No. 22-824

IN THE

Supreme Court of the United States

THE SYNOD OF BISHOPS OF THE RUSSIAN ORTHODOX CHURCH OUTSIDE OF RUSSIA, ET AL.,

Petitioners,

v.

ALEXANDER BELYA,

Respondent.

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

BRIEF OF *AMICI CURIAE* LAW & RELIGION SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are legal scholars who research, write, and teach about the First Amendment's Religion Clauses and the interplay of law and religion. *Amici* believe that a robust ministerial exception is critical to safeguarding the Clauses' guarantee that religious institutions may decide who performs religious functions, free from government interference. *Amici* write to explain the need for this Court's review to confirm that the ministerial exception is an immunity from suit that courts should resolve at the first opportunity—including on interlocutory appeal—rather than exposing religious organizations to costly litigation before concluding that the exception applied all along. *Amici* recently submitted a similar *amicus* brief in support of petitioner in *Faith Bible Chapel Int'l v. Tucker*, No. 22-741, advocating for the Court's review of the same issue in that case.

Amici are the following nine legal scholars:

Berg, Thomas C.	Lund, Christopher
Clark, Elizabeth	Moreland, Michael P.
Cochran, Robert F., Jr.	Pushaw, Robert J.
Garnett, Richard W.	Volokh, Eugene
Laycock, Douglas	

Professor Laycock argued *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171

[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief 's preparation.

(2012), and all *amici* have written extensively on matters relevant to this case. An overview of *amici*'s relevant scholarship is included in the Appendix.

SUMMARY OF ARGUMENT

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), this Court recognized the "ministerial exception"—a doctrine grounded in the First Amendment's Religion Clauses that precludes courts from applying secular laws "to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188; *accord Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).[2] This case raises a question that has divided the courts of appeals: whether the ministerial exception is an immunity from suit, such that an order denying application of the ministerial exception is subject to interlocutory appeal.

This procedural question has important substantive implications and warrants review. As this case demonstrates, failing to treat the ministerial exception as an immunity from suit to be resolved early in the litigation and subject to interlocutory review risks imposing on religious institutions the substantial burdens of litigation—including large expenses, probing discovery, and judicial examination into inherently ecclesiastical questions—even when they are exempt

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[2] As members of this Court have recognized, "the term 'ministerial exception' is somewhat of a misnomer" because the doctrine "is not limited to members of the clergy or others holding positions akin to that of a 'minister.'" *Our Lady of Guadalupe*, 140 S. Ct. at 2069 n.1 (Thomas, J., concurring). The doctrine applies to "certain key employees" of religious organizations who perform religious functions even where they have not been "given the title of 'minister.'" 140 S. Ct. at 2055 (majority op.). *Amici* use the term "ministerial exception" as a shorthand, with the understanding that it applies to employees of religious institutions other than formal ministers.

from suit. That result undermines the ministerial exception's central purpose of preserving "[t]he independence of religious institutions" and avoiding "judicial entanglement in religious issues." *Our Lady of Guadalupe*, 140 S. Ct. at 2060, 2069. The appealability of orders rejecting the ministerial exception is thus a question of immense constitutional significance that recurs each time the exception is denied.

To avoid making denial of the ministerial exception effectively unreviewable, this Court should grant certiorari and hold that the ministerial exception is an immunity from suit similar to immunities for government officials, and that denials of the exception thus are immediately appealable. The Court need not chart new territory to reach that conclusion. Like official immunities, the ministerial exception implements a structural constitutional limitation rooted in constitutional text and history, the common law, and pragmatic concerns regarding the risk of judicial entanglement. And the need for immediate appellate review is even stronger for the ministerial exception than for many official immunities, because it implements the Religion Clauses' express protections from government entanglement in matters of religion.

The Court should thus grant certiorari to resolve growing disagreement regarding the nature of the ministerial exception—an issue "of 'exceptional importance'" that "can and should be reviewed by" this Court. Pet. App. 63a (Cabranes, J., dissenting from denial of rehearing en banc); *see* Pet. 14–29; Pet. App. 75a (Park, J., dissenting from denial of rehearing en banc); *Tucker v. Faith Bible Chapel Int'l*, 53 F.4th 620, 627–29 (10th Cir. 2022) (Bacharach, J., dissenting from denial of rehearing en banc).

