have recognized, "This 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." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015).

These principles demonstrate that the burden of litigating the issues related to a religious organization's decisions can itself be an unconstitutional imposition of governmental authority over a religious entity. For example, although the Christian elementary school teacher in *Hosanna-Tabor* presented her claims as ordinary employment discrimination and retaliation claims, the religious school noted that it considered the teacher to have a central role in providing a religiously infused education and expected the teacher to abide by the church's doctrine of internal dispute resolution. 565 U.S. at 194. The import of this Court's holding was that "civil courts are in no position to second-guess" the religious body's assessment that such a procedure was required for one of its "ministers." *Id.* at 206 (Alito, J., joined by Kagan, J., concurring). Subjecting religious organizations to discovery and trial over decisions regarding whom they deem qualified (and unqualified) to serve as their ministers would impermissibly interfere with religious entities' "decision-making processes on a matter of intense doctrinal concern," "expose[] those processes to an opponent[,] and [would] induce similar ongoing intrusions against religious bodies' self-government." *Whole Woman's Health v. Smith*, 896 F.3d 362, 373 (5th Cir. 2018).

Until the Tenth Circuit's decision and the Second Circuit's recent decision in *Belya v. Kapral*, 45 F.4th 621 (2d Cir. 2022) (2-1 decision), *rehearing en banc denied*, 59 F.4th 570 (2d Cir. 2023) (6-6 decision), *pet. for cert. filed sub nom. The Synod of Bishops of the Russian Orthodox Church Outside of Russia v. Belya*,

No. 22-824 (U.S. Feb. 27, 2023), nearly every circuit court to consider the issue had recognized that the First Amendment protects religious entities from the prejudicial effects of litigation when they invoke a church autonomy defense, including the ministerial exception. *See Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968 (7th Cir. 2021) (en banc) (expressing concern over "the prejudicial effects of incremental litigation" on a religious entity, which is in part why courts must "stay out of employment disputes involving those holding certain important positions with churches and other religious institutions"); *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 835 (D.C. Cir. 2020) (rejecting the NLRB's jurisdiction over a Catholic university because the process of determining the university's religious nature and faculty members' roles in the university's religious mission would "impinge on rights guaranteed by the Religion Clauses"); *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568, 569-72 (7th Cir. 2019) (ministerial exception is 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"); *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (court's "extensive pre-trial inquires and trial itself" regarding nun's discrimination claim "constituted an impermissible entanglement with judgments that fell within the exclusive province of the [religious body]"); *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 produced an improper "coercive effect" on that organization's governance).

The decision below cited no other circuit case in support of its conclusion that the ministerial exception does not provide "protection from the burdens of litigation itself." *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1037 (10th Cir. 2022). That the Tenth Circuit could point to no other circuit court that agreed with its conclusion is telling, and the court thus created a circuit split with dubious doctrinal grounding. The Second Circuit then unfortunately joined *Tucker*'s erroneous view. *See Belya*, 45 F.4th at 633 (citing *Tucker* and concluding that church autonomy "provides religious associations neither an immunity from discovery nor ... trial" but "serves more as an ordinary defense to liability" [cleaned up]).

The well-reasoned dissents in the Tenth and Second Circuits support Faith Bible here. In *Tucker*, Judge Bacharach dissented on the initial panel, 36 F.4th at 1048-66, and also dissented from denial of rehearing en banc, joined by Judges Tymkovich and Eid, 53 F.4th 620, 625-30. Judge Bacharach covered at length why the ministerial exception is a protection from litigation, not just a defense to liability. *See id.* The dissenters summarized their position: "Though most defenses protect only against liability, the ministerial exception protects a religious body from the suit itself. Without that protection, religious bodies will inevitably incur protracted litigation over matters of religion." 53 F.4th at 625 (Bacharach, J., dissenting). Similarly, Judge Park's dissent from the denial of rehearing en banc in *Belya*, which five judges

joined, found that church autonomy defenses bear "strong resemblance to qualified immunity" and are "protections against the burdens of litigation itself." 59 F.4th at 579 (Park, J., dissenting from the denial of rehearing en banc, joined by Chief Judge Livingston, and Judges Sullivan, Nardini, and Menashi). And Judge Cabranes wrote separately to emphasize that the issues raised warrant Supreme Court review: "The denial of *en banc* review in this case is a signal that the matter can and should be reviewed by the Supreme Court." *Id.* at 573 (Cabranes, J., dissenting from the denial of rehearing en banc). Amici agree; the issues raised by Faith Bible's petition plead for review by this Court.

