No. _____

In the Supreme Court of the United States

FAITH BIBLE CHAPEL INTERNATIONAL,

Petitioner,

v.

GREGORY TUCKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

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

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

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner Faith Bible Chapel International was the defendant-appellant below. Respondent Gregory Tucker was the plaintiff-appellee below. Petitioner represents that it has no parent entities and issues no stock.

RELATED PROCEEDINGS

There are no related proceedings.

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INTRODUCTION

This case involves a wrenching disagreement within a church over a chapel service about race and faith, dividing a religious community and pitting a school Chaplain (Respondent here) against church leadership. This internal dispute is no business of the judiciary or civil authorities. It is not a proper subject for depositions and discovery, cross-examinations, lawyers' arguments, or jury deliberations. The Free Exercise and Establishment Clauses of the First Amendment categorically bar judicial inquiry and interference in religious leadership disputes. The government has no role. Once Respondent admitted that he accepted the role of Chaplain and provided spiritual guidance and counseling to students, the case should have been dismissed without allowing inquiry into the church's beliefs or its chaplaincy decisions.

But a divided panel of the Tenth Circuit held that the protections of the Religion Clauses are nothing more than a defense against liability. In the panel's view, the First Amendment does not prevent courts from deploying the full panoply of legal process—including merits discovery and jury trial—to probe the mind of the church regarding a minister's Title VII claims. Such interference is merely the "cost of living" in a "highly regulated society." Thus, any error by a trial court in failing to apply the First Amendment's protections must await appeal until the church has been subjected to discovery, jury trial, and judgment.

At the time of the decision below, every other federal court of appeals and state supreme court to address this issue—thirteen in all—had gone the other way. Those courts treat church autonomy defenses such as the "ministerial exception" as a shield against

the intrusions of merits litigation—not just the possible imposition of damages or reinstatement.[1]

Indeed, from the first ministerial exception cases over 50 years ago, the exception has been understood as a threshold legal issue, akin to an immunity, that bars courts from exposing ministerial decisions to the coercive effects of Title VII litigation. Modern caselaw and scholarship agree. And this Court has long emphasized that such decisions must be the church's alone, free of state interference, warning that the Religion Clauses can be violated by the very process of inquiry and not just the results courts reach.

Three conclusions follow from this understanding of the ministerial exception: (1) the First Amendment protects churches against merits discovery and trial in cases within the exception; (2) ministerial status is a legal question for the court rather than a fact question for the jury; and (3) denial of a dispositive motion to invoke the ministerial exception must be appealable on an interlocutory basis.

But not in the Tenth Circuit. Nor in the Second Circuit or Massachusetts, which quickly adopted the Tenth Circuit's holding. The decision below is thus on the wrong side of three acknowledged splits over the scope of the Religion Clauses: a 13-3 split over whether the Religion Clauses protect against the burdens of litigation; a 5-1 split over whether ministerial status is a legal question or a jury question; and a 6-3 split over

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[1] Petitioner uses the familiar shorthand "ministerial exception" even though the principle covers roles and faiths beyond what the term suggests.

whether church autonomy defenses are eligible for interlocutory appeal.

As Judges Bacharach, Tymkovich, and Eid argued in dissenting from denial of rehearing en banc, the panel's errors reflect "a fundamental misconception of the ministerial exception" and "implicate important structural issues at the heart of the Religion Clauses." By "extend[ing] judicial meddling in religious matters," the panel caused "the very evil that underlays the recognition of the ministerial exception."

Thus, for instance, the panel itself predicts that juries will now "often" be required to decide the legal question of who qualifies as a minister for purposes of the First Amendment. And churches will be "haled into court" to answer the merits of a minister's employment claims, without appellate recourse until after final judgment on the merits—when much of the damage will already have been done. As courts have long warned, that burden will be too heavy for many churches to bear, forcing them to make ministerial choices with an eye toward litigation instead of the spiritual needs of their flock.

None of this was necessary. Respondent admits that he served as the "chaplain" at a church school, provided spiritual guidance to students, and planned chapel services. He also taught courses in the Bible department such as "Christian Leadership" and "Worldviews and Apologetics." Those admissions are dispositive. It is "church authorities"—not civil courts—who determine "the essential qualifications of a chaplain" and whether Respondent "possesses them." *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). Certiorari is warranted.

OPINIONS BELOW

The Tenth Circuit's opinion is reported at 36 F.4th 1021 (10th Cir. 2022) and reproduced at App.1a. The district court's opinion denying summary judgment is reported at 2020 WL 2526798 (D. Colo. 2020) and reproduced at App.99a, and its order denying reconsideration is reproduced at App.115a.

JURISDICTION

The court of appeals entered its judgment on June 7, 2022. App.138a. The petition for rehearing was denied on November 15, 2022. App.116a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"

The relevant portions of Title VII of the Civil Rights Act, 42 U.S.C. 2000e, *et seq.*, and text of 28 U.S.C. 1291 are reprinted in the Appendix. App.139a.

STATEMENT OF THE CASE

I. Factual background

A. Petitioner Faith Bible Chapel

Petitioner Faith Bible Chapel is a nondenominational Christian church in Arvada, Colorado. App.141a, 200a-201a. Faith Christian Academy is Faith Bible's church school that offers kindergarten through twelfth grade education. App.8a, 200a. Both legally and as a religious matter, "the school and the church are one * * * entity." App.201a.

Faith Christian "provid[es] a biblically integrated education" that prepares students to "glorify God and serve others through the power of the Holy Spirit" and encourages them "to develop an increasingly vital relationship with Jesus[.]" App.158a; see also App.159a-169a. Students take Bible courses, attend weekly chapel services, and commit to "wholeheartedly" grow their "God-given spiritual, intellectual, and physical gifts to honor and glorify God." App.178a. Faith Christian emphasizes preparing students to "defend the Christian Worldview, while understanding opposing worldviews." App.160a.[2]

B. Respondent Tucker's roles at Faith Christian Academy

Respondent Gregory Tucker worked at Faith Christian's high school from 2000 to 2018, apart from a four-year interlude as a missionary.

Tucker joined Faith Christian in response to a "spiritual calling." App.219a. In his job application, Tucker said Faith Christian's "ministry" aligned with his belief that education should be "shaped by the Bible, which * * * conveys truth in every area of life, including all academic disciplines," and that the "main goal in educating students should be to help them become more like Jesus Christ." App.267a. Tucker represented that he had the "necessary skills and experience" to teach at Faith Christian, in part because of his "extensive work in ministry." App.272a.