ARGUMENT

I. THE AVAILABILITY OF INTERLOCUTORY APPEALS FOR ORDERS DECLINING TO APPLY THE MINISTERIAL EXCEPTION IS A QUESTION OF IMMENSE IMPORTANCE THAT WARRANTS REVIEW.

This case raises the question whether the ministerial exception is an immunity from suit such that interlocutory appellate review is available for orders declining to apply that immunity. That issue implicates the core nature of the ministerial exception and recurs each time courts decline to apply the exception to religious organizations. The Court should grant certiorari to resolve this important question.

The ministerial exception flows from both of the First Amendment's Religion Clauses. "By imposing an unwanted minister" on a religious institution through employment-discrimination laws, "the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 188. Similarly, "[a]ccording the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause" by impermissibly allowing "government involvement in such ecclesiastical decisions." *Id.* at 188–89. Because the appointment of ministers is an inherently religious decision, the ministerial exception is necessary to prevent "intrusion" into the "independence of religious institutions," *Our Lady of Guadalupe*, 140 S. Ct. at 2060, and avoid "excessive government entanglement with religion" and "the danger of chilling religious activity," *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S.

327, 344 (1987) (Brennan, J., concurring in the judgment); *accord* Douglas Laycock, *Church Autonomy Revisited*, 7 Geo. J. L. & Pub. Pol'y 253, 262 (2009) (imposing unwanted religious leaders is both "a Free Exercise Clause problem" and "an Establishment Clause problem").

Failing to permit interlocutory appeal when a trial court declines to apply the ministerial exception directly undermines the exception's purpose. *Hosanna-Tabor* explained that even the act of "inquiring into whether the [religious institution] had followed its own procedures" is sufficiently intrusive to be unconstitutional. 565 U.S. at 187; *see also id.* at 205–06 (Alito, J., concurring) ("the mere adjudication of . . . questions [about church doctrine] would pose grave problems for religious autonomy"). The Religion Clauses limit "not only the conclusions that may be reached" in a dispute over church governance and doctrine, but also "the very process of inquiry leading to findings and conclusions." *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979). Absent an interlocutory appeal in cases where a trial court has incorrectly rejected application of the ministerial exception, protracted litigation would divert significant resources from the religious institution's core functions and intrude on its autonomy over "internal management decisions"—outcomes that "[t]he First Amendment outlaws." *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

Subjecting religious institutions to the legal process absent immediate appeal would thus "create the danger of chilling religious activity," *Amos*, 483 U.S. at 344 (Brennan, J., concurring in the judgment), and could even cause religious institutions to second-guess employment decisions they would otherwise make with regard to "wayward minister[s]" who are directly

"contradict[ing] the church's tenets," *Our Lady of Guadalupe*, 140 S. Ct. at 2060–61. And because ministerial-exception cases virtually always involve matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them," permitting litigation to proceed without interlocutory appellate review will inevitably invite civil courts to decide issues that lie "at the core of ecclesiastical concern" where civil courts exercise "no jurisdiction." *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713–14, 717 (1976).

Failing to permit interlocutory review of decisions declining to apply the ministerial exception thus would immediately produce the injuries that the exception guards against and make the denial effectively unreviewable on appeal. Put differently, "after final judgment, the harm from judicial interference in church governance will be complete," because even a reversal cannot undo the original, improper intrusion. Pet. App. 74a (Park, J., dissenting from denial of rehearing en banc). This Court should grant certiorari to decide whether these significant harms are justified in light of the nature and purpose of the ministerial exception.

II. THE COURT HAS ALREADY LAID THE DOCTRINAL FOUNDATION NECESSARY TO HOLD THAT DENIAL OF THE MINISTERIAL EXCEPTION IS SUBJECT TO INTERLOCUTORY APPELLATE REVIEW.