B. The Collateral Order Doctrine Allows For Immediate Review of the Denial of Church Autonomy Defenses

The Tenth Circuit's decision that the collateral order doctrine cannot apply to correct a district court's erroneous denial of the application of the ministerial exception was in error. The collateral order doctrine allows for immediate review of 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) (cleaned up).

The First Amendment interests at stake under church autonomy defenses mean that the denial of a defense like the ministerial exception is effectively unreviewable on appeal from a final judgment.

Allowing courts and opposing parties in litigation to inquire into internal church affairs, including internal determinations about who is qualified to serve as a minister, is *itself* an irreparable harm that cannot be remedied by review after final judgment. Once the probing has been done, the forced production of religious documents ordered, the invasive depositions taken, and the internal affairs publicized, the judicial and adjudicative interference has been accomplished. It is no remedy to say on later appeal that the litigation should not have proceeded. *See Shoop v. Twyford*, 596 U.S. ___, 142 S. Ct. 2037, 2043 n.1 (2022) (allowing immediate review of "mere discovery order" because the order created risks and burdens "that [could not] be remedied after final judgment").

The Seventh Circuit explained this threat of irreparable harm in *McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013). In that case, the district court decided that factual disputes required a trial to determine a church membership issue. The Seventh Circuit allowed immediate collateral-order review of a request that the court take judicial notice of a Catholic order's ruling on whether a litigant was "a member of a Roman Catholic religious order." *Id.* at 976. The court held that it was impermissible to submit that question to the jury because "if the jury decide[d]" that the litigant was a member of the religious order "it [would] be rejecting the contrary ruling of the religious body ... authorized by the Church to decide such matters." *Id.* This would run afoul of 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,'" and would violate the church autonomy requirements of

the First Amendment. *Id.* Allowing a "secular court" to "resolv[e] a religious issue" would "cause confusion, consternation, and dismay in religious circles" such that "[t]he harm of such a governmental intrusion into religious affairs would be irreparable." *Id.* This denial of "the immunity from the travails of a trial" would "wreak irreparable harm on the appellant." *Id.* at 975.

Likewise, the Fifth Circuit's decision in *Whole Woman's Health*, demonstrates that the constitutionally protected "private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs" necessarily offers protection from the intrusions of litigation, and therefore denial of that protection should be immediately appealable. 896 F.3d at 373 (quoting *Hosanna-Tabor*, 565 U.S. at 199-200). There, the court took up immediate review of a discovery order requiring Catholic bishops to turn over internal church communications related to abortion. The court held that immediate review was necessary 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 immediate 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.

In this way, the ministerial exception functions like other constitutional immunities and requires immediate review. For example, the denial of qualified immunity is routinely reviewed on

immediate appeal under the collateral order doctrine. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) ("[T]he applicability of the [collateral order] doctrine in the context of qualified-immunity claims is well established."). This is precisely because, like the ministerial exception, qualified immunity is an immunity from facing suit, not just liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (because "qualified immunity is in fact an entitlement not to stand trial," denial of that immunity is "effectively unreviewable on appeal from a final judgment"). Indeed, several lower courts have analogized the ministerial exception to a qualified immunity defense because both immunities' purpose would be wholly defeated if they were only reviewable after final judgment. *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. 2006) (ministerial exception "is akin to a government official's defense of qualified immunity"); *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002) (church autonomy defense "is similar to a government official's defense of qualified immunity").

Thus, religious entities asserting the ministerial exception must be entitled to immediate review of an order denying that defense because their First Amendment rights to be free from government intrusion and entanglement are not adequately protected if, in an after-the-fact review, a court of appeals determines the defense was wrongly denied. The collateral order doctrine applies to protect "particular value[s] of a high order," and this Court has recognized that constitutional protections from trial qualify as such. *Will v. Hallock*, 546 U.S. 345,

352-53 (2006). This Court has instructed, "When a policy is embodied in a constitutional ... provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994). The gravity of the First Amendment concerns at stake here emphatically meet this criterion of importance, particularly when compared to the broad range of issues courts have found to warrant collateral-order review.

For example, courts have considered the following issues sufficiently "important" to merit immediate review:

- Requests by media for access to documents. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006); *United States v. Graham*, 257 F.3d 143, 147-48 (2d Cir. 2001).

- Requests for litigants to proceed anonymously. *See Doe v. Coll. of New Jersey*, 997 F.3d 489, 494 (3d Cir. 2021); *Doe v. Vill. of Deerfield*, 819 F.3d 372, 376 (7th Cir. 2016).

