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 Courts of Appeals for the Tenth Circuit

BRIEF OF JEWISH COALITION FOR RELIGIOUS LIBERTY, MUSLIM PUBLIC AFFAIRS COUNCIL, THE ALEPH INSTITUTE, AND PROFESSOR ASMA UDDIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PAUL ZIDLICKY*
DANIEL J. HAY
MARCUS BAUER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com
Counsel for Amici Curiae

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*Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations and individuals representing a diverse cross-section of minority faith traditions. *Amici* understand that for all faith communities, and especially smaller and less well-resourced faiths, the ministerial exception serves as an indispensable bulwark for free exercise and against government intrusion into religious governance. *Amici* are concerned that, without the ability immediately to appeal erroneous applications of the ministerial exception, faith communities will have no choice but to make doctrinal and personnel decisions with an eye towards limiting litigation exposure, and not solely based on the teaching of their faith. This case presents the Court with an important opportunity to ensure that the ministerial exception will remain more than a fig leaf of protection of religious liberty.

The **Jewish Coalition for Religious Liberty** is an association of American Jews concerned with the current state of religious-liberty jurisprudence. The Coalition aims to protect the ability of all Americans to practice their faith freely and to foster cooperation between Jews and other faith communities. Its founders have filed *amicus* briefs in the Supreme Court of the United States and federal courts of appeals, published op-eds in prominent news outlets, and established a volunteer network to promote support for religious liberty within the Jewish community.

The **Muslim Public Affairs Council** ("MPAC") is a nonprofit 501(c)(3) public affairs organization that has worked since its founding in 1988 to enhance

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amici* and their counsel funded its preparation or submission.

American pluralism, improve understanding, and speak out on policies that affect American Muslims. Through engaging government, media, and communities, MPAC leads the way in bolstering more nuanced portrayals of Muslims in American society and partnering with diverse communities to encourage civic responsibility.

The **Aleph Institute** is a Section 501(c)(3) certified nonprofit Jewish organization dedicated to assisting and caring for the spiritual wellbeing of members of specific populations who are isolated from the regular community, such as U.S. military personnel, prisoners, and people institutionalized or at risk of incarceration due to mental illness or addictions. Aleph addresses their religious, educational, and spiritual needs, advocates for their civil and religious rights, and provides support to their families at home left to fend for themselves.

Professor Asma Uddin is a Religion and Society Program Fellow at the Aspen Institute, where she leads a project on Muslim-Christian polarization in the United States. She was formerly legal counsel at the Becket Fund for Religious Liberty and has held fellowships at Georgetown, UCLA, and Brigham Young University Law School. She serves as an advisor on religious freedom to the Organization for Security and Cooperation in Europe and is a term member of the Council on Foreign Relations.

SUMMARY OF ARGUMENT

For more than 150 years, this Court has instructed civil courts to stay out of matters involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679, 733 (1871). This

limitation exists precisely because litigation over ecclesiastical decisionmaking risks "secular control or manipulation" over religious institutions. *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). That risk arises not from the mere threat of liability, but from the expense of defending civil claims and the intrusion of having church leadership deposed, examined, and tried over matters of doctrine and polity. For that reason, religious liberty defenses should be resolved as early as practicable, recognizing that delayed vindication of First Amendment rights invites the same harms as outright denial of the rights. See, *e.g.*, *Nystedt* v. *Nigro*, 700 F.3d 25, 30 (1st Cir. 2012) ("[T]he policy of the law favors the resolution of immunity defenses as early in a lawsuit as may be practicable."); cf. *Jones* v. *Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Immunity claims should be resolved as early in the case as possible—and by the court rather than the jury."), *aff'd*, 515 U.S. 304 (1995)

The decision below threatens to hollow out this core protection of free exercise. For the church autonomy doctrine to serve its intended function, houses of worship must be able to rely on it *ex ante*, trusting that faithful implementation of policy and doctrine will not result in meritless but costly litigation. It would be a Pyrrhic victory indeed for a house of worship to have its autonomy vindicated only on appeal, after incurring hundreds of thousands of dollars in litigation expense, having its internal correspondence and decisions publicized, and subjecting its leadership and their doctrinal decisions to the crucible of civil discovery. Especially for smaller houses of worship and those representing minority faith traditions, the cost and burden of litigation would inherently interfere with their ecclesiastical decisionmaking; they will either

weigh their religious judgment against litigation exposure, or they will be forced to redirect religious funds from religious exercise to litigation budgets.