Granting review will not lead the Court into unfamiliar territory; existing precedent shows that interlocutory review should be available to vindicate the ministerial exception. The Court has previously held

that denials of official immunity are subject to immediate appellate review. *A fortiori*, the same result is warranted here: The ministerial exception is properly characterized as an immunity from suit that rests on foundations at least as compelling as official immunities. Thus, courts should resolve the ministerial exception early in litigation just as they do for official immunities—including through interlocutory appeals.

A. Under Existing Precedent, Interlocutory Appeal Is Available to Vindicate Official Immunities.

When determining whether a governmental official is entitled to immunity from suit, this Court has said it is "guided by the Constitution," "history," "common law," and "concerns of public policy, especially as illuminated by our history and the structure of our government." *Nixon v. Fitzgerald*, 457 U.S. 731, 747–48 (1982). The Court has relied on such considerations in fashioning an absolute immunity from suit for "officials whose special functions or constitutional status requires complete protection from suit." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

For example, the Court has held that the Constitution's Speech or Debate Clause—which provides that, "for any Speech or Debate in either House" of Congress, a legislator "shall not be questioned in any other Place," U.S. Const. art. I, § 6, cl. 1—"is an absolute bar to interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). The Clause embodies a "privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings" that dates back to the sixteenth century. *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). That privilege "would be of little value if [legislators] could

be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Id.* at 377. And a lawsuit would "creat[e] a distraction and forc[e] Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 503.

The Court has cited similar constitutional, historical, and pragmatic reasons in granting other officials absolute immunity. The Court has held, for example, that the President "is entitled to absolute immunity from damages liability predicated on his official acts" as a "functio[n]" of his "office." *Nixon*, 457 U.S. at 749. The Court reasoned that this principle was "rooted in the constitutional tradition of the separation of powers and supported by our history." *Ibid.* Judges similarly enjoy immunity "for acts done . . . in the exercise of their judicial functions," a principle that has "a deep root in the common law." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871); *accord Stump v. Sparkman*, 435 U.S. 349, 362–63 (1978). The Court expressed concern that "[i]mposing such a burden on judges would contribute not to principled and fearless decisionmaking but to intimidation." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Prosecutors also enjoy a "common-law immunity . . . based upon the same considerations that underlie the common-law immunit[y] of judges." *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976). According to the Court, they receive an immunity from civil suits regarding official actions because of the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties," raising "the possibil-

ity that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

Officials who do not receive absolute immunity receive qualified immunity under this Court's precedents, which "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow*, 457 U.S. at 818). The Court has asserted that this immunity is justified in light of, *inter alia*, "social costs[,] includ[ing] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," *Harlow*, 457 U.S. at 814, and on courts' relative inability to competently "second-gues[s]" certain official actions, *White v. Pauly*, 580 U.S. 73, 78 (2017) (per curiam).

All of these official immunities have been held to be "*immunit*[*ies*] *from suit*," not "mere defense[s] to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Immunities generally give rise to "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution" of the question whether the exception applies. *Ibid.* This entitlement is "effectively lost if a case is erroneously permitted to go to trial." *Ibid.* This Court has thus "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)). Courts must be "alert" to prevent harassing lawsuits, including by "quickly terminat[ing]" lawsuits at the motion-to-dismiss or summary-judgment stage when presented

with a valid claim of immunity. *Harlow*, 457 U.S. at 808 (citation omitted).

Consistent with these principles, this Court has also recognized that immunity decisions are subject to interlocutory appellate review. Beginning with *Abney v. United States*, 431 U.S. 651 (1977)—a case involving immunity under the Double Jeopardy Clause—this Court has recognized that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell*, 472 U.S. at 525; *see*, *e.g.*, *Nixon*, 457 U.S. at 742–43 (presidential immunity); *Helstoski v. Meanor*, 442 U.S. 500, 507 (1979) (legislative immunity under the Speech or Debate Clause). The same is true for all qualified immunity appeals that turn on issues of law. *Mitchell*, 472 U.S. at 530.