- Requests to lift an automatic bankruptcy stay. *See In re Looney*, 823 F.2d 788, 791 (4th Cir. 1987).

- Requests to remove a website. *See Marceaux v. Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 490 (5th Cir. 2013).

- Requests to withdraw as counsel. *See Sanford v. Maid-Rite Corp.*, 816 F.3d 546, 549 (8th Cir. 2016);

Brandon v. Blech, 560 F.3d 536, 537 (6th Cir. 2009); *Lieberman v. Polytop Corp.*, 2 F.App'x 37, 38-39 (1st Cir. 2001).

- Requests for reimbursement of deposition expenses. *See Copeland v. Ryan*, 852 F.3d 900, 904-05 (7th Cir. 2017).

- Requests to unseal documents. *See Callahan v. United Network for Organ Sharing*, 17 F.4th 1356, 1361 (11th Cir. 2021); *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.,* 913 F.3d 443, 448 (5th Cir. 2019).

These myriad interests that courts have found sufficient to merit immediate review pale in comparison to the fundamental constitutional immunity at risk of deprivation here.

The district court's denial of summary judgment as to the applicability of the ministerial exception also conclusively determined a disputed question. The court definitively determined that Faith Bible had no ministerial exception "immunity" and was subject to a trial on the merits. *See Mitchell*, 472 U.S. at 537 ("[T]he court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations"); *McCarthy*, 714 F.3d at 975 (order rejecting religious body's determination was conclusive because it "irrevocably deprived" the religious entity of the "freedom from having to undergo trial"). The decision denying summary judgment here therefore is immediately reviewable under the collateral order doctrine.

C. The Decision Below Departs from Established Precedent That a Denial of the Ministerial Exception Justifies Immediate Appeal

Courts throughout the country, even beyond those cases cited by Faith Bible in its petition, have adopted the view that in order to give the Religion Clauses their full force and effect, in protecting the free exercise of religion and in preventing impermissible government intrusion into religious affairs, the ministerial exception protects religious entities from *trial*, not just liability. For this reason, courts have agreed that protecting this right requires immediate review of orders denying the defense. The Tenth Circuit's holding that immediate review is never available for a district court's denial of summary judgment on a ministerial exception defense therefore departs from the majority of courts to consider the issue, and this Court should grant certiorari to bring the minority jurisdictions in line with the constitutional principles previously established.

At the federal level, the Fifth and Seventh Circuits have allowed immediate appeals in cases involving church autonomy defenses on the basis that such review is necessary to fully protect the First Amendment rights implicated by the doctrine. *See Whole Woman's Health*, 896 F.3d at 367-69; *McCarthy*, 714 F.3d at 974-76. Similarly, courts in Kentucky, Connecticut, North Carolina, and the District of Columbia have recognized that the ministerial exception must be immediately reviewable because the defense functions as an immunity from trial, not

just liability. *See Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608-09 (Ky. 2014); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1200 (Conn. 2011); *Harris v. Matthews*, 643 S.E.2d 566, 569 (N.C. 2007); *United Methodist Church v. Baltimore Ann. Conf. v. White*, 571 A.2d 790,792 (D.C. 1990).

While states have their own rules governing interlocutory and immediate review, the First Amendment's protections of religious entities' internal decision-making on issues of faith and doctrine remain constant, regardless of forum. The high court in the District of Columbia, for example, has recognized that, like many "constitutional immunities and guarantees," a "claim of immunity under the Free Exercise Clause and the Establishment Clause of the First Amendment of the Constitution will be irreparably lost if not adjudicated before trial," and therefore a denial of a church autonomy defense must be "reviewed pretrial or it can never be reviewed at all." *United Methodist Church*, 571 A.2d at 792; *see also Heard v. Johnson,* 810 A.2d 871, 877 (D.C. 2002) (denial of motion to dismiss based on First Amendment immunity is "unreviewable on appeal from a final judgment if the case proceeds to trial because the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation" [cleaned up]); *Kelsey v. Ray*, 719 A.2d 1248, 1249 n.2 (D.C. 1998) (allowing immediate appeal of denial of motion to dismiss based on "ecclesiastical dispute").