After teaching mostly science classes during his initial stint at the school, App.204a, Tucker left Faith

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[2] Faith Christian is transitioning from a K-12 to a K-8 school.

Christian in 2006 to serve as a missionary in the Dominican Republic. App.192a, 227a, 257a, 263a. He returned in 2010 and applied to teach Bible and science at Faith Christian. App.225a-227a, 256a. Faith Christian hired him back on a part-time basis, and he began teaching in the Bible department. App.218a, 231a-233a. Tucker additionally resumed teaching science courses in his last year at the school. App.215a.

Tucker understood that Faith Christian set the "clear expectation" that he and his fellow teachers "endorse Christianity" and "'integrate' a Christian worldview into [their] teaching," which should be "Bible-oriented." App.206a-207a. Tucker believed it was his duty to "demonstrate * * * Christian character" and "teach Christ as the center" of his students' education. App.268a.

Tucker described one of his Bible department courses, "Christian Leadership," as teaching "specific leadership principles * * * from a Christian perspective." App.233a. He explained that another of his Bible department courses, "Worldviews and Apologetics," taught students that "Christianity reflected a credible worldview." App.204a, 231a-232a. Tucker received strong evaluations confirming that his teaching "consistently illuminate[d] Biblical principles." App.212a, App.207a.

In 2014, Tucker returned to a full-time role at the school by agreeing to additionally serve as Faith Christian's Chaplain, also called the Director of Student Life (his preferred title). App.152a-157a, 207a-208a. Tucker's work as Chaplain required about 20-25 hours per week in addition to his teaching responsibilities. App.216a. In accepting the Chaplain role, Tucker affirmed that "the hand of the Lord" was on him, that

he had "the gift necessary to perform in the position of Chaplain," and that "God ha[d] called [him] to minister" at Faith Christian. App.152a.

Tucker's job description explained that the Chaplain "plans activities that enhance student spiritual growth," "[m]aintains awareness of the [school's] spiritual pulse," and "promote[s] the most positive spiritual growth climate possible." App.216a-217a. The Chaplain was also tasked with "connect[ing] students with spiritual life issues to others who can support" them and helping "parents with questions regarding their student's spiritual growth." App.216a-217a. Tucker held himself out to students as their "Director of Student Life/Chaplain" and informed them that he was responsible for their "spiritual wellbeing" and for providing "opportunities for student spiritual growth." App.218a, 233a. Tucker testified that he in fact performed these religious functions. App.233a-234a.

In 2017, Tucker was entrusted with planning Faith Christian's weekly chapel services, a responsibility reserved to senior leadership. App.208a. Tucker was "excited at the opportunity to help facilitate this important aspect of life here at Faith," and promptly began implementing ideas to improve the services, including changes to worship and student-led devotional teaching. App.250a-253a.

Faith Christian chapel services are "a time for staff and students alike to hear from the Lord and to draw together spiritually." App.188a. Tucker accordingly planned chapel services to address "matters of spiritual importance," App.289a, with the goal of "point[ing] students back to the gospel and how that impacts the entirety of their lives." App.192a. For instance, Tucker designed one chapel service to focus on

school missions trips that "shared and modeled Christ" in the Dominican Republic, Romania, and Costa Rica. App.240a. Most chapel services included worship, App.234a-235a, 238a-239a, and prayer, which Tucker sometimes personally led. App.234a.

Once a month, Tucker changed the format of chapel services into small "Chapel Breakout Groups" that "g[a]ve students an opportunity to have Biblically grounded, honest, open, and broad conversations about spiritual topics." App.252a. Topics he set for discussion included "progressing toward Christlikeness" and overcoming "false gods" that "keep[] us from truly following Jesus." App.237a, 242a.

As Chaplain, Tucker also provided guidance to faculty on ministering to students. He instructed leaders on how to conduct the Chapel Breakout Groups. App.237a, 242a. Faculty consulted with him about helping students "put their faith into action." App.249a. He provided faculty with materials to help grow students as the "body of Christ" and exhorted them to "spur one another on toward love and good deeds." App.244-245a (quoting *Hebrews* 10:25). And Tucker assisted fellow Bible teachers with administering the Student Spiritual Goals program, which he helped students take seriously by describing the goals as "tangible steps we can take to improve our relationship with God." App.245a-246a.

C. Tucker's termination

In January 2018, Tucker planned to hold a chapel service on issues of race and faith. App.142a. Faith Christian's leadership and faculty supported that plan, consistent with the school's religious beliefs and policies against racism. App.142a; 161a, 275a. After

receiving their blessing, Tucker engaged in "MUCH thought and prayer," and consulted with a pastor to prepare for the chapel service. App.193a. He intended the chapel service to reflect his views of how the "Bible repeatedly explains" the "kingdom of God" should function. App.194a-195a.

Tucker led the "Race and Faith Chapel" service on January 12, 2018. App.142a. His message accused Faith Christian students and parents of racism, which the message defined in terms of white privilege and systemic bias. App.195a. Many students and parents complained to school leadership that Tucker's message was political rather than biblical. App.195a. After evaluating these concerns, Faith Christian concluded that the message of the chapel service was not consistent with church teaching. App.280a. Among other things, the service included interpretations and applications of Bible passages that departed from the church's understanding of Scripture. App.143a, 275a, 280a. School leadership held a series of meetings with Tucker to express these concerns, but Tucker disagreed with their interpretations of the Bible. App.280a. He published a letter to the school community airing his views, App.191a-199a, and began openly expressing his disagreement with the school's leadership. See, *e.g.*, App.143a, 146a, 275a, 277a, 280a.

On January 19, school leadership relieved Tucker of his responsibilities of planning and speaking at chapel services. App.143a. Tucker repeatedly expressed his frustration over losing chapel responsibilities in conversations and emails to school leadership, to a member of the Faith Bible Board of Elders, and to a faction of parents who supported him. App.143a-

144a. The school informed Tucker on February 15 that his contract would not be renewed at the end of the school year. App.145a. Tucker responded by sending a faculty-wide email explaining his disagreement with the decision. App.145a-146a. On February 26, Tucker was terminated for his role in the chapel service and how his insubordinate conduct contributed to the divisive aftermath. App.146a.