The Court should grant certiorari and clarify that "the ministerial exception protects a religious body from [a] suit itself" and a district court's denial of this defense is immediately appealable through the collateral-order doctrine. Pet. App. 126a (Bacharach, J., dissenting from the denial of en banc consideration). As the Petition and the dissenting opinions below correctly explain, the Tenth Circuit misconceived the operation of the collateral-order doctrine in the context of the ministerial exception, and in so doing deepened multiple circuit splits. *Amici* write to underscore that two features of the Tenth Circuit's opinion will undermine the ministerial exception's protections, rendering those protections meaningless as a practical matter in many cases and especially in cases involving minority faiths and smaller religious communities.

First, the Tenth Circuit's parted with the position of three sister Circuits and two state high courts when it held that whether an employee is a "minister" is "quintessentially a factual determination for the jury." Pet. App. 26a n.8. This ruling will deprive the ministerial exception of its power to significantly shorten litigation that challenges core ecclesiastical decisionmaking. As this case demonstrates, artfully pleading around the ministerial exception is not hard, and could be as simple as omitting from a pleading the full scope of the plaintiff's religious responsibilities. See *id.* at 140a (amended complaint striking references to Plaintiff's title as a "chaplain" and instead substituting the title of "teacher and dean").

Second, the Tenth Circuit's decision insulates even the most egregious misapplication of the ministerial exception from effective appellate review by holding

that the ministerial exception "protects religious employers from liability," but not from "the burdens of litigation itself." Pet. App. 31a. As a result, no denial of a ministerial exception defense—no matter how egregious or burdensome to religion—can be immediately appealed because, in the Tenth Circuit's view, "any error . . . can be effectively reviewed and corrected through an appeal after final judgment." Pet. App. 52a.

Each of these erroneous holdings warrants the Court's review. But these two doctrinal errors are also reinforcing. The first makes it more likely district courts will reject ministerial exception defenses at the pleading stage, and the second shields such rulings from any form of immediate appellate review. These risks are particularly acute for minority faith traditions, who frequently employ ministers with titles and duties unfamiliar to judges and juries—or with no titles at all. An unfamiliar religion may have more difficulty convincing the fact-finder that a leader is undisputedly a "minister" than would a Catholic archdiocese or evangelical Christian church. Further, without the ability to obtain an immediate appeal to correct erroneous lower-court decisions, minority religious organizations will find themselves stuck in drawn-out litigation. And, because they are small, they might find it impossible to pay for litigation without sacrificing core religious ministry or acquiescing to the entanglement with civil authority on religious matters.

This case provides the Court an ideal vehicle to resolve these conflicts and thus confirm the ministerial exception's role in protecting religious freedom. The case would allow the Court to make clear that the ministerial exception must be interpreted so that First Amendment protections extend equally to "small, new, or unpopular denominations." *Larson* v. *Valente*, 456

U.S. 228, 245 (1982). For these reasons, the petition should be granted.

ARGUMENT

I. Early—and Correct—Application of the Ministerial Exception is Necessary to Protect Religious Autonomy, Especially for Religious Minorities.

The First Amendment "protect[s] the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Under the ministerial exception, "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* This is because "a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities." *Id.* (emphasis added). This defense is a structural protection of religious liberty, preventing "'civil intrusion and excessive entanglement,' thereby reserving matters of ministerial employment for religious organizations." *Starkey* v. *Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 942 (7th Cir. 2022); accord *Our Lady of Guadalupe*, 140 S. Ct. at 2069 ("Deciding such questions would risk judicial entanglement in religious issues.").

Yet, the decision below operates to hollow out the ministerial exception. First, the Tenth Circuit panel held—in conflict with every other circuit and state high court to address the question—that whether an employee "was or was not a 'minister'" is "quintessentially a factual determination for the jury," not a legal determination. Pet. App. 26a n.8. Second, the Tenth

Circuit panel stated that the ministerial exception merely "protect[s] a religious employer from *liability* on claims asserted by a '*minister*,'" but "does not immunize religious employers from the burdens of litigation itself." *Id.* at 52a.

