No. 22-741

In the
Supreme Court of the United States

FAITH BIBLE CHAPEL INTERNATIONAL
Petitioner,

v.

GREGORY TUCKER,
Respondent.

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

BRIEF OF *AMICI CURIAE* BILLY GRAHAM EVANGELISTIC ASSOCIATION, SAMARITAN'S PURSE, CONCERNED WOMEN FOR AMERICA, THE FAMILY FOUNDATION, ILLINOIS FAMILY INSTITUTE, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE

in Support of Petitioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTERESTS OF *AMICI CURIAE*[1]

The **Billy Graham Evangelistic Association** (BGEA) was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including God Loves You Tour events, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, the Billy Graham Library, and the Billy Graham Archive & Research Center. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square; to cultivate prayer, and to proclaim the Gospel. BGEA believes its mission to be primarily a spiritual endeavor and further believes that, to fulfill its mission, its employees must share its religious beliefs and acknowledge that those beliefs are put into action through their employment with BGEA in pursuit of its religious mission and objectives.

Samaritan's Purse is a nondenominational, evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have been given notice of the filing of this brief.

around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

Concerned Women for America (CWA) is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare, including religious liberties. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The Family Foundation (TFF) is a Virginia non-partisan, non-profit organization committed to promoting strong family values and defending the sanctity of human life in Virginia through its citizen advocacy and education. TFF serves as the largest pro-family advocacy organization in Virginia. Its interest in this case is derived directly from its concern to advance a culture in which children are valued,

religious liberty thrives, and marriage and families flourish.

The **Illinois Family Institute** (IFI) is a non-profit educational and lobbying organization based in Tinley Park, Illinois, that exists to advance life, faith, family, and religious freedom in public policy and culture from a Christian worldview. A core value of IFI is to uphold religious freedom and conscience rights for all individuals and organizations.

The **International Conference of Evangelical Chaplain Endorsers** (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for all.

The **National Legal Foundation** (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters seek to ensure that the free exercise of religion and the autonomy of religious organizations is protected.

The **Pacific Justice Institute** (PJI) is a non-profit legal organization established under section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As

such, PJI has a strong interest in the development of the law in this area.

SUMMARY OF ARGUMENT

When government officials are denied qualified immunity in § 1983 cases, they may take an interlocutory appeal. The ministerial exception protects the same interests, and so, it, too, should be allowed immediate appeal. If anything, the ministerial exception presents a greater need, as it involves religious organizations expressly protected by the First Amendment, rather than government officials shielded by a non-constitutional immunity.

This case also presents a good vehicle for the Court to affirm that religious organizations must be their own masters as to who qualifies as their "ministers" for purposes of the exception. Good-faith decisions by religious organizations as to which employees should hold to the organization's faith and practice in order to best advance its ministry should be given full credit. Courts improperly and invariably second-guess such decisions when they adjudicate how "important" the employee's responsibilities are to the ministry and whether those responsibilities are dominantly "secular" or "religious."

ARGUMENT

I. The Ministerial Exception Serves the Same Overall Purposes as Qualified Immunity in § 1983 Cases, and Interlocutory Appeal Is Just as Appropriate When It Is Denied

The purpose of the ministerial exception is to protect churches, synagogues, and other religious

organizations (such as the church school here) from having government officials second-guess their determinations about who will serve as their agent-employees and to remove the financial and other threats to their functioning that litigation invariably brings in its wake. The ministerial exception allows religious entities to make personnel decisions without having to factor in the monetary, emotional, and temporal costs that litigation entails. These protections emanate from the Religion Clauses of the First Amendment.[2]

Qualified immunity for government actors in § 1983 cases serve similar purposes, and, for that reason, this Court in *Mitchell v. Forsyth*[3] found that appeals from denial of qualified immunity met the requirements for an interlocutory appeal set out in *Cohen v. Beneficial Industrial Loan Corp.*,[4] i.e., "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[5] Relying on *Harlow v. Fitzgerald,*[6] in which this Court established the qualified

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[2] *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012).

[3] 472 U.S. 511 (1985).

[4] 337 U.S. 541 (1949).

[5] *Id.* at 546. Of course, the ministerial exception is more akin to absolute than qualified immunity and, for that additional reason, requires an interlocutory appeal, as trial will defeat the purpose of the immunity. *See id.* at 525 (citing *Nixon v. Fitzgerald,* 457 U.S. 731 (1982)).