II. Procedural history

A. District court proceedings

On May 25, 2018, Tucker filed a complaint with the Equal Employment Opportunity Commission alleging race discrimination. App.148a. On June 7, 2019, he sued Faith Bible under Title VII and Colorado's wrongful-discharge law, claiming he was the victim of "racially discriminatory termination." App.140a. Tucker sought damages, punitive damages, and injunctive relief. App.150a.

Tucker, who is white, alleged that he was terminated in "direct response to [his] organization of the" chapel service and how its "message" told Faith Christian's students and parents that "they were guilty of racism." App.141a. According to Tucker, his termination and other experiences at the school, including racial slurs he allegedly received or heard about, showed he was opposing a racially hostile environment. App.148a. Tucker claimed he then suffered retaliation for this opposition when Faith Bible "removed [him] from his position as Chapel director," "banned [him] from speaking in front of students at future Chapel Meetings," removed his "Chapel planning responsibilities," and terminated his employment. App.143a-149a. Tucker further alleged that Faith Bible's stated

reasons for his termination were pretextual. App.141a.

Faith Bible moved to dismiss, arguing that the First Amendment barred courts from entanglement in such religious disputes between a church and its minister. The district court converted the motion into one for summary judgment and allowed discovery limited to resolving Tucker's ministerial status. App.100a. In his response, Tucker did not argue that genuine disputes of material fact precluded summary judgment. Instead, he attempted to characterize his undisputed responsibilities as secular in nature. For example, Tucker tried to characterize chapel services as mere "assemblies or symposiums" covering "matters of interest." App.209a. And although he conceded his obligations to "endorse Christianity," Tucker portrayed his duties as lacking religious significance because Faith Christian welcomes students from "a diversity of Christian backgrounds" rather than a single denomination. App.207a, 209a.

The district court denied summary judgment, concluding that a jury must decide whether Tucker was a "minister." App.113a. The court did not specify which material facts were genuinely disputed, suggesting only that there was a question about whether Tucker held himself out as "Director of Student Life or Chaplain." App.99a. The court ordered the parties to conduct full merits discovery into Tucker's allegations of race discrimination and pretext, and scheduled a 5-7 day jury trial.

B. Tenth Circuit proceedings

Faith Bible appealed to the Tenth Circuit and moved for a stay of district court proceedings, arguing

that merits discovery and trial would irreparably harm its First Amendment rights. While the motion was pending, Tucker served requests for production, seeking Faith Bible's internal deliberations regarding Tucker's termination, its internal deliberations about other personnel and student disciplinary actions, and "all" internal and parental communications about the disputed chapel service. App.291a. Faith Bible notified the Tenth Circuit, and a two-judge motions panel composed of Chief Judge Tymkovich and Judge Eid granted the stay, concluding that Faith Bible was likely to succeed on its appeal and would be irreparably injured absent a stay. App.98a.

On June 7, 2022, a divided merits panel dismissed the appeal for lack of jurisdiction. Judge Ebel, joined by Judge McHugh, held that the denial of summary judgment on a religious employer's ministerial exception defense is not appealable under the three-factor collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). App.55a. The majority agreed that Faith Bible met one factor, finding "no doubt" that the ministerial exception "presents an important First Amendment issue" that is "separate from the merits" of Tucker's claims. App.29a. But it found that Faith Bible failed to satisfy the other two *Cohen* factors—"conclusive[]" determination of the ministerial exception defense and "effective[] unreview[ability] on appeal from a final judgment." App.23a.

Both conclusions arose from the majority's holding that the ministerial exception protects "just from liability," and is not a threshold legal immunity from the "burdens of litigation itself." App.29a-31a. The panel said this holding was dispositive: Faith Bible would

"meet the first and third *Cohen* requirements *if* we treat[ed] the 'ministerial exception' as immunizing a religious employer" from merits litigation. App.29a (emphasis added). But since there was no such immunity, churches can be "haled into court" to defend ministerial decisions. App.39a. That is simply "the cost of living and doing business" in a "highly regulated society." App.32a. Thus, "any error a district court makes" in applying the exception can only "be reviewed and corrected after final judgment has been entered" on the merits. App.31a. The panel likewise concluded that ministerial status is not a "legal determination" for courts, but instead "quintessentially a factual determination for the jury," and one juries will "often" need to decide. App.7a, 26a.

Judge Bacharach dissented. He concluded the ministerial exception "serves as a structural safeguard against judicial meddling in religious disputes" and therefore "protects religious bodies from the suit itself." App.58a. He explained that *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC* "unmistakabl[y] * * * characterized the ministerial exception as a defense that would prevent the proceeding itself." App.68a (citing 565 U.S. 171 (2012)). Thus, an order denying summary judgment on the exception conclusively rejects a "claim to immunity from suit," and can be immediately appealed to avoid "litigation over the content and importance of religious tenets, and blurring of the line between church and state." App.77a. Judge Bacharach also concluded that Tucker "would qualify as a minister even under [Tucker's] version of the facts," and thus, Faith Bible should have received summary judgment. App.95a-96a.

Faith Bible sought rehearing en banc, which was denied 6-4. In dissent, Judges Bacharach, Tymkovich, and Eid explained that the panel's decision "reflects a fundamental misconception of the ministerial exception," and splits with numerous circuits and state high courts. App.126a (listing contrary decisions from the Third, Fourth, Fifth, Sixth, Seventh, and D.C. Circuits and several states). The ministerial exception's "structural role" in "limiting governmental power over religious matters" "protects a religious body from the suit itself." App.126a. "Without that protection," they warned, "religious bodies will inevitably incur protracted litigation over matters of religion." App.126a. By "enmesh[ing] the courts in ecclesiastical disputes," the panel "extends judicial meddling in religious matters—the very evil that underlays the recognition of the ministerial exception." App.130a, 135a. Thus, they concluded, "[t]he stakes" are not only "exceptionally important for religious bodies," but also "implicate important structural issues at the heart of the Religion Clauses." App.126a, 137a.

REASONS FOR GRANTING THE PETITION

I. The decision below creates multiple splits over the scope of the Religion Clauses' bar on judicial interference in church leadership disputes.

The panel's decision creates three important splits over the scope of the Religion Clauses. The panel's first and foundational error is its holding that the ministerial exception protects "just from liability," not from merits discovery or trial. App.29a. This holding has now been joined by the Second Circuit and the Massachusetts Supreme Judicial Court. But it splits with

every other federal circuit and state high court to address the issue—thirteen in all. These courts treat the Religion Clauses' guarantee of religious independence as a threshold legal question that, in the nature of an immunity, must be resolved before allowing litigation over the merits of a plaintiff's underlying claim.