These holdings contradict previously unanimous precedent from other federal and state courts, Pet. 2, and are also untenable on their own terms. Together, they transform what should be an outcome-determinative threshold question of law (ministerial status) into an issue of fact subject to resolution late in the case, after full discovery, at summary judgment, at trial or perhaps only much later following final judgment and appeal. The practical effect of that ruling is to require religious groups to expend hundreds of thousands of dollars in litigation resources and to expend countless hours in the crucible of civil litigation. See *Watson*, 80 U.S. at 728–29 (warning of the "total subversion of [voluntarily organized] religious bodies[] if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed").

Discounting the First Amendment interests at stake this way is inconsistent with this Court's long-settled precedent on qualified immunity. As the Tenth Circuit opinion itself recognized, "[b]ecause qualified immunity is predicated on 'an immunity from suit rather than a mere defense to liability,'" the protection "'is effectively lost if a case is erroneously permitted to go to trial.'" Pet. App. 35a (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)). As a result, without immediate appeal, the normal functioning of government would be disrupted. Indeed, this Court has repeatedly emphasized that "even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Mitchell*, 472 U.S. at 526 (quoting *Harlow* v.

Fitzgerald, 457 U.S. 800, 817 (1982)). That is because "subjecting officials to the risks of trial" or even pretrial discovery will (1) "distract[] … officials from their governmental duties," (2) lead officials to make decisions based on the threat of liability, and (3) ultimately, "deter[] … able people from public service." *Id.* (quoting *Harlow*, 457 U.S. at 816). To avoid these costs, the collateral-order doctrine permits immediate appeal when a court rejects a qualified-immunity defense.

These rationales apply equally, if not more so, to religious organizations invoking the ministerial exemption. See *Bryce* v. *Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) ("[T]he assertion that the First Amendment precludes [a lawsuit challenging church decision-making] is similar to a government official's defense of qualified immunity."). By their very nature, religious organizations are not designed to turn a profit, and instead endeavor to devote their limited resources to fulfilling their mission and living their faith. Forcing religious organizations and officials to stand trial following an erroneous district court decision denying the ministerial exception will unnecessarily distract officials from their religious duties—including crucial duties such as educating the young and serving the poor. Further, only the largest churches and denominations have in-house lawyers and a standing litigation budget; for many houses of worship, a litigation defense fund will necessarily come out of money that otherwise would go to acts of discipleship, ministry, or charity.[2]

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[2] Although some qualified immunity cases have disputed issues of fact concerning what the officer did, the issue of whether the law was clearly established and whether the officer was a state actor are questions of law for the Court. In the ministerial

(*continued on next page*)

And the costs of misapplication of the ministerial exceptions are not only financial. By its nature, litigation draws attention to the litigants, and will put a spotlight on sensitive and confidential religious decisions. Internally, litigation is likely to expose rifts within the community and undermine confidence in its ministers, leading to strife and potentially schism.

The Tenth Circuit's ruling below is also inconsistent with its own and its sister circuits' precedent addressing immediate appeals in litigation implicating the First Amendment. Specifically, so-called Anti-SLAPP statutes protect First Amendment rights by creating a special motion to dismiss for "claims aimed at chilling First Amendment expression." *Los Lobos Renewable Power, LLC* v. *AmeriCulture, Inc.*, 885 F.3d 659, 662 (10th Cir. 2018). When a district court denies one of these motions to dismiss, the Fifth, Ninth, Tenth, and Eleventh circuits have permitted immediate appeal because the states' anti-SLAPP laws aim to "protect[] potential victims from the effort and expense of carrying on frivolous lawsuit." *Id.* at 667. See *Royalty Network, Inc.* v. *Harris*, 756 F.3d 1351, 1356 (11th Cir. 2014) ("The denial of a motion to dismiss for failure to comply with Georgia's anti-SLAPP statute implicates significant constitutional guarantees and values of an exceptionally high order; specifically, the right to freedom of speech and the right to petition the government for redress of grievances."); *Henry* v. *Lake Charles Am. Press, LLC*, 566 F.3d 164 (5th Cir. 2009); *Batzel* v. *Smith*, 333 F.3d 1018 (9th Cir. 2003), *superseded by statute as stated in Langer* v. *Kiser*, 57 F.4th 1085 (9th Cir. 2023). Not permitting immediate appeal, these decisions recognize, would chill First Amendment rights, since the lack of assurance in correct