Denials of official immunities are immediately appealable because they satisfy the collateral-order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) (interlocutory appeals permitted from collateral orders "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action"). In particular, these immunities have been deemed to serve as "an entitlement not to stand trial under certain circumstances," *Mitchell*, 472 U.S. at 525, based on a "substantial public interest" in preserving a "value of a high order"—here, "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a

State's dignitary interest, and mitigating the government's advantage over the individual," *Will v. Hallock*, 546 U.S. 345, 352–53 (2006).

B. In Light of the Court's Official-Immunity Precedents, Interlocutory Appeal Should Be Available to Vindicate the Ministerial Exception.

The Court's precedents on official immunity strengthen the case for certiorari because they provide ample authority for the Court to resolve the questions presented. The ministerial exception implements a structural limitation rooted in constitutional text, history, and the common law—factors this Court has looked to in recognizing official immunities. And just as the Court's official-immunity cases have cited pragmatic concerns regarding the risk of undue judicial interference with the acts of officials in other branches of government, the ministerial exception is designed to immunize constitutionally protected religious decisions from judicial intrusion. Because the justifications for the ministerial exception have comparable foundations and serve similar purposes to those previously cited by the Court in the official-immunity context, the ministerial exception should receive at least the same degree of procedural protections—including the availability of interlocutory appeal. Indeed, the case for vigorously protecting the ministerial exception is considerably stronger than it is for common-law official immunities because, unlike those immunities, the ministerial exception is firmly grounded in two constitutional clauses that expressly protect liberty in matters of religion.

1. The Ministerial Exception Rests on Foundations Similar to—and in Some Instances Stronger Than—Those Undergirding Official Immunities.

a. Constitutional Text and Structure—The ministerial exception is rooted in the text and structure of the Constitution.[3] The ministerial exception is a "necessary implication" of both Religion Clauses of the First Amendment. Paul Horwitz, *Act III of the Ministerial Exception*, 106 Nw. U. L. Rev. 973, 982, 992 (2012). This Court has recognized that "imposing an unwanted minister" on a religious institution "infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 565 U.S. at 188. And "the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions," is likewise "violate[d]" if the government "determine[s] which individuals will minister to the faithful." *Id.* at 188–89; *accord Our Lady of Guadalupe*, 140 S. Ct. at 2060 ("[A]ny attempt by government to dictate or even to influence [matters of faith and doctrine] would constitute one of the central attributes of an establishment of religion."). The ministerial exception thus protects the free-exercise rights of the religious institution invoking the immunity and also ensures that private lawsuits do not roll back the guarantee of disestablishment, which includes "the freedom of all religious institutions to choose their

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[3] While the First Amendment mentions only acts of Congress, this Court has since made clear that it applies to improper judicial interference by state and federal courts. *See*, *e.g.*, *United States v. Ballard*, 322 U.S. 78, 86 (1944) (federal courts); *Milivojevich*, 426 U.S. at 698 (state courts).

clergy." Michael W. McConnell, *Reflections on* Hosanna-Tabor, 35 Harv. J.L. & Pub. Pol'y 821, 829 (2012).

In short, the ministerial exception is a deeply rooted "structural limitation" 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), and therefore prohibits *any* "[s]tate interference" in the "sphere" of religious institutions' internal governance, *Our Lady of Guadalupe*, 140 S. Ct. at 2060; *see also* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 94 (1980) (arguing that the Religion Clauses provide a "structural or separation of powers function"). The exception thus reflects the foundational "limit[s] [on] the role of civil courts in the resolution of religious controversies" that prevent courts from becoming "entangled in essentially religious controversies." *Milivojevich*, 426 U.S. at 709–10. This Court's instructions in *Hosanna-Tabor* left no room for doubt on these points: "it is impermissible for the government to contradict a church's determination of who can act as its ministers," because "the authority" to make such a "strictly ecclesiastical" decision "is the church's alone." 565 U.S. at 185, 194–95 (citation omitted); *accord Our Lady of Guadalupe*, 140 S. Ct. at 2069 (noting that allowing courts to decide questions of faith and doctrine "would risk judicial entanglement in religious issues"); Helen M. Alvaré, *Church Autonomy After* Our Lady of Guadalupe School, 25 Tex. Rev. L. & Pols. 319, 325–26 (2021) ("courts are constitutionally incompetent" to resolve internal disputes over church operations and religious beliefs).