The second split concerns whether ministerial status is a legal question for the court or a fact question for the jury. The panel held the latter, splitting with "every federal or state appellate court to address the issue." App.134a. Neither the panel nor Tucker were able to identify a single case submitting the question of ministerial status to a jury.

The third split concerns whether the denial of a dispositive motion to invoke Religion Clauses defenses is appealable on an interlocutory basis. The panel held that interlocutory appeal is not available based on its view that the ministerial exception provides no immunity from merits proceedings. Thus, the exception must await appeal until after merits discovery, a jury trial, and final judgment. That conclusion is now the subject of a 6-3 split among the federal circuits and state high courts.

These splits reflect a square and acknowledged conflict over the scope of the Religion Clauses. Each independently warrants review.

A. The decision below created what is now a 13-3 split in holding that the Religion Clauses bar only the imposition of liability and not merits discovery or trial.

This Court has long recognized that an immunity is not "a mere defense to liability," but instead an "entitlement not to stand trial or face the other burdens

of litigation," including "broad-reaching discovery." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). That right is "effectively lost if a case is erroneously permitted to go to trial." *Ibid.* "Immunity-related issues, th[is] Court has several times instructed, should be decided at the earliest opportunity." *Osborn* v. *Haley*, 549 U.S. 225, 238, 253 (2007).

The same is true of constitutional claims that "contest[] the very authority of the Government to hale [the defendant] into court to face trial." *Abney* v. *United States*, 431 U.S. 651, 659 (1977) (Double Jeopardy Clause); see also *Helstoski* v. *Meanor*, 442 U.S. 500, 507 (1979) (Speech or Debate Clause). In such cases, the "full protection" of the right "would be lost" if the defendant were "forced to 'run the gauntlet'" and "endure a trial" that the Constitution prohibits. *Abney*, 431 U.S. at 662.

1. The Tenth Circuit concluded the ministerial exception leaves churches to run the gauntlet. The panel held that the exception protects "just from liability," and not against "the burdens of litigation itself," such as merits discovery and "being haled into court" for trial. App.29a, 31a, 39a. Because the exception does not "immunize[] a religious employer from ever having to litigate its minister's employment discrimination claims," App.47a., "*any* error the district court makes in failing to apply [the exception] can be effectively reviewed and corrected through an appeal *after* final judgment is entered in the case," App.52a (emphases added); 32a n.12.

Both the Second Circuit and Massachusetts' high court have now adopted that conclusion. See *Belya* v. *Kapral*, 45 F.4th 621, 633 (2d Cir. 2022) (citing panel

opinion, concluding church autonomy "provides religious associations neither an immunity from discovery nor * * * trial" but "serves more as an ordinary defense to liability") (cleaned up); *Doe* v. *Roman Catholic Bishop of Springfield*, 190 N.E.3d 1035, 1044 (Mass. 2022) (citing panel opinion, concluding church autonomy protects against liability only).

2. Thirteen federal circuits and state high courts disagree. The First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, and the Connecticut, Kentucky, North Carolina, Texas, and District of Columbia high courts, have determined that the Religion Clauses provide protection—similar to an immunity—against the burdens of litigation.

The "pioneering cases" that first recognized the ministerial exception emphasized that it bars merits discovery and trial. *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (citing *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir. 1972), and *Rayburn* v. *General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985)). The Fifth Circuit explained in *McClure* that judicial "investigation and review" of a minister's Title VII claim would, without more, "produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." 460 F.2d at 560. Similarly, Judge Wilkinson warned for the Fourth Circuit that in Title VII lawsuits by ministers, "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, [and] cross-examination," unleashing the "full panoply of legal process designed to probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171. Relying on this Court's guidance in *NLRB* v. *Catholic Bishop*, the

Fourth Circuit determined this result was unconstitutional because "[i]t is not only the conclusions that may be reached" in litigation, but "the very process of inquiry" that can "infringe on rights guaranteed by the Religion Clauses." *Id.* at 1171 (quoting 440 U.S. 490, 502 (1979)). "[P]itting church and state as adversaries" in a "protracted legal process" would exert improper pressure to make ministerial decisions not based on "doctrinal assessments" but to "avoid[] litigation or bureaucratic entanglement." *Ibid.*

Until the decision below, federal circuits uniformly agreed. For instance, the Seventh Circuit explained that the denial of a Religion Clauses defense was "akin to a denial of official immunity," which protects "from the travails of a trial and not just from an adverse judgment." *McCarthy* v. *Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). "Adjudicating" the merits of claims subject to the ministerial exception causes "impermissible intrusion into, and excessive entanglement with" a religious group's autonomy through the "prejudicial effects of incremental litigation." *Demkovich* v. *St. Andrew the Apostle Parish*, 3 F.4th 968, 980-982 (7th Cir. 2021) (en banc).

Similarly, the D.C. Circuit relied on this Court's guidance in *Catholic Bishop* to hold that "the EEOC's two-year investigation" of a claim subject to the ministerial exception, "together with the extensive pretrial inquiries and the trial itself, constituted an impermissible entanglement with [religious] judgments." *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 466-467 (D.C. Cir. 1996). It explained—contrary to the panel below—that being "deposed, interrogated, and *haled into court*" over ministerial decisions puts impermissible pressure on those choices. *Ibid.* (emphasis added).

Other circuits concur. See *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (chaplaincy decisions are "*per se* religious matters and cannot be reviewed by civil courts"; "the very process of inquiry" would violate Religion Clauses) (quoting *Catholic Bishop*, 440 U.S. at 502); *Natal* v. *Christian & Missionary All.*, 878 F.2d 1575, 1577-1578 (1st Cir. 1989) (civil court cannot "probe into a religious body's selection and retention of clergymen"; the "inquiry" itself is barred).