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exception context, the threshold legal issue is whether the plaintiff's status qualifies him or her as a minister.

application of the anti-SLAPP defense will have the same consequences as no defense at all. *Los Lobos*, 885 F.3d at 667 (recognizing that courts cannot "secure th[e] statute's protections after final judgment on the merits because . . . [the] burdensome legal process has already been brought to bear at that point").

Again, the analogy to the ministerial exception is unmistakable. Just as the harm of a "strike suit" targeting protected First Amendment speech (*i.e.*, chilling protected expression) cannot be remedied on appeal, so too the harm of misapplication of the ministerial exception (*i.e.*, chilling and introducing secular concerns into religious decisionmaking) cannot be remedied on appeal from a long-away and costly final judgment. As in the anti-SLAPP context, the *process of litigation itself* brings about the harm that justifies the protection in the first place. Pet. App. 76a-77a (Bacharach, J., dissenting) (emphasizing that under the Tenth Circuit's decision churches will "suffer judicial meddling in religious doctrine, expensive and time-consuming litigation over the content and importance of religious tenets, and blurring of the line between church and state"). In fact, the case for interlocutory review is even stronger in this context, where the underlying right is rooted in a constitutional guarantee (the Free Exercise Clause) and implicates a structural limitation on government power (the Establishment Clause).

Given these potential costs and interferences, the mere threat of litigation will often be enough to make a small religious institution think twice before faithfully applying its doctrine in personnel decisions. A religious organization's leaders may, due only to the "prospect of future investigations and litigation," alter how the organization is operated—including how it hires and fires employees, grants tenure, or makes other employment decisions. *EEOC* v. *Cath. Univ. of*

Am., 83 F.3d 455, 467 (D.C. Cir. 1996). In some instances, religious leaders, who unlike most public officers are not indemnified, may make core religious decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments." *Rayburn* v. *Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). Ultimately, if such suits are allowed to proceed without immediate appeal, religious organizations may be mired in years of litigation, including onerous discovery in addition to a lengthy trial. The threat of such litigation will "deter[] … able people from" serving in leadership roles in religious organization. *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 816).

The Tenth Circuit's characterization of the ministerial exception solely as a defense to liability, and not an immunity from litigation, is contrary to well-established precedent and to the experience of *Amici* and their members. The Court should grant certiorari to resolve the appropriate standard applicable to the ministerial exception.

II. The Tenth Circuit's Opinion Will Harm Minority Faiths Because Factfinders' Unfamiliarity Makes Erroneous Denials More Likely.

Treating "the question of whether an employee is a 'minister'" as "quintessentially a fact determination" would weaken the vitality of the ministerial exception, especially in cases involving minority faiths. Pet. App. 26a n.8. Contra*, e.g.*, *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999) ("The status of employees as ministers . . . remains a legal conclusion for this court.").

Categorizing the threshold ministerial issue as a pure fact question means that small, minority

religious groups may disproportionately find themselves on the losing end of an erroneous ministerial exception ruling in district court.[3] And foreclosing interlocutory appeal of such determinations means that they risk finding themselves in expensive, drawn-out litigation that they cannot afford. That is because, if treated as a pure fact question—which it is not—the ministerial exception will often be resolved by a jury focusing on standardized factors, titles, and credentials derived from the most common religions. Where a litigant has a familiar title (priest, reverend, etc.) or a vocational marker (*e.g.*, seminary degree or ordination), a jury may be more likely to identify the party as a minister of the religious group. By contrast, ministers with no titles, whose role is confirmed by their role in the community or an unfamiliar cultural context, will not be as easily identifiable and are more likely to be seen as creating a fact dispute on the ministerial exemption issue. As a result, "religious practices that conform to this culture w[ill] be protected more often than practices that don't." Asma T. Uddin, *When Islam Is Not a Religion: Inside America's Fight for Religious Freedom* 132 (2019); cf. Gregory Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11:*

