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* RELIGIOUS LIBERTY PROFESSORS CHOPKO, ESBECK, & TUTTLE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who for decades have closely studied constitutional law and religious liberty and have published numerous books and scholarly articles on the topic and addressed it in litigation. The *amici* are law professors whose scholarship, teaching, and practice focus on the Religion Clauses of the First Amendment. The *amici* bring a deep understanding of the Supreme Court's First Amendment jurisprudence that may help the Court understand the importance of the question presented in this case and resolve the parties' claims. *Amici* share an interest in advancing the understanding of how courts should handle ministerial exception arguments as a matter of civil and appellate procedure.

Mark E. Chopko is an Adjunct Professor of Law at Georgetown University Law Center. For more than 20 years, he was the General Counsel to the United States Conference of Catholic Bishops. He now chairs his firm's practice group which serves religious and nonprofit institutions.

Carl H. Esbeck is the R.B. Price Emeritus Professor and Isabelle Wade & Paul C. Lydia Emeritus Professor of Law at the University of Missouri. He has published widely in religious liberty, church-state relations, and federal civil rights litigation, including

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[1] Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were timely notified pursuant to Rule 37.2(a) of *amici curiae*'s intent to file this brief.

articles discussing the ministerial exception and the principles of church autonomy.

Robert W. Tuttle is the David R. and Sherry Kirschner Berz Research Professor of Law and Religion at the George Washington University Law School and a Professor of Religion (by courtesy) at the George Washington University's Columbian College of Arts & Sciences. He is the author or co-author of numerous articles and reports in the fields of church-state law and legal ethics, along with the book Secular Government, Religious People (Eerdmans, 2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

The question raised in this petition—whether the denial of a ministerial exception defense is subject to interlocutory appeal—was left open by this Court's two recent ministerial exception decisions. Courts are divided and important religious liberty interests will continue to be diminished if courts decline to make interlocutory appeal available. *Amici* urge the Court to grant review and hold that ministerial exception appeals should be heard as collateral orders.

The ministerial exception raises many challenging issues for courts, including who qualifies for the exception, which claims are subject to the exception, and how fact-finding should occur. The *amici* have a range of views, including some disagreements, on these and other questions going to the merits of the ministerial exception. Crucially, however, all *amici* agree that the First Amendment supports early resolution of the ministerial exception as a threshold legal

issue, subject to interlocutory appeal, the issue squarely presented by this petition.

The Tenth Circuit panel majority inappropriately relied on scholarship by *Amici* Professor Tuttle to support the finding that interlocutory appeal was not appropriate. *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1037, 1039 n.13 (10th Cir. 2022). Professor Tuttle's scholarship, in fact, supports the availability of interlocutory appeal, specifically drawing an analogy to the well-trodden path of qualified immunity appeals under the collateral order doctrine. Judge Bacharach's dissent from denial of rehearing en banc drew attention to the misplaced reliance on Professor Tuttle's scholarship. *Tucker v. Faith Bible Chapel Int'l*, 53 F.4th 620, 628 (10th Cir. 2022) (Bacharach, J., dissenting from denial of rehearing en banc). The law professors all consider interlocutory appeal as a collateral order to be appropriate and consistent with procedural law as well as constitutional rights under the Religion Clauses.

In cases where the trial court declines to find the ministerial exception applies, such as this case below, appellate courts should allow for immediate appeal as a final collateral order. Ministerial exception determinations satisfy the three criteria for finding an appealable final order. Determinations protect important constitutional rights, are conclusive, separate from the merits of the dispute, and would be effectively unreviewable after final judgment. Just as courts have reasoned that qualified immunity satisfies the rigorous test for an appealable collateral order, denials of a ministerial exception defense likewise satisfy these requirements. This Court should grant the

petition and hold that denials of ministerial exception defense are appealable collateral orders.

ARGUMENT

This case presents an important question concerning the manner in which lower courts should resolve claims to the ministerial exception. Although *amici* disagree about many aspects of the ministerial exception, all agree that whether the exception applies should be resolved early in litigation and should be subject to interlocutory appeal. *Amici* urge this Court to grant review in this case and hold that orders denying claims to the ministerial exception are immediately appealable as collateral orders.

I. THE MINISTERIAL EXCEPTION SHOULD BE RESOLVED EARLY IN LITIGATION AND SUBJECT TO INTERLOCUTORY APPEAL AS A COLLATERAL ORDER

In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), this Court unanimously located a robust ministerial exception in both Religion Clauses. As this petition shows, allowing litigation to continue when the lower court should have recognized the constitutional import of the ministerial exception will compound the injury via church-government entanglement the Court in *Hosanna-Tabor* found must not occur in litigation in full. In this context, procedural questions and how claims are processed carry constitutional weight.