Several circuits have emphasized that, far from an ordinary defense to liability, the Religion Clauses provide a structural check on judicial interference in internal religious matters. The Sixth Circuit held that the exception is not merely a "personal" protection, but a "structural limitation imposed on the government by the Religion Clauses" that "categorically prohibits" judicial "involve[ment] in religious leadership disputes." *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). See also *Lee* v. *Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (agreeing with *Conlon* that "the exception is rooted in constitutional limits on judicial authority"). Under this structural limitation, "even if a religious organization wants" adjudication of ministerial disputes, a federal court has an independent duty "not [to] allow itself to get dragged in[]." *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated in part on other grounds by Hosanna-Tabor*, 565 U.S. 171. See also *Whole Woman's Health* v. *Smith*, 896 F.3d 362, 367, 373-374 (5th Cir. 2018), *cert. denied* 139 S. Ct. 1170 (2019) (citing *Hosanna-Tabor* to conclude that the Religion Clauses' "structural protection" applies against "judicial discovery procedures").

Four states and the District of Columbia have similarly held that the Religion Clauses provide "protection against the 'cost of trial' and the 'burdens of broad-reaching discovery.'" *Presbyterian Church (U.S.A.)* v. *Edwards*, 566 S.W.3d 175, 179 (Ky. 2018); *In re Diocese of Lubbock*, 624 S.W.3d 506, 515-516 (Tex. 2021) (church autonomy bars "any investigation" by courts of "the internal decision making of a church judicatory body"); *Dayner* v. *Archdiocese of Hartford*, 23 A.3d 1192, 1199-1200 (Conn. 2011), *abrogated in part on other grounds by Trinity Christian Sch.* v. *Commission on Hum. Rights*, 189 A.3d 79 (Conn. 2018) ("the very act of litigating" a ministerial dispute is barred, "making the discovery and trial process itself a [F]irst [A]mendment violation"); *Harris* v. *Matthews*, 643 S.E.2d 566, 570 (N.C. 2007) ("substantial" church autonomy rights are "irreparably injured" by allowing merits proceedings); *United Methodist Church* v. *White*, 571 A.2d 790, 792-793 (D.C. 1990) (Religion Clauses "grant churches an immunity from civil [merits] discovery").

Scholars agree that the ministerial exception is not limited to liability. For instance, Professors Douglas Laycock and Thomas Berg explained below that "the ministerial exception is best understood as an immunity analogous to immunities for government officials." Laycock & Berg Amicus C.A. Br. 2. Other scholars concur. See, *e.g.*, Peter Smith & Robert Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018) (exception "limits the power of the government not only to issue and enforce a binding judgment on [religious] matters but also merely to entertain such questions"); Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First

Amend. L. Rev. 233, 293-294 (2012) (similar); Carl H. Esbeck, et. al., *Religious Freedom, Church-State Separation, & the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 189-190 (2011) (similar). Indeed, a coauthor of the sole article that the panel claimed supported its conclusion filed amicus briefs *in this case* explaining that the panel was mistaken. App.132a-133a.

The conflict between the Tenth Circuit's opinion and other courts is both square and acknowledged. The panel noted its liability-only approach "contradicts" the "structural" holdings of the Third, Sixth, and Seventh Circuits. App.42a. The Second Circuit in *Belya* confirmed that several circuits have "draw[n] explicit parallels between qualified immunity and church autonomy." 45 F.4th at 633 & n.12. Massachusetts likewise acknowledged the split on this score. *Doe*, 190 N.E.3d at 1044. And the dissents below highlight contrary authority from the Third, Fourth, Sixth, Seventh, and D.C. Circuits, among others. App.64a, 66a-67a, 129a-130a, 131a.

3. The panel's decision also conflicts with this Court's precedents. As noted above, this Court has long held that the "very process of inquiry" into religious matters, separate and apart from liability determinations, can violate the Religion Clauses. *Catholic Bishop*, 440 U.S. at 502. "[R]eligious controversies are not the proper subject of civil court inquiry"—"[f]or civil courts to analyze" the internal "ecclesiastical actions of a church" would require "exactly the inquiry that the First Amendment prohibits." *Serbian E. Orthodox Diocese for U.S. & Can.* v. *Milivojevich*, 426 U.S. 696, 713 (1976). On "matters of church government as well as those of faith and doctrine," religious groups must have "independence from secular control

or manipulation." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

Hosanna-Tabor explained that ministerial selection is a "strictly ecclesiastical" decision and that the "Religion Clauses bar the government from interfering with th[at] decision." 565 U.S. at 181, 187 (quoting *Kedroff*, 344 U.S. at 119); see also *id.* at 196 ("the ministerial exception *bars such a suit*" (emphasis added)). Even "inquiring into" a church's leadership decisions is "unconstitutional[]." *Id.* at 187. As Justices Alito and Kagan explained in their concurrence, the "mere adjudication" of a minister's Title VII claim against his church "pose[s] grave problems for religious autonomy." *Id.* at 205-206.

This of course does not mean that religious groups "enjoy a *general* immunity from secular laws." *Our Lady*, 140 S. Ct. at 2060 (emphasis added). Churches may not commission battery or commit securities fraud. But the First Amendment does "protect their autonomy with respect to internal management decisions," including "the selection of the individuals who play certain key roles" for their "central mission." *Ibid.* For courts "even to influence" such matters is something the "First Amendment outlaws." *Ibid.* Thus, courts are "bound to stay out of [ministerial] employment disputes" altogether. *Ibid.*

The panel below failed to grapple with any of this, pointing instead to *Hosanna-Tabor*'s footnote 4, which described the ministerial exception as an affirmative defense rather than a "jurisdictional bar." App.9a. But that is a red herring. Many immunities are not jurisdictional, and some jurisdictional issues do not provide immunities. See, *e.g.*, App.129a; see also *Petruska* v.

Gannon Univ., 462 F.3d 294, 302 (3d Cir. 2006) (ministerial exception is "akin to a government official's defense of qualified immunity"—"barr[ing] adjudication of" the merits, not jurisdiction).

The relevant question is whether the Religion Clauses limit the "process of inquiry" into ministerial employment disputes, or instead allow the "full panoply of legal process" to "probe the mind of the church in the selection of its ministers." *Rayburn*, 772 F.2d at 1171 (quoting *Catholic Bishop*). The Tenth Circuit holds the latter, breaking from this Court's guidance and that of every court to previously consider the issue.

B. The decision below created a 5-1 split by treating the ministerial exception as a jury question.

The Tenth Circuit likewise holds that ministerial status is not a threshold "legal determination," but rather a "binary factual question" that is "quintessentially" a "determination for the jury." App.49a, 26a n.8; see also App.7a, 16a-17a, 19a n.4, 48a-49a, 51a-52a, 53a. As the rehearing dissent explained, that conclusion splits with "every federal or state appellate court to address the issue," which have all "characterized ministerial status as a question of law." App.134a.