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[3] *Amici* note that a sizable, and seemingly disproportionate, number of ministerial exception cases involve Jewish and Muslim faith communities. *See, e.g.*, *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018) (per curiam); *Friedlander* v. *Port Jewish Ctr.*, 347 F. App'x 654 (2d Cir. 2009); *Bethea* v. *Nation of Islam*, 248 F. App'x 331 (3d Cir. 2007) (per curiam); *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004); *Markel* v. *Union of Orthodox Jewish Congregations of Am.*, No. 2:19-CV-10704-JWH-SK, 2023 WL 1093676 (C.D. Cal. Jan. 3, 2023), *appeal docketed*, No. 23-55088 (9th Cir. Jan. 27, 2023); *Leavy* v. *Congregation Beth Shalom*, 490 F. Supp. 2d 1011 (N.D. Iowa 2007); *El-Farra* v. *Sayyed*, 226 S.W.3d 792 (Ark. 2006).

Empirical Evidence from the Federal Courts, 98 Iowa L. Rev. 231, 234 (2012).

The ministerial exception must account for the reality that "virtually every religion in the world is represented in the population of the United States." *Hosanna-Tabor Evangelical Lutheran Church* v. *EEOC*, 565 U.S. 171, 198 (2012) (Alito, J., concurring). This "religious diversity" means that factfinders "cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." *Our Lady of Guadalupe*, 140 S. Ct. at 2066. Juries are more likely to be confused in cases dealing with minority religions because of analytical overemphasis on titles and formal training stemming from majority-culture biases.

For example, ordination—the process by which individuals in certain faiths become ministers—"has no clear counterpart in . . . other religions." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring). Within religions like Judaism, different traditions vary in ordination requirements and methods, and may not recognize other traditions' ordinations. Judaism in general confers ecclesiastical titles like rabbi on only some, but not at all, individuals performing ministerial functions. See *Grussgott*, 882 F.3d at 657. For example, in many Orthodox synagogues, congregants rather than rabbis lead services. And the term minister itself "is rarely if ever used . . . by Catholics, Jews, Muslims, Hindus, or Buddhists." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

Islam, on the other hand, rejects the concept of priesthood as understood by some Christians and Jews. "[E]very Muslim can perform the religious rites, so there is no class or profession of ordained clergy." *Id.* at 202 n.3 (quoting 10 Encyclopedia of Religion

6858 (2d ed. 2005)). Indeed, a central tenet of Islam is the equality of all believers, see *Our Lady of Guadalupe*, 140 S. Ct. at 2064, and this equality means multiple individuals (*imams*, *shaykhs*, *muftis*, or for that matter a person with no official religious title) in Sunni Islam may perform ministerial functions.

Similarly, in the Society of Friends, an individual Quaker may exercise a position of leadership in the Society, such as serving on the committee of ministry and oversight, but never undergo any special education or ordination. This is congruous with the Quaker's rejection of clericalism and the affirmation of the "priesthood of all believers," see Abbott et al., *Historical Dictionary Of The Friends (Quakers)* 225-226 (2nd ed. 2012), but this lack of formal training may lead a jury (filled with its own conceptions regarding ordination) to erroneously conclude that such a Quaker does not qualify as a minister.

Other features of religious communities, too, vary markedly between and even within religions. Houses of worship come in every conceivable configuration—some are literally houses, and some lack even a roof or a door. To many jurors, the term "community center" suggests summer camps and recreational sports team. But in Islam (especially as practiced in the United States), a community center is oftentimes a dual-purpose facility which serves both as a mosque as well as a gathering place for a loose community of Muslims who might live within a certain short or long distance driving radius. See, *e.g.*, *In re 650 Fifth Ave.*, 2014 WL 1516328, at *5 (S.D.N.Y. Apr. 18, 2014), *vacated on other grounds by Kirschenbaum* v. *650 Fifth Ave. & Related Props.*, 830 F.3d 107 (2d Cir. 2016). In faiths as diverse as Evangelical Christianity, Scientology, and the Hare Krishna movement all encourage proselytization as an expression of faith in public locations,

blurring the line between minister and parishioner, whereas in Judaism, even the rabbis typically do not engage in proselytization. And there can even be great variation within religions. Christian churches meet everywhere from august cathedrals to movie houses and bars. For many Reform and Conservative Jews, the terms "synagogue" and "temple" are synonyms, whereas many Orthodox Jews do not use the word "temple" except in reference to the First and Second Temple in Jerusalem, the latter destroyed in 70 A.D. See FEMA, *Tip Sheets: Engaging Faith Communities*, https://bit.ly/3JgaqZb (last visited Mar. 7, 2023).