The Supreme Court of Kentucky has recognized the same, and has held that both the ministerial

exception, and the broader church autonomy defense, should "be applied in a manner that is procedurally consistent with the application of qualified governmental immunity," meaning the denial of either of these defenses is "subject to prompt appellate review." *St. Joseph Cath. Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 737 (Ky. 2014). The Kentucky Supreme Court has explained that, like qualified immunity defenses, "it is important that [religious defenses] be framed as legal questions and resolved expeditiously at the beginning of litigation to minimize the possibility of constitutional injury." *Kirby*, 426 S.W.3d at 608-09 (cleaned up); *see also Presbyterian Church (U.S.A.) v. Edwards*, 566 S.W.3d 175, 179 (Ky. 2018) ("A party entitled to [First Amendment] immunity is immune not only from liability, but also from the burdens of defending the action.").

Other courts have endorsed the same comparison of church autonomy defenses, like the ministerial exception, to official immunity and recognized that immediate appellate review is available for both types of defenses. *See Celnik v. Congregation B'Nai Israel*, 131 P.3d 102, 105 (N.M. 2009) (recognizing a "claim of constitutional immunity based on the church autonomy doctrine" should be treated similarly to a qualified immunity defense); *Hope Int'l Univ. v. Superior Ct.*, 119 Cal App. 4th 719, 730 (2004) (granting interlocutory review of denial of summary judgment based on First Amendment defense because "[t]he very process of review itself threatens to entangle the court in a sectarian controversy"); *In re Lubbock*, 624 S.W.3d 506, 511

(Tex. 2021) (allowing immediate appeal of denial of dismissal on ecclesiastical abstention grounds).

Thus, while the majority of courts have recognized the necessity of immediate interlocutory review when First Amendment church autonomy defenses are rejected, courts like the Tenth Circuit in *Tucker* and the Second Circuit in *Belya*—which themselves are internally conflicted, as shown by the circuits' 6-4 and 6-6 split votes on whether to rehear the matters *en banc*—have strayed from constitutional principles and set those circuits on a path where courts may run roughshod over constitutionally guaranteed religious autonomy. This Court's review is thus necessary to protect not just the religious liberty secured by the Religion Clauses but also the procedures by which that liberty is secured, because without the latter, the former's value is lost.

II. Without the Availability of Immediate Appeal in Ministerial Exception Cases, Religious Entities Face Impermissible Burdens on Their Religious Exercise

Allowing the Tenth Circuit's decision in this case, which categorically prevents collateral order interlocutory review of any order rejecting a ministerial exception defense (and likely any church autonomy defense), would have dire consequences for religious entities that face employment litigation by their religious personnel. This is particularly true given the extraordinarily broad reach of the Tenth Circuit's decision, which effectively holds that any employment discrimination plaintiff who is willing to

swear under oath that he or she is not a "minister" is entitled to a jury trial on the issue.

Protecting religious groups from unconstitutional burdens of litigation that would encroach on their religious autonomy is essential. Without such immunity, many such groups would face the untenable dilemma of either not exercising their religious beliefs or closing their doors.

Take, for example, the members of amicus ACSI, which is an international membership society serving Protestant Christian elementary and secondary schools that seek to integrate faith and education. Most of these schools have just a few hundred students, operate either independently or in association with an independent local church, and survive on a carefully planned and limited budget. Tuition income provides only a portion of the revenue needed to run the school, leaving generous donors to provide by the balance. Schools efficiently manage their finances through heavy use of volunteers and teachers who serve the school's faith mission by accepting far less pay than they could earn in a public school setting. Legal expenses, if they even appear as a line item in the school's budget, are for essential consultations only, not for defending litigation. When events like a pandemic or an economic downturn occur, they take many schools near a fiscal failing point. To tell a religious school that it is constitutionally entitled to fire a teacher-minister based on non-compliance with the school's religious standards, but that it will cost $300,000 (or more) in legal fees to defend that decision through trial, is to

communicate that that First Amendment is an empty promise: You are free to believe what you want, but if you attempt to exercise those beliefs, the justice system will impose huge and punishing costs on that religious exercise.

Without the protection of immunity from trial, religious schools are forced into choices with no acceptable outcome: retain religiously antagonistic personnel to avoid the cost of litigation, or preserve religious identity but risk bankrupting the school with legal fees. *See Cath. Univ. of Am.,* 83 F.3d at 467 (noting that being "deposed, interrogated, and haled into court" would "inevitably affect" how a religious school defines its teacher criteria); *Rayburn v. Gen. Conf. 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"). Failing to ensure that religious entities have a form of immunity from litigation over religious decisions would also deter constitutionally protected activities, by forcing schools to turn over "internal communications" evidencing "decision-making processes on a matter of intense doctrinal concern." *Whole Woman's Health*, 896 F.3d at 373. And allowing costly discovery to proceed in these cases could "empower[] certain interest groups to harass, impose disastrous costs on, and uniquely

burden religious organizations." *Id.* The chilling effect of litigation costs are notably real, and the Tenth Circuit's erroneous decision must be corrected to prevent this unconstitutional burden on religious entities and schools throughout the country.