The Fifth, Sixth, and Seventh Circuits concluded that determining the "status of employees as ministers" is "a legal conclusion for th[e] court." *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999); *Conlon*, 777 F.3d at 833 ("whether the [ministerial] exception attaches at all is a pure question of law"); *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657,

662 (7th Cir. 2018) (affirming that application of exception to "given factual scenario is a question of law," since "ultimate question" of "whether [plaintiff] was a ministerial employee" is "legal"). The Kentucky and Washington high courts agree. *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 608-609 (Ky. 2014) (whether plaintiff "is a ministerial employee is a question of law" that must "be handled as a threshold matter" and "resolved expeditiously at the beginning of litigation to minimize the possibility of constitutional injury"); *Woods* v. *Seattle's Union Gospel Mission*, 481 P.3d 1060, 1070 (Wash. 2021) ("'minister' is a legal question").

This Court's ministerial exception decisions also resolved ministerial status as a matter of law. *Hosanna-Tabor*, 565 U.S. at 180-181, 196; *Our Lady*, 140 S. Ct. at 2056 n.1. This Court "called on courts"—not juries—"to determine whether each particular position implicate[s] the fundamental purpose of the exception." *Our Lady*, 140 S. Ct. at 2067. While that determination considers "all relevant circumstances," *id.*, doing so is necessarily a legal judgment. Thus, the *Our Lady* decision granted summary judgment under the ministerial exception despite "differences of opinion on certain facts" because no "*material* fact [was] genuinely in dispute." *Id.* at 2056 n.1.

The panel failed to identify any case that has assigned such sensitive determinations to a jury. But the panel predicts that it will now "often" be the case that the jury will "decide whether an employee qualifies as a 'minister.'" App.19a n.4. That exacerbates "judicial meddling in religious matters—the very evil that underlays recognition of the ministerial exception." App.135a.

C. The decision below created what is now a 6-3 split over whether denial of a dispositive motion based in the Religion Clauses is appealable on an interlocutory basis.

The panel's erroneous conclusion that the ministerial exception is not a threshold legal immunity fatally infected its holding that the exception is ineligible for interlocutory appeal. The Second Circuit and Massachusetts have since agreed. But the Fifth Circuit and Seventh Circuit allow interlocutory review of church autonomy defenses, as do Connecticut, Kentucky, North Carolina, and the District of Columbia.

1. Under *Cohen*'s collateral-order doctrine, pretrial orders denying an immunity are immediately appealable under 28 U.S.C. 1291 because they (1) "conclusively determine whether the defendant is entitled to immunity from suit," (2) the "immunity issue is both important and completely separate from the merits of the action," and (3) "this question could not be effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Plumhoff* v. *Rickard*, 572 U.S. 765, 772 (2014). This Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage of the litigation." *Wood* v. *Moss*, 572 U.S. 744, 755 n.4 (2014) (cleaned up). A "substantial claim" to immunity is therefore "an order appealable before final judgment." *Mitchell*, 472 U.S. at 525.

Here, the panel's holding that no immunity existed was dispositive. It found the second *Cohen* criteria satisfied, since "there is no doubt" that "decisions denying

a religious employer summary judgment on the 'ministerial exception'" present "an important First Amendment issue" that is "separate from the merits of an employee's discrimination claims." App.29a.

But the panel claimed that the ministerial exception flunked "the first and third *Cohen* requirements" because the ministerial exception was not a legal immunity from merits litigation. App.29a-30a, 53a. The panel emphasized this determination was dispositive: Faith Bible would have met both requirements "*if* we treat the 'ministerial exception' as immunizing a religious employer" from merits litigation. App.29a (emphasis added). But because the panel held that the exception acts only to "protect a religious employer from *liability*," it concluded that "any error the district court makes in failing to apply" the exception to bar a minister's claims "can be effectively reviewed and corrected through an appeal after final judgment is entered." App.52a (emphasis in original).

The Second Circuit and Massachusetts followed the panel below. Because the Second Circuit agreed that the Religion Clauses provide "neither an immunity from discovery nor * * * trial" on the merits, it likewise agreed that *Cohen* does not permit interlocutory appeal. *Belya*, 45 F.4th at 633. The Massachusetts Supreme Judicial Court reached a similar conclusion. *Doe*, 190 N.E.3d at 1043-1044.

2. The Fifth and Seventh Circuits go the other way. In *Whole Woman's Health*, the Fifth Circuit permitted interlocutory appeal from the denial of church autonomy defenses, holding that "interlocutory court orders bearing on First Amendment rights remain subject to appeal pursuant to the collateral order doctrine." 896

F.3d at 368 (collecting cases). Such rights were threatened where the district court ordered Catholic bishops to produce decades of internal communications pursuant to a third-party subpoena. *Id.* at 366. Citing the "structural protection afforded religious organizations and practice under the Constitution," the court held that "[t]he standards of the collateral order doctrine are met" because "the consequence of forced discovery here is 'effectively unreviewable' on appeal from the final judgment." *Id.* at 367, 373.

In *McCarthy*, the Seventh Circuit likewise allowed an interlocutory appeal where the district court "ruled that a federal jury shall decide" whether a defendant is "a member of a Roman Catholic religious order." 714 F.3d at 976. Because that decision was "closely akin to a denial of official immunity"—an "immunity from the travails of a trial and not just from an adverse judgment"—the order was "within our appellate jurisdiction under the collateral order doctrine." *Id.* at 974-975. The court reasoned that the erroneous denial of an immunity defense "irrevocably deprive[s]" the defendant of "one of the benefits * * * that his immunity was intended to give him"—the "freedom from having to undergo a trial." *Id.* at 975. And the "harm" of "governmental intrusion into religious affairs" would be similarly "irreparable," "just as in the other types of case in which the collateral order doctrine allows interlocutory appeals." *Id.* at 974-976.[3]

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[3] The panel ignored *McCarthy*, instead citing *Herx* v. *Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085 (7th Cir. 2014). App.35a-36a. But *Herx* nowhere disavowed *McCarthy*, instead "hold[ing] only" that the defendant's "few sentences" of briefing failed to carry its burden of persuasion for interlocutory jurisdiction. 772 F.3d at 1090-1091. That is not this case. App.72a n.8.