The ministerial exception should be understood to protect against the process of litigation itself, not just ultimate liability. *See Hosanna-Tabor*, 565 U.S. at

205–06 (Alito, J., concurring) ("[T]he mere adjudication of such questions would pose grave problems for religious autonomy."). This court has addressed limits on court intervention in the context of other types of religious disputes. *E.g. Kedroff v. Saint Nicholas Cathedral,* 344 U.S. 94, 116 (1952) (footnote omitted) ("[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."); *N.L.R.B. v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979) ("It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions."); *see also Demkovich v. St. Andrew the Apostle Par., Calumet City*, 3 F.4th 968, 975 (7th Cir. 2021) (en banc) ("[A]voidance, rather than intervention, should be a court's proper role when adjudicating disputes involving religious governance.").

In this case the Court should give full meaning to the protections of the ministerial exception by recognizing that the petitioner appropriately lodged an interlocutory appeal.

The protection afforded by the ministerial exception arises from the broader and older principle that civil courts lack the competence to decide essentially religious issues. *See Watson v. Jones*, 80 U.S. 679, 729 (1872) (referring to the lack of competence of civil courts on matters of "ecclesiastical law and religious faith"). That the ministerial exception is an affirmative defense does not preclude the threshold determination, when needed, including by interlocutory

appeal when a trial court declines to apply the defense at the summary judgment phase. Affirmative defenses, including qualified immunity, may still be subject to immediate collateral appeal. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified . . . immunity is an affirmative defense.").

As an affirmative defense, the ministerial exception is *sui generis*. The defense derives from a constitutional imperative grounded in the Religion Clauses of the First Amendment. As required by the First Amendment, the ministerial exception "imposes a disability on civil government with respect to specific religious questions." Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1867 (2018); *see also* Carl H. Esbeck, *After* Espinoza*, What's Left of the Establishment Clause?*, 21 Fed. Soc. Rev. 186, 202 (2020) ("[T]he defense operates like an immunity from suit as to certain discrete subject matters that go to a religious organization's control over the doctrine, polity, and personnel that execute its present vision or determine its future destiny.").

Courts should treat the resolution of the ministerial exception in light of the constitutional basis of the rule. Justice Brennan noted in a Title VII dispute how the very process of litigation burdens religious exercise. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343, (1987) (Brennan, J., concurring) ("this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity"). Thus, "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…" Mark E. Chopko & Marissa Parker, *Still A Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 292 (2012). Religious institutions are substantially burdened by prolonged litigation. *Id.* at 299 ("Even without the cost and expense of litigation, the cost of handling more cases against churches can be measured in the damage to and diversion from mission and ministry. Churches would be less likely to engage in otherwise protected personnel actions and may be forced to keep employing a person in a position of ministry despite the church leadership's belief that the person is unsuitable to the job."). In this way, the robust constitutional backing for the ministerial exception distinguishes it from how courts treat other affirmative defenses.

Absent the ability to resolve ministerial exception claims early in litigation, the government risks chilling or limiting religious freedom. While this Court has recently recognized the ministerial exception in two important cases, *Hosanna-Tabor*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020), the real-world protections of this First Amendment right depend upon the availability of collateral appeal opportunity.

II. THE MINISTERIAL EXCEPTION QUALIFIES FOR INTERLOCUTORY APPEAL

Cases deciding the applicability of the ministerial exception should be treated as appealable collateral orders. The procedural details of how lower courts apply the first amendment rights embodied in the ministerial exception will frequently come into

question and deserve this Court's careful attention. The issue is important and recurring nationally.

This Court's *Hosanna-Tabor* opinion recognized that the ministerial exception serves as a complete bar to suit rather than merely a defense to liability. *See Hosanna-Tabor*, 565 U.S. at 196. Consistent with this, immediate appeal rights best protect the constitutional values at play. As Judge Park recently put it, "[r]ejections of church autonomy defenses should be immediately appealable, in the same way that denials of qualified immunity are appealable." *Belya v. Kapral*, 59 F.4th 570, 577 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc).

A. The ministerial exception should be resolved early in litigation because it is a question of law that serves a value of high order.

The ultimate question of "whether the exception attaches at all is a pure question of law." *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015). The exception exists because "the Establishment Clause limits the power of the government not only to issue and enforce a binding judgment [against religious organizations] on [ministerial employment] matters but also merely to entertain such questions." Smith & Tuttle, *supra*, at 1881.

The panel majority below glossed over the important role of the ministerial exception in preventing judicial interference into the internal affairs of religious organizations. *See Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060 ("The independence of religious institutions in matters of 'faith and doctrine'

is closely linked to independence in what we have termed'matters of church government.' . . . And a component of this autonomy is the selection of the individuals who play certain key roles.") (citation omitted). A critical purpose of the ministerial exception is to prevent secular court entanglement in the sense of civil interference in internal matters of church governance. These concerns are best addressed as early as practicable in litigation.

B. The ministerial exception warrants interlocutory appeal for substantially the same reasons as qualified immunity, which has been subject to interlocutory appeal for decades.

The Supreme Court has long held that denials of summary judgment based on qualified immunity are immediately appealable under the collateral-order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) ("[Q]ualified immunity questions should be resolved at the earliest possible stage of a litigation[.]"). Many of the jurisprudential reasons for hearing qualified immunity appeals prior to final judgment also apply to the ministerial exception.