The facts of this case demonstrate how, in the absence of deliberate focus on the constitutional issues at stake, a careless court decision that is not subject to immediate appellate review virtually guarantees that any religious entity invoking the ministerial exception will be subject to mission-impairing legal costs. The Tenth Circuit panel here opined that there were factual issues pertaining to Tucker's status as a "minister" that required a jury trial, 36 F.4th at 1031 n.4, but that is simply not true.[2] Rather, while the record contained evidence on both sides of the issue, there was no *genuine* issue of *material* fact regarding the application of the ministerial exception. For example, the district court noted that Tucker preferred to hold himself out as the Director of Student Life instead of a Chaplain, but Faith Bible does not dispute that fact. *See* Petitioner's Appendix ("Pet.App.") 106a. Faith Bible relied on the fact that

---

[2] The court's conclusion that whether Tucker was "minister" is a factual question for the jury, 36 F.4th at 1029-31, is clearly incorrect. In *Our Lady* and *Hosanna-Tabor*, this Court determined that the ministerial exception applied on appeals from decisions granting summary judgment. 565 U.S. at 181; 140 S. Ct. at 2059. If the application of the exception were a question for the jury any time the employee presents evidence supporting his or her position that he or she is not a minister, this Court would not have held that the exception applied; it would have remanded the cases with instructions to submit the question to the jury.

Tucker's written contract listed his position as "Chaplain," specifically affirmed that he was serving as a "minister," and required him to, among other things, attend faculty prayer sessions, attend a Christian church regularly, and encourage students in developing their Christian faith. Pet.App.101a-103a. Tucker, for his part, does not appear to dispute any of those facts. The same is true for what occurred during the "Chapel Meetings" Tucker organized. Pet.App.108a. Tucker asserts that some gatherings did not have expressly religious purposes. *Id.* But that is beside the point. Faith Bible presented unrebutted evidence that these gatherings were known as "Chapel Meetings" within the school, and that they often involved prayer or other spiritual components. *See* Pet.App.104a, 109a. Nor does Tucker dispute that he organized the "Race and Faith Chapel" that ultimately led to his dismissal. *See* App.104a. In fact, Tucker himself admitted his religious objectives in presenting the chapel:

> In a letter to students, parents, and teachers dated February 6, 2018, Mr. Tucker stated, "The Bible repeatedly explains the kingdom of God as made up of a diverse group of people from every tribe, language, people, and nation (Rev. 9, John 11). My prayer was that this [Race and Faith Chapel] would be a step toward recognizing and appreciating this beautiful picture."

2020 WL 2526798, at *3; Pet.App.194a-195a.

Thus, while the parties had different perspectives on the evidence, there was more than

sufficient *undisputed* evidence to hold that Tucker was a "minister" for purposes of the ministerial exception, and Tucker's evidence did not create any *material* issue that undermined such a holding. Therefore, the matter at hand was a matter of law; that there were facts supporting each side's argument did not transform the issue into a question of fact for the jury. *See Hosanna-Tabor*, 565 U.S. at 191-92 (allowing summary judgment as to whether plaintiff was a "minister"); *Our Lady*, 140 S. Ct. at 2066-69 (same).

To hold otherwise would mean religious entities could almost never prevail on a dispositive motion on ministerial exception grounds, for nearly every plaintiff has a perspective that differs from his or her employer. Such a result would require every religious entity targeted with employment claims to proceed through trial to vindicate its "authority to select, supervise, and if necessary, remove a minister," despite this Court's directive that religious employers have the First Amendment right to do so "without interference by secular authorities." *Our Lady*, 140 S. Ct. at 2060. The result here renders hollow the Religion Clauses' protections. This Court should grant the petition for certiorari, reverse the circuit court's holding that interlocutory review is not available to address the rejection of church autonomy defenses, and set the *Tucker* matter back on the proper path toward resolution under the First Amendment.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully Submitted,

CHRISTIAN M. POLAND
Counsel of Record
ANDREA R. BUTLER
BRYAN CAVE LEIGHTON
PAISNER LLP
161 N. Clark St., Suite 3400
Chicago, IL 60601
312-602-5085
christian.poland@bclplaw.com
Attorneys for Amicus Curiae

March 10, 2023