The Connecticut, Kentucky, North Carolina, and District of Columbia high courts likewise allow interlocutory appeal of denied ministerial exception and church autonomy defenses. *Dayner*, 23 A.3d at 1200 (allowing "interlocutory appeal from the denial" of ministerial exception); *White*, 571 A.2d at 793 (under *Cohen*, denial of exception "is immediately appealable as a collateral order"); *Kirby*, 426 S.W.3d at 609 n.45 (denial of exception "is appropriate for interlocutory appeal"); *Harris*, 643 S.E.2d at 569-570 ("immediate appeal is appropriate").[4] While state courts of course have their own rules governing interlocutory appeal, their understanding of the scope of the Religion Clauses drives how they apply those rules. The dispositive difference is whether they understand the clauses to provide immunity from merits discovery and trial.

3. The panel's opinion is also inconsistent with this Court's precedent. This Court has "often" permitted interlocutory appeals to determine "the proper scope of First Amendment protections," *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55 (1989) (collecting cases), including in the context of church autonomy rights, *Roman Catholic Archdiocese of San Juan* v. *Feliciano*, 140 S. Ct. 696 (2020) (considering under 28 U.S.C. 1258 an interlocutory appeal of an order foreclosing Religion Clauses defenses).

This special care where First Amendment and other "constitutional rights are concerned" "reflect[s] the familiar principle of statutory construction" that

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[4] Legal scholars agree interlocutory appeal is appropriate. See *supra* at 20-21.

courts "should construe statutes (here, § 1291) to foster harmony with * * * constitutional law." *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994). The statutory "policy * * * to avoid piecemeal litigation" must therefore "be reconciled with policies embodied in * * * the Constitution." *Id.*; accord *McClendon* v. *City of Albuquerque*, 630 F.3d 1288, 1296 (10th Cir. 2011) (Gorsuch, J.); see also *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (permitting interlocutory appeal of "a claim to a fundamental constitutional protection").

The Religion Clauses are core limitations on state power that "lie at the foundation of our political principles" and safeguard the "broad and sound view of the relations of church and state under our system of laws." *Watson* v. *Jones*, 80 U.S. 679 (1871) (applying federal common law); *Kedroff*, 344 U.S. at 116 (adopting *Watson*'s analysis as constitutional). Our system of government thereby reflects a "broad principle" of "church autonomy" that flatly "outlaws * * * [s]tate interference in that sphere." *Our Lady*, 140 S. Ct. at 2060-2061. The panel did not explain why such fundamental rights are categorically ineligible for appellate review while many less weighty interests are reviewed regularly. See, *e.g.*, *Doe* v. *MIT*, 46 F.4th 61, 65-66 (1st Cir. 2022) (collecting cases from nine circuits allowing interlocutory appeal of orders denying pseudonymity).

Instead, the panel and the Second Circuit resisted this conclusion by reference to Justice Alito's statement respecting the denial of certiorari in *Gordon College* v. *DeWeese-Boyd*, 142 S. Ct. 952 (2022). App.123a (statement supporting en banc denial); *Belya*, 45 F.4th at 633. But *Gordon College* is distinguishable. There,

the questions presented solely concerned the application of the ministerial exception, and the "interlocutory posture" of the case—under 28 U.S.C. 1257, not 1291—would have unduly "complicate[d]" review of those questions. 142 S. Ct. at 955. Here, the lead issue *is* the interlocutory posture—and particularly whether the proper scope of the Religion Clauses requires immediate review to avoid the irreparable harm of merits discovery and trial. Once that scope is understood to provide an immunity grounded in a structural constitutional "claim of right not to stand trial," interlocutory appeal is required. *Mitchell*, 472 U.S. at 525. Thus, as in other immunity cases, the "source of the [Tenth] Circuit's confusion was its mistaken conception of the scope of protection afforded by" the claimed immunity. *Behrens* v. *Pelletier*, 516 U.S. 299, 308 (1996).

II. The rulings below failed to properly apply the ministerial exception.

Certiorari is also warranted to resolve the application of the ministerial exception here. See, *e.g.*, *Mitchell*, 472 U.S. at 528-530 (reversing denial of jurisdiction and resolving the "claim of immunity"). As Judge Bacharach explained, that the exception applies here should have been obvious, as Tucker's own representations to the Tenth Circuit suffice to confirm his ministerial status. App.135a-136a; see also App.83a-93a. But the orders below show that courts need this Court's guidance on how the ministerial exception should be applied.

Two errors stand out. First, the panel dismissed objective evidence of Tucker's job responsibilities—including his contract, job description, and teacher handbook—as "self-serving documents." App.54a. But

this Court has explained that a religious institution's "definition and explanation" of an employee's role is "important" to avoid religious entanglement, particularly in "a country with the religious diversity of the United States." *Our Lady*, 140 S. Ct. at 2066; accord *Starkey* v. *Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931, 941 (7th Cir. 2022) (ministerial status confirmed by employment documents confirming what minister was "entrusted to do").

Second, the panel refused to evaluate the district court's summary assertion that unidentified fact issues prevented finding ministerial status. App.54a n.21. But simply asserting that "material issues of fact remain" does not preclude an appellate court from resolving the "essentially legal immunity question." *Behrens*, 516 U.S. at 304, 306, 312-313 (cleaned up). Here, the panel below should have conducted its own review of the record to answer that legal question. See *id.* at 313; see also *Bose Corp.* v. *Consumers Union of U.S.*, 466 U.S. 485, 499 (1984) ("in cases raising First Amendment issues" appellate courts must "make an independent examination of the entire record"). It instead sent the case to a jury trial.

If these errors stand uncorrected, the panel decision will become a roadmap to routine end runs around the ministerial exception. The errors will also cause constitutional injury here. On remand, Respondent's discovery requests will probe—and his arguments will require a jury to second-guess—Faith Bible's doctrines about racial justice and racial guilt, as well as its internal assessment of Tucker's departures from church teaching and insubordination to church authority. As this Court has recognized since *Watson* v. *Jones*, that is not permissible in civil courts.

III. The scope of the Religion Clauses' bar on judicial interference in religious disputes is a vital and recurring question of nationwide importance.

The panel majority and dissent united on one point: there is "no doubt" this appeal "presents an important First Amendment issue." App.29a, 78a. They are right. The "important" First Amendment issues in this case carry sweeping implications, both for the autonomy of religious organizations and for government entities seeking to avoid entanglement.