This structural view of the ministerial exception finds support dating back to the work of John Locke, which was an "indispensable part of the intellectual backdrop" for the founding generation. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1431 (1990); *see also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 354 (2002) (Locke's ideas "formed the basic theoretical ground for the separation of church and state in America"). In Locke's view, "the whole jurisdiction of the magistrate reaches only to . . . civil concernments," and "all civil power, right, and dominion, is bounded and confined to . . . promoting these things," such that "it neither can nor ought in any manner to be extended to the salvation of souls." John Locke, *A Letter Concerning Toleration* (1689), *in* 5 The Founders' Constitution 52, 52 (Philip B. Kurland & Ralph Lerner eds., 1987). As Locke recognized, the "joining together of several members into [a] church-society" is "absolutely free and spontaneous" and thus the church has absolute authority in adopting rules for "admitting and excluding members." *Id.* at 53–54. That absolute authority regarding membership, *a fortiori*, encompasses the ability to appoint ministers and to establish "distinction of officers." *Id.* at 53.

Founding-era sources confirm that civil authorities in this country have long been understood to lack authority to intrude into internal religious matters. Early American leaders "embraced the idea of a constitutionalized distinction between civil and religious authorities" and a resulting "zone of autonomy in which churches and religious schools could freely select and remove their ministers and teachers." Richard W. Garnett, Hosanna-Tabor*, Religious Freedom, and Constitutional Structure*, 2011–12 Cato Sup. Ct.

Rev. 307, 313. For example, James Madison—"the leading architect of the religion clauses of the First Amendment," *Hosanna-Tabor*, 565 U.S. at 184 (citations omitted)—publicly rejected the idea that "the Civil Magistrate is a competent Judge of Religious Truth," arguing instead that "Religion" was "exempt from the authority" both of "Society at large" and "that of the Legislative Body." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *in* 5 The Founder's Constitution 82, 82–83. As Madison later explained, "[t]he 'scrupulous policy of the Constitution in guarding against a political interference with religious affairs' . . . prevent[s] the Government from rendering an opinion on the 'selection of ecclesiastical individuals.'" *Hosanna-Tabor*, 565 U.S. at 184 (quoting Letter from James Madison to Bishop Carroll (Nov. 20, 1806), *reprinted in* 20 Records of the American Catholic Historical Society 63 (1909)). Any attempt by the state to control "the election and removal of [a] Minister," Madison believed, thus "exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions." *Id.* at 184–85 (emphasis omitted) (quoting 22 Annals of Cong. 982–83 (1811)).

b. Common Law and History—The ministerial exception also has deep roots in the common law and history. This Court's first case to address the religious autonomy doctrine (of which the ministerial exception is a subset) did not rely on the Religion Clauses. *Watson v. Jones* involved a dispute over slavery between two factions of a Presbyterian church that had split into "distinct bodies," each claiming to be the real "church." 80 U.S. (13 Wall.) 679, 681

(1872). The highest governing body of the Presbyterian Church determined that the anti-slavery faction was the authorized church. *Id.* at 727.

This Court refused to disturb that ruling, explaining that "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" is "a matter over which the civil courts exercise no jurisdiction." *Watson*, 80 U.S. (13 Wall.) at 733. By "inquir[ing] into" such matters, the "civil courts" "would deprive [religious] bodies of the right of construing their own church laws." *Ibid.* Thus, based on "a broad and sound view of the relations of church and state under our system of laws"—rather than any particular provision of the Religion Clauses or any other constitutional text—the Court held "that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Id.* at 727.

c. Practical Concerns—The ministerial exception also reflects practical concerns similar to those the Court has invoked for other immunity doctrines.