Indeed, in other contexts, courts have admonished groups of citizens for too narrowly construing ministerial exceptions. In relation to the ministerial exemption to the military draft, for instance, the Fifth Circuit reversed the conviction of a Jehovah's Witness, who refused to comply with the orders of his local draft board, after the board incorrectly determined that he did not qualify for the exception. *Pate* v. *United States*, 243 F.2d 99, 104 (5th Cir. 1957). The board based its decision primarily on the fact that the "defendant did not earn his livelihood from the ministry," "did not have a pulpit," and devoted only "1200 hours per year to the actual preaching work." *Id.* at 102. The Fifth Circuit reversed the draft board, holding that it "in effect rewritten the law to require duties and conditions [for being a minister] which the law d[id] not require" and warning boards not to "fit and mold" a minister from a minority faith "into the orthodox straight-jacket of ministers of an orthodox church." *Id*. at 103.

By wrongly characterizing the threshold ministerial issue as a fact question to be posed to a jury, the Tenth Circuit decision exposes religious organizations to potentially "hostile and unbelieving" juries which may be predisposed (as the board in *Pate*) to be suspicious of

an unfamiliar religion's organizational structure and the ministerial claims of its leaders. *Id.*

Smaller congregations and minority faiths thus may face greater litigation risk in connection with personnel decisions than majority-faith churches. *Contra* Pet. App. 32a n.12 (stating there is "no . . . evidence" religious institutions will be any more burdened by civil litigation than "all other institutions"). That is particularly concerning because mosques, synagogues, and affiliated schools are often not connected to any central organization and therefore may lack the resources of a large denomination. The Tenth Circuit's opinion would require smaller congregations to decide whether to divert donations to legal-defense funds or forsake the religious autonomy guaranteed by the First Amendment.

Institutions like mosques, synagogues, and Jewish day schools may be more likely than majority religions to be on the losing end of an erroneous ministerial-exception decision in district court and thus more likely to be required to endure months or years of unnecessary litigation and discovery. The predictable end result of this precedent is that "religious practices that conform to [majority] culture w[ill] be protected more often than practices that don't." Uddin, *supra*, at 132.

Finally, the Tenth Circuit's holding is unworkable. If ministerial status is a factual question for the jury, then parties will be required to put on dueling experts expositing contradictory doctrinal interpretations. Judges will be required to instruct the jury on how to apply ecclesiastical law to the facts before it. These developments, however, would work a remarkable entanglement of the courts in decisions that, by law, are reserved to religious authorities. If there is any role for a jury, it is merely to resolve truly contested matters of historical fact—like whether Respondent led chapel

services (which he undisputedly did, Pet. App. 8a), and not resolving whether the plaintiff's role is truly ministerial in the defendant's faith tradition, cf, *e.g.*, *Grussgott*, 882 F.3d at 657 (rejecting argument that whether a Hebrew teacher in a Jewish school is a minister had to be "left for a jury").

The proper approach is instead to resolve First Amendment-based immunity "early," to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. This includes prompt correction through interlocutory appeal, and by limiting factual questions capable of defeating immediate appeal to those properly submitted to a jury. In particular, the question of whether an employee is a minister is a legal question, with substantial deference shown to religious organizations' good-faith de-terminations that duties are "ministerial." This substantive and procedural deference ensures all religious organizations, including minority faiths, enjoy the same robust constitutional protections enjoyed by larger groups. Failing to so defer, on the other hand, substantially multiplies the risk of "judicial entanglement in religious issues." *Our Lady of Guadalupe*, 140 S. Ct. at 2069.

CONCLUSION

For these reasons, and those set forth in the Petition, Faith Bible's petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL ZIDLICKY*
DANIEL J. HAY
MARCUS BAUER
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pzidlicky@sidley.com

Counsel for Amici Curiae

*Counsel of Record

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