[6] 457 U.S. 800 (1982).

immunity standard, the *Mitchell* Court noted that one of the major purposes of qualified immunity was to prevent "distractions" from interfering with government officials, such as police officers, performing their duties:

> the "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816. Indeed, Harlow emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquires of this kind can be peculiarly disruptive of effective government." *Id.*, at 817.
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> With these concerns in mind, the *Harlow* Court refashioned the qualified immunity doctrine in such a way as to "permit the resolution of many insubstantial claims on summary judgment" and to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broadreaching discovery" in cases where the legal norms the officials are legged to have violated were not clearly established at the time. *Id.*, at 817-818.[7]

In *Harlow*, this Court bounded the qualified immunity proceedings, making them matters of law, by requiring the plaintiff's version of the facts to be accepted for purposes of the legal inquiry and limiting

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[7] 472 U.S. at 526.

discovery before trial to that issue in appropriate cases.[8]

These considerations are fully applicable—and even more pressing—when the ministerial exception is asserted by a religious organization. While protecting government officials in the exercise of their duties is a laudatory goal, protecting religious organizations who have a special standing under the First Amendment is a constitutional imperative.[9] Moreover, the judiciary is forbidden to delve into the theological or administrative affairs of religious organizations, unlike its ability to oversee government actions.[10] Thus, the qualified immunity precedent of this Court strongly supports an immediate, interlocutory appeal when applicability of the ministerial exception is denied, as the dissenting judges below explained.[11]

II. This Case Presents a Good Vehicle to Advance and Clarify the Doctrine of the Ministerial Exception

This case also raises the question of what approach courts should utilize for future determinations of whether a religious organization's employee qualifies under the ministerial exception. It provides the vehicle for this Court to affirm that the First

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[8] 457 U.S. at 817-18.

[9] *See Our Lady of Guadalupe*, 140 S. Ct. at 2055; *Hosanna-Tabor,* 565 U.S. at 702.

[10] *See, e.g.*, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 718 (1976).

[11] *See Tucker v. Faith Bible Chapel Int'l*, 55 F.4th 620, 626 (10th Cir. 2022) (Bacharach, Tymkovich, Eid, JJ., dissenting from denial of en banc reconsideration), 36 F.4th 1021, 1050, 1056-57 (2022) (Bacharach, J., dissenting).

Amendment does not allow the government to second-guess the sincere decision of a religious organization with respect to who will carry out its mission.

This Court in *Hosanna-Tabor* declined to set out any specific test that could be used in future cases.[12] It found only that, on the facts of that case, the employment decision of the church school with respect to a teacher was not reviewable by the government.[13] This Court in *Our Lady of Guadalupe* went further and explained that the judgment of the religious organization itself had to be given substantial weight.[14] This case provides an appropriate vehicle to develop this doctrine further, harmonizing the test with the basic principle motivating the ministerial exception and the standard that the Court uses in determining the sincerity of religious beliefs by individuals.

Justice Thomas in his concurrence in *Hosanna-Tabor* articulated a correct formulation for the ministerial exception: The Religion Clauses require courts to defer to a religious organization's good-faith understanding of who qualifies as its "minister" for purposes of the exception.[15] Stated more generally, First Amendment protections reach any employee of a religious organization that the organization sincerely believes must adhere to its faith and conduct principles for it to best accomplish its ministries.[16]

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[12] 565 U.S. at 190.
[13] *Id.*
[14] 140 S. Ct. at 2066.
[15] 565 U.S. at 196 (Thomas, J., concurring).
[16] *Cf. NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 501-04 (1979) (finding Congress did not intend to give NLRB

The error and inconsistency in using even a generic, "functional" definition of who qualifies as a "minister" for purposes of the exception is shown in the case law interpreting the exception in the wake of *Hosanna-Tabor*. For instance, in *Grussgott v. Milwaukee Jewish Day School, Inc.*,[17] the Seventh Circuit, while deciding the case prior to the decision in *Our Lady of Guadalupe*, found that a lack of overlap with titles and responsibilities of the teacher in *Hosanna-Tabor* was more than counterbalanced when it analyzed the "substance" of her responsibilities and whether they had a sufficiently "religious" function. However, this forced the court, as does the test in *Our Lady of Guadalupe*, to wade into the question of whether her teaching was merely "secular" or "cultural," rather than "religious."[18]

To its credit, the Seventh Circuit, when finding in favor of the school, stated what should be the controlling rules. It first noted that it is inappropriate for courts to draw "a distinction between secular and religious teaching . . . when doing so involves the government challenging a religious institution's honest assertion that a particular practice is a tenet of its faith."[19] The Seventh Circuit concluded by tracking the substance of what Justice Thomas proposed as the

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jurisdiction over church-related schools in part because it would raise First Amendment issues).

[17] 882 F.3d 655 (7th Cir. 2018).

[18] *Id.* at 659-60; *see also Meek v. Pittenger*, 421 U.S. 349, 370 (1975) (noting difficulty of separating the religious from the secular in a church school setting).