One fundamental concern is the limits of judicial authority and competence. "[T]he judicial process is singularly ill equipped to resolve" issues of religious doctrine, which are "not within the judicial function and judicial competence." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981). That is not to say that courts and juries lack "technical or intellectual capacity." Thomas C. Berg, Kimberlee

Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 176 (2011). Rather, the issue is the costs of imposing liability for religious decisions and the very high risk of error in judicial (or jury) evaluation of those decisions. "Religious teachings cover the gamut from moral conduct to metaphysical truth." *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). As a result, "matters of faith" may not be strictly "rational or measurable by objective criteria" of the sort that courts and juries are used to applying. *Milivojevich*, 426 U.S. at 714–15. And "[c]ivil judges obviously do not have the competence of ecclesiastical tribunals in applying the 'law' that governs ecclesiastical disputes." *Id.* at 714 n.8; *see also Thomas*, 450 U.S. at 716 ("Courts are not arbiters of scriptural interpretation.").

That is especially true in the context of a church's choice of a minister. To pass judgment on a religious institution's selection of its ministers would require a "civil factfinder [to] si[t] in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring). Religious leadership decisions may be made by reference to criteria that civil tribunals are "ill-equipped" to second-guess—consider, for example, the Biblical accounts of "a stammering Moses [being] chosen to lead the people, and a scrawny David to slay a giant" due to their faith. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 203 (2d Cir. 2017); *accord Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (observing that disputes concerning ministers present "issue[s] that [courts] cannot resolve intelligently"); Douglas Laycock, Hosanna-Tabor *and the Ministerial*

Exception, 35 Harv. J. L. & Pub. Pol'y 839, 850 (2012) (judges and juries "cannot know what makes a good minister in each of the enormously diverse array of religions in the United States").

Moreover, even a brief inquiry into church governance or doctrine can chill the free exercise of religion. "If civil courts undertake to resolve such controversies . . . , the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969). Religious organizations face a "significant burden" if made to "predict which of [their] activities a secular court will consider religious." *Amos*, 483 U.S. at 336. Beyond any actual penalties imposed by the courts, the "[f]ear of potential liability" has a profound chilling effect on "the way an organization carrie[s] out . . . its religious mission." *Ibid.* That fear is compounded by the possibility that a religious institution could incur hundreds of thousands of dollars in attorney's fees without any possibility of reimbursement even if successful on the merits, while facing the threat of paying the plaintiff's attorney's fees if it loses. That chilling effect is one of the "dangers that the First Amendment was designed to guard against," making it essential to protect "religious organizations['] autonomy in matters of internal governance." *Hosanna-Tabor*, 565 U.S. at 196–97 (Thomas, J., concurring).

2. Decisions Denying the Ministerial Exception Warrant Interlocutory Review.

Denials of the ministerial exception are fit for interlocutory appeal under the collateral order doctrine

for the same reasons this Court has recognized for denials of official immunities. Accordingly, the Court already has the doctrinal tools necessary to resolve the important issues in this case.

Most importantly, the ministerial exception—like official immunities—serves as an "entitlement not to stand trial under certain circumstances." *Mitchell*, 472 U.S. at 525; *accord* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183, 1191 (2014) (ministerial exception is a "right not to face litigation over the choice of one's clergy," not just a "defense to liability"). As explained, the very purpose of the ministerial exception is to prevent excessive judicial entanglement with religion and to preserve the independence of religious institutions protected by the First Amendment's Religion Clauses. *See Hosanna-Tabor*, 565 U.S. at 188–89; *supra* at 4–5.

Absent early enforcement of the ministerial exception, including through appellate review when necessary, a religious institution suffers the very harm the ministerial exception aims to prevent—facing secular scrutiny of its selection of ministers—by the time the case goes to trial and final judgment. At that point, the court of appeals cannot put the cat back in the bag; "the district court's decision is effectively unreviewable," *Mitchell*, 472 U.S. at 527, because it has already denied the religious institution core aspects of the protections intended to be afforded by the ministerial exception. As with the official immunities this Court has already recognized, the ministerial exception is "effectively lost if a case is erroneously permitted to go to trial," *id.* at 526, because the costs, burdens, and intrusions of the civil litigation process will already have deprived the religious institution of its right to

be free from government-compelled interference with its ecclesiastical autonomy and will have produced the very chilling of religious activity and excessive entanglement that the ministerial exception is intended to prevent. And as with official immunities, the only way to give full effect to the ministerial exception is to determine its application "at the earliest possible stage in litigation" through a district-court ruling that is subject to interlocutory appellate review. *Hunter*, 502 U.S. at 227–28 ("Immunity ordinarily should be decided by the court long before trial.").