1. The stakes for religious organizations are high because the decision below turns a fundamental right into a pleading game. An unhappy minister in the Tenth or Second Circuits can now relabel even *chaplaincy* duties in secular terms to evade the ministerial exception and force the case to a jury trial, with no appellate recourse until the case is concluded. That subjects religious organizations to the "prejudicial effects of incremental litigation," *Demkovich*, 3 F.4th at 982—which is often precisely the point.

Playing word games is now the strategy du jour for plaintiffs trying to conjure fact disputes in ministerial exception cases across the country. In *Demkovich*, the Seventh Circuit noted that the plaintiff—a church music director—"repackaged his allegations of discriminatory termination as hostile work environment claims" to evade the ministerial exception. 3 F.4th at 982. In *Starkey*, the plaintiff insisted that she was not a minister—despite agreeing to serve as a "minister of the faith" in senior leadership—because she allegedly never performed the religious duties she was hired to do. 41 F.4th at 940-941. Tucker himself offers a master class in strategic redefinition: chapel services become

"pep rallies," courses in Christian apologetics become merely "comparative-religion course[s]," and a chaplain becomes "foremost, a *science* teacher." Tucker C.A. Br. 4, 44, 46.

Barring the door to prompt interlocutory review incentivizes that artful pleading, encouraging plaintiffs to turn litigation into leverage by "pitting church and state as adversaries" in a "protracted legal process" that will last years—and will now often include a jury trial on ministerial status. See *Rayburn*, 772 F.2d at 1171. A more burdensome and entangling result is difficult to imagine. But it is now the law of the Tenth and Second Circuits.

It is a "tax on religious liberty" to "forc[e] religious institutions to defend themselves on matters of internal governance." *McRaney* v. *North Am. Mission Bd.*, 980 F.3d 1066, 1074 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) (collecting cases). Without a path to interlocutory review, that tax is multiplied to such a degree that even longstanding religious organizations eventually abandon meritorious defenses and settle their cases. See, *e.g.*, Patrick Dorrian, "Religious College, Professor End Bias Suit Over LGBTQ Advocacy," *Bloomberg Law*, Jan. 18, 2023, https://perma.cc/ARL6-88N4. Absent this Court's intervention, many more religious organizations across the country will likewise succumb to the punishing and "prejudicial effects of incremental litigation." *Demkovich*, 3 F.4th at 982.

Even worse, "uncertainty about whether [a] ministerial designation will be rejected"—and a "corresponding fear of liability"—may cause religious groups to "conform [their] beliefs and practices regarding 'ministers' to the prevailing secular understanding."

Hosanna-Tabor, 565 U.S. at 197 (Thomas, J., concurring). "These are certainly dangers that the First Amendment was designed to guard against." *Id.*

2. The decision below also undermines a host of procedural tools that lower courts and government agencies have developed to avoid religious entanglement. These tools for managing church-state cases are grounded in an understanding of the scope of the Religion Clauses rejected by the opinion below. Allowing that decision to stand will thus reverberate—and foment church-state conflict—far beyond the context of interlocutory appeals.

For example: Courts "regularly bifurcate discovery in ministerial cases" by focusing initial discovery and dispositive motions solely on resolving ministerial status. *Fitzgerald* v. *Roncalli High Sch.*, No. 1:19-cv-04291, 2021 WL 4539199, at *1 (S.D. Ind. Sept. 30, 2021) (collecting cases and noting the court's inability to find "a single ministerial exception case in which a court denied bifurcation"). A primary rationale for this practice is that it "avoid[s] judicial entanglement in the internal organization of religious institutions." *Ibid.* Not so in the Tenth and Second Circuits, where nothing short of the "ultimate liability" determination offends the First Amendment. App.41a; see also *Belya* v. *Kapral*, No. 20-cv-6597 (S.D.N.Y. July 27, 2021), Dkt. 66 (rejecting bifurcation).

Similarly, courts have long avoided overstepping "constitutional limits on judicial authority" by raising the ministerial exception *sua sponte* when parties failed to do so, see *Sixth Mount Zion*, 903 F.3d at 118 n.4, *Catholic Univ.*, 83 F.3d at 459-460; and refusing to ignore it as waived by a party, *Conlon*, 777 F.3d at

836, *Petruska*, 462 F.3d at 296. But the Tenth and Second Circuits' reconceptualization of the Religion Clauses abandons these safeguards and pushes courts into entanglement.

Courts won't be the only ones confused. Enforcement agencies like the EEOC have learned over time to process ministerial employment actions in a manner that respects the Religion Clauses. For instance, the EEOC litigation manual explains that the ministerial exception "is not just a legal defense" for religious groups, but a constitutional "obligat[ion]" on "the government and courts" that should "be resolved at the earliest possible stage *before* reaching the underlying discrimination claim." EEOC Compliance Manual § 12 (emphases added). This was not always the case. *Hosanna-Tabor*, 565 U.S. at 189 (EEOC denying the Religion Clauses created any such obligation); *Catholic Univ.*, 83 F.3d at 466-467 (two-year EEOC investigations into minister's Title VII claim violated the First Amendment). In at least two circuits, there is now cause to think that it will not remain so.

Finally, the Tenth Circuit's decision also undermines other forms of appellate review. For instance, by making ministerial status "a factual determination for the jury," App.26a, the panel effectively barred the door to relief under 28 U.S.C. 1292(b), which requires showing that the order "involves a controlling question of law."

Thus, the Tenth Circuit's decision not only forecloses interlocutory appellate review, it erodes the procedural tools that courts otherwise use to prevent judicial entanglement in religious disputes. The end result will ignite the very church-state conflicts that the Establishment Clause forbids as a structural matter

and the Free Exercise Clause proscribes as a matter of right. And in an era of increasing societal polarization, it will stoke even more polarized fights over religion-related issues.

* * *

The panel below concluded civil courts should adjudicate religious leadership disputes under "the same standards as all other institutions and employers in America." App.32a. To the majority, "requiring a religious employer" to endure the burdens of a minister's litigation under "generally applicable employment nondiscrimination" laws is just "the cost of living and doing business in a civilized and highly regulated society." App.32a. That conclusion is the kind of "remarkable" and "untenable" view of church-minister relations that this Court unanimously rejected for failing to reflect the "special solicitude" that the Religion Clauses provide for "the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189.

CONCLUSION

The Court should grant the petition.

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