Qualified immunity shields government officials from suit based on good faith performance of their duties, so long as those acts do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. If a trial court denies qualified immunity at the summary judgment phase the officer must go through the burdensome discovery on the merits and trial process before a final, appealable judgment could enter. Interlocutory appeal allows the "immunity from

suit" to protect officers from the harms of continuing through litigation to final judgment when immunity should have been granted. *Mitchell*, 472 U.S. at 526.

The doctrines are similar in their prudential goals and reasons for needing resolution as a threshold matter. First, the ministerial exception closely resembles qualified immunity by protecting from burdens of merits litigation when the trial court should have granted the immunity or defense early in the case. Consider, if a trial court denies summary judgment based on the ministerial exception, and that decision was erroneous, the "absence of an avenue for immediate appeal will require the court not only to permit discovery about, but to resolve, quintessentially religious questions." Smith & Tuttle, *supra*, at 1881. But the Establishment Clause prohibits courts from ruling on the validity, meaning, or importance of a religious question or dispute. *See Widmar v. Vincent*, 454 U.S. 263, 271–72 n.11 (1981) (discussing entanglement of government and religion).

Second, both doctrines aim to protect an institution quite apart from the immediate context of the disputed liability between the parties. With the ministerial exception, the courts protect the separation of church and state, rightly understood. By its very nature the ministerial exception imposes a disability on courts deciding religious questions, that is, church-state separation leaves the question in dispute solely for resolution by the church.

C. The ministerial exception satisfies the three elements of the collateral order doctrine.

The collateral order doctrine is properly invoked when the question on appeal conclusively determines an issue, the issue is separate from the merits, and the issue would be effectively unreviewable after a final judgment is entered. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). This Court has explained how a "small set of prejudgment orders" are collateral to the merits of an action, but are "'too important' to be denied immediate review." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). Denials of the ministerial exception defense, such as the petition below, should qualify as appealable collateral orders.

The first requirement for collateral order review is easily satisfied. The ministerial exception is appropriate for an interlocutory appeal because if the exception applies, the lawsuit is terminated, and thus the legal issue is conclusively decided. *Hosanna-Tabor*, 565 U.S. at 196; *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061. And if a claim to the exception is denied, the defendant forever loses its claim to immunity from being subject to the intrusion of trial. In this case, if the ministerial exception applies to bar Mr. Tucker's Title VII claim against Faith Bible Chapel, then the exception conclusively determines this case. If not, Faith Bible will be subject to the very judicial inquiry into its affairs that the exception is intended to avoid, regardless if the matter is later reversed on appeal.

The second requirement for collateral order review is likewise met since the merits of an

employment discrimination claim are separate and distinct from the First Amendment application under the ministerial exception. There is little dispute that the issues are fully distinct. *Tucker*, 36 F.4th at 1036 ("Faith Christian has established *Cohen*'s second requirement").

The third requirement for collateral order is established because the decision would be effectively unreviewable after final judgment. Consider how courts are compelled to decide religious questions if a case proceeds beyond the initial stages of litigation. A terminated minister could have a written contract requiring, among other things, fidelity to church doctrine. If that minister sued for breach of contract, the church would raise the ministerial exception as a defense. If a trial court rejected the defense and proceeded to decide whether the minister was faithful to church doctrine, the court would become entangled in religious doctrine. *See Thomas v. Review Bd. Of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981) (noting that "it is not within the judicial function and judicial competence to inquire" into the interpretation of religious doctrine). This is just the sort of governmental interference with church doctrine that the ministerial exception is intended to prevent.

The intrusion and interference into church affairs can never be fully restored after trial. The panel majority below erroneously posits that the ministerial exception is reviewable after final judgment because an appellate court can apply the exception as a bar to liability after the fact. *Tucker*, 36 F.4th at 1036–38. Citing scholarship from Professor Tuttle, the majority argues that the ministerial exception is nothing more than a defense to liability and does not immunize a

religious organization from suit. *See id.* at 1039 n.13. However, the court misstates Professor Tuttle's analysis. While it may be true that the ministerial exception can be applied after final judgment to insulate religious institutions from ultimate liability, delaying appeal over the exception's application exposes religious organizations to unconstitutional interference by civil process into their internal governance. True, appellate court can reverse a judgment erroneously exposing a religious organization to suit. But applying the collateral order doctrine to the ministerial exception "would better guard against Establishment Clause violations by trial courts than would the standard requirement of a final judgment before appeal." Smith & Tuttle, *supra*, at 1881.

Appeals from ministerial exception determinations satisfy the three criteria of a collateral order, just as denials of qualified immunity have long qualified for immediate appeal.

III. COLLATERAL ORDER APPEAL IS APPROPRIATE IN THIS CASE

Amici contend this Court should reverse and find that Petitioner's appeal was a properly raised collateral order. Such threshold determination of the legal question properly respects the constitutional rights and immunities underlying the ministerial exception. While *amici* do not take a position on the merits of whether the ministerial exception applies,

amici agree that this Court should decide the question as raised in this appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 10, 2023