One factor this Court has cited in holding that decisions denying official immunity are immediately appealable is that "substantial social costs" like "harassing litigation" may "unduly inhibit officials in the discharge of their duties," *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). The same is true for the ministerial exception: Litigation and the "burdens of suit" risk violating the First Amendment's bar on judicial meddling in the church's "internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. Indeed, "[f]orcing the parties through years of expensive litigation, where churches may weary of the diversion of resources away from mission, is precisely the kind of equitable consideration, coupled with the importance of the threshold constitutional question, that warrants an immediate appeal." Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-*Hosanna-Tabor, 10 First Amendment L. Rev. 233, 294 (2012) (footnote omitted).

Practically speaking, the ministerial exception's nature as a protection against standing trial means

that it should be granted whenever a court can determine that the immunity applies as a matter of law based on the allegations in the complaint. This is fully consistent with *Hosanna-Tabor*'s statement that, as a procedural matter, the ministerial exception "operates as an affirmative defense" rather than "a jurisdictional bar." 565 U.S. at 195 n.4. The same is true of most official immunities, which typically are not jurisdictional, but still must be applied as "at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 231–32 (citation omitted); *see Tucker*, 53 F.4th at 626 (Bacharach, J., dissenting from denial of rehearing en banc) ("[E]ven when affirmative defenses aren't jurisdictional in district court, they may trigger the collateral-order doctrine."). And in cases where the ministerial exception's applicability cannot be resolved at the pleading stage, discovery should initially be limited only to the facts necessary to resolving that question so that the exception's applicability can be immediately determined through a motion for summary judgment focused on that issue.[4]

Whether decided on a motion to dismiss or a limited motion for summary judgment, denial of the ministerial exception should be "immediate[ly] appealab[le]," just as a denial of official immunities is immediately appealable. *Mitchell*, 472 U.S. at 526–27; *see also Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) (permitting successive appeals following denials of motions to dismiss and for summary judgment based on qualified immunity). Without interlocutory review—which often could "readily" dispose of the

[4] Petitioners suggested a similar approach below, moving for limited initial discovery to determine whether the ministerial exception applied, but the district court denied this motion. *See* Pet. App. 11a, 52a–54a.

question whether the ministerial exception applies, *Pearson*, 555 U.S. at 237—the ministerial exception may be erroneously denied and even put to the jury at a trial. In fact, this is exactly what the Tenth Circuit has predicted would "often" happen, *Tucker*, 36 F.4th at 1031 n.4, rendering the exception and immunity it provides "effectively lost," *Mitchell*, 472 U.S. at 526.

If anything, there are even stronger reasons to permit immediate appellate review in ministerial-exception cases: Not only will the right at issue "have been lost, probably irreparably," by the time of final judgment, *Cohen*, 337 U.S. at 546, but "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (citation omitted). *See* Pet. App. 75a (Park, J., dissenting from denial of rehearing en banc) ("Denial of a church autonomy defense should be an appealable collateral order in light of its strong resemblance to qualified immunity."). Certainly there is no basis for treating a First Amendment right as "fundamental" as the "right to religious liberty" less favorably than official immunities. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1901 (2021) (Alito, J., concurring in the judgment).

All of this follows from the logic of the Court's existing precedents. Already, multiple courts of appeals have rightly recognized the similarity between official immunities and the ministerial exception. *See* Pet. App. 76a (Park, J., dissenting from denial of rehearing en banc) (collecting cases). And as petitioners explain, Pet. 18; *see id.* at 15–23, many lower courts have also acknowledged that the ministerial exception shields religious organizations "from the travails of a trial and not just from an adverse judgment." *McCarthy v.*

Fuller, 714 F.3d 971, 975 (7th Cir. 2013) (Posner, J.). The Court should grant certiorari in both this case and *Faith Bible*, No. 22-741, to confirm that the ministerial exception is an immunity from suit, the denial of which is subject to interlocutory appellate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 31, 2023

APPENDIX

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