[19] 882 F.3d at 660 (citing *Amos*, 483 U.S. at 343 (Brennan, J., concurring); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)).

governing rule in *Hosanna-Tabor*: "This does not mean that we can never question a religious organization's designation of what constitutes religious activity, but we defer to the organization in situations like this one, where there is no sign of subterfuge."[20]

The Second Circuit in *Fratello v. Archdiocese of New York*[21] also recognized the problem of courts applying even a deferential functional test to determine who is performing religious duties important enough to the organization to be considered its "minister" for purposes of the exception. It noted that "courts are ill-equipped to assess whether, and to what extent, an employment dispute between a minister and his or her religious group is premised on religious grounds."[22] As the Second Circuit observed earlier in its decision,

> Judges are not well positioned to determine whether ministerial employment decisions rest on practical and secular considerations or fundamentally different ones that may lead to results that, though perhaps difficult for a person not intimately familiar with the religion to understand, are perfectly sensible—and perhaps even necessary—in the eyes of the faithful. In the Abrahamic religious traditions, for instance, a stammering Moses was chosen to lead the people, and a scrawny David to slay a

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[20] *Id.*; *see also Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring); *id.* at 199 (Alito, J., concurring) (exception applies if "religious group believes" employee performs key functions described).

[21] 863 F.3d 190 (2d Cir. 2017).

[22] *Id.* at 203.

giant.[23]

One might elaborate that courts are not just "ill-equipped" and poorly "not well positioned" for this exercise, but constitutionally prohibited.

In *Cannata v. Catholic Diocese of Austin*,[24] the Fifth Circuit dealt with a music minister who, as in this case, tried to avoid the ministerial exception by recasting his duties for the church as purely secular. The Fifth Circuit, relying on the sworn statement of the priest that music was an integral and important part of the mass, properly ruled that the ministerial exception applied. It disallowed the employee's contrary statement that his duties were not religious because that contention was a direct challenge to church doctrine as expressed in good faith by the organization. It ruled that it was foreclosed from adjudicating such a challenge by the Religion Clauses": "we may not second-guess whom the Catholic Church may consider a lay liturgical minister under canon law."[25] In the absence of any indication of subterfuge or pretextualism by the priest, that was exactly the right result.

The decisions in both *Hosanna-Tabor* and *Our Lady of Guadalupe* make factual findings that the teachers involved were "important" or "key" or

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[23] *Id.* at 203.

[24] 700 F.3d 169 (5th Cir. 2012).

[25] *Id.* at 177-80; *see also Sterlinski v. Cath. Bishop of Chicago*, 934 F.3d 568 (7th Cir. 2019) (finding church organist covered by exception).

"essential."[26] Inserting these adjectives as a permanent part of the test would improperly allow a court to second-guess a religious judgment of the organization. Justice Alito in his concurrence in *Hosanna-Tabor* recognized exactly that:

> The credibility of Hosanna-Tabor's asserted reason for terminating respondent's employment could not be assessed without taking into account both the importance that the Lutheran Church attaches to the doctrine of internal dispute resolution and the degree to which that tenet compromised respondent's religious function. If it could be shown that this belief is an obscure and minor part of Lutheran doctrine, it would be much more plausible for respondent to argue that this doctrine was not the real reason for her firing. If, on the other hand, the doctrine is a central and universally known tenet of Lutheranism, then the church's asserted reason for her discharge would seem much more likely to be nonpretextual. But whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy: It would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission.

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[26] *Our Lady*, 140 S. Ct. at 2060 ("key roles," "important positions"), 2063 ("important religious ceremonies or rituals"), 2064 ("important responsibility") 565 U.S. at 190-91 ("key employees").

> . . . .
> What matters in the present case is that 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.[27]

This states the law properly, and it should be embraced as the standard to evaluate the assertion of the ministerial exception by a religious organization. The Religion Clauses require courts to give full credit to a religious organization's good-faith judgment as to which employees are its "ministers" for purpose of the exception. Justice Brennan stated it cogently in *Amos*: "we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities."[28]

This case provides an excellent vehicle to continue the proper development of the law regarding the ministerial exception and to anchor it in the basic principle, as articulated over seventy years ago, that the First Amendment protects the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as

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[27] *Id.* at 205-06 (Alito, J., concurring); *see also Sterlinski*, 934 F.3d at 570; *cf. Amos*, 483 U.S. at 339 (noting that requiring a court to determine what duties are "secular" and what are "religious" would be an "intrusive inquiry into religious belief" of a religious group).

[28] 483 U.S. at 342-43 (Brennan, J., concurring).

those of faith and doctrine."[29] This principle demands that the elucidation of the ministerial exception be advanced from that given in *Our Lady of Guadalupe*—i.e., that a "religious institution's explanation of the role of such employees in the life of the religion in question is important,"[30]—to an understanding that the religious organization's explanation is determinative if made in good faith and if not pretextual.

CONCLUSION

Your *Amici* urge the Court to grant the petition for certiorari to confirm that denial of the ministerial exception to a religious organization is subject to interlocutory appeal and to continue to refine when courts should find the exception applicable.

Respectfully submitted,
this 10th day of March 2023,

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[29] *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 116 (1952).
[30] 140 U.S. at 2066.