

APPENDIX

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Christopher M. Wolpert
Clerk of Court

PUBLISH

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GREGORY TUCKER,

Plaintiff-Appellee,

v.

FAITH BIBLE CHAPEL
INTERNATIONAL, d/b/a Faith
Christian Academy, Inc.,

Defendant - Appellant.

No. 20-1230

EUGENE VOLOKH; ROBERT J.
PUSHAW; RICHARD W. GAR-
NETT; ROBERT COCHRAN;
ELIZABETH A. CLARK; THE AS-
SOCIATION OF CHRISTIAN
SCHOOLS INTERNATIONAL;
THE COLORADO CATHOLIC
CONFERENCE; RELIGIOUS LIB-
ERTY SCHOLARS; JEWISH COA-
LITION FOR RELIGIOUS LIB-
ERTY; PROFESSOR ASMA UD-
DIN; NATIONAL WOMEN'S LAW
CENTER; AMERICAN FEDERA-
TION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES;

AMERICAN SEXUAL HEALTH ASSOCIATION; CALIFORNIA WOMEN LAWYERS; DC COALITION AGAINST DOMESTIC VIOLENCE; DESIREE ALLIANCE; EQUAL RIGHTS ADVOCATES; EQUALITY CALIFORNIA; EQUITY FORWARD; FORGE, INC.; GLBTQ LEGAL ADVOCATES & DEFENDERS; HUMAN RIGHTS CAMPAIGN; IN OUR OWN VOICE; NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA; KWH LAW CENTER FOR SOCIAL JUSTICE AND CHANGE; LATINOJUSTICE PRLDEF; LEGAL AID AT WORK; LEGAL VOICE; MUSLIMS FOR PROGRESSIVE VALUES; NARAL PRO-CHOICE AMERICA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NEW YORK LAWYERS FOR THE PUBLIC INTEREST; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; REPRODUCTIVE JUSTICE ACTION COLLECTIVE;

SERVICE EMPLOYEES INTERNATIONAL UNION; SPARK REPRODUCTIVE JUSTICE NOW!, INC.; UJIMA INC.; THE NATIONAL CENTER ON VIOLENCE AGAINST WOMEN IN THE BLACK COMMUNITY; WOMEN EMPLOYED; WOMEN LAWYERS ON GUARD INC.; WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; WOMEN'S BAR ASSOCIATION OF THE STATES OF NEW YORK; WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS; THE WOMEN'S LAW CENTER OF MARYLAND; WOMAN'S LAW PROJECT; WV FREE, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND THE INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION,

Amici Curiae.

**Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CV-01652-RBJ-STV)**

Daniel H. Blomberg (Daniel D. Benson and Christopher Mills, The Becket Fund for Religious Liberty, Washington, D.C., and Christopher J. Conant and Robert W. Hatch, Hatch Ray Olsen Conant LLC, Denver, Colorado, with him on the briefs), The Becket Fund for Religious Liberty, Washington, D.C. for Defendant-Appellant.

Bradley Girard (Richard B. Katskee, Americans United for Separation of Church and State, and Bradley A. Levin, Jeremy A. Sitcoff, and Peter G. Friesen, Levin Sitcoff, PC, Denver, CO, with him on the brief), Americans United for Separation of Church and State, Washington, D.C., for Plaintiff-Appellee.

Before **BACHARACH**, **EBEL**, and **McHUGH**,
Circuit Judges

EBEL, Circuit Judge.

This appeal presents a single jurisdictional issue: Whether Appellant Faith Bible Chapel International can bring an immediate appeal under the collateral order doctrine challenging the district court's interlocutory decision to deny Faith summary judgment on its

affirmative “ministerial exception” defense. Faith operates a school, Faith Christian Academy (“Faith Christian”). Plaintiff Gregory Tucker, a former high school teacher and administrator/chaplain, alleges Faith Christian fired him in violation of Title VII (and Colorado common law) for opposing alleged race discrimination at the school. As a religious employer, Faith Christian generally must comply with anti-discrimination employment laws. But under the affirmative “ministerial exception” defense, those anti-discrimination laws do not apply to employment disputes between a religious employer and its ministers. Here, Faith Christian defended against Tucker’s race discrimination claims by asserting that he was a “minister” for purposes of the exception.

The Supreme Court deems the determination of whether an employee is a “minister” to be a fact-intensive inquiry that turns on the particular circumstances of a given case. Here, after permitting limited discovery on only the “ministerial exception,” the district court ruled that, because there are genuinely disputed material facts, a jury would have to resolve whether Tucker was a “minister.” Summary judgment for Faith Christian, therefore, was not warranted. Faith Christian immediately appealed that decision, seeking to invoke our jurisdiction under the collateral order doctrine.

The Supreme Court has stated time and again that the collateral order doctrine permits a narrow exception to the usual 28 U.S.C. § 1291 requirement that we only review appeals taken from final judgments entered at the end of litigation. In deciding whether the collateral order doctrine permits immediate appeals

from the category of orders at issue here—orders denying summary judgment on the “ministerial exception” because there remain disputed issues of material fact—we must weigh the benefit of an immediate appeal against the cost and disruption of allowing appeals amid ongoing litigation. After conducting that balancing, we determine that we do not have jurisdiction to consider this interlocutory appeal. Instead, we conclude the category of orders at issue here can be adequately reviewed at the conclusion of litigation.

In deciding that we lack jurisdiction, we reject Faith Christian’s arguments, which the dissent would adopt. Faith Christian seeks to justify an immediate appeal first by making the novel argument that the “ministerial exception” not only protects religious employers from liability on a minister’s employment discrimination claims, but further immunizes religious employers altogether from the burdens of even having to litigate such claims. In making this argument, Faith Christian deems the “ministerial exception” to be a semi-jurisdictional “structural” limitation on courts’ authority to hear Title VII claims. On that basis, Faith Christian then draws an analogy between the decision to deny Faith Christian summary judgment on its “ministerial exception” defense and those immediately appealable decisions to deny government officials qualified immunity from suit under 42 U.S.C. § 1983.

We reject both steps of Faith Christian’s argument. The Supreme Court has made clear that the “ministerial exception” is an affirmative defense to employment discrimination claims, rather than a jurisdictional limitation on the authority of courts to hear such claims. Further, the “ministerial exception” is not

analogous to qualified immunity available to government officials. The Supreme Court has only permitted immediate appeals from the denial of qualified immunity when the issue presented for appeal is one of law, not fact. Here, on the other hand, the critical question for purposes of the “ministerial exception” is the fact-intensive inquiry into whether Tucker was a minister.

Moreover, the reason that the Supreme Court permits immediate appeals from the denial of qualified immunity is to protect, not individual government officials, but rather the public’s interest in a functioning government. That public interest is not present when a private religious employer seeks to avoid liability under Title VII from employment discrimination claims.

Faith Christian’s (and the dissent’s) argument for application of the collateral order doctrine here contradicts several well-established lines of Supreme Court precedent establishing that

- the question of whether an employee is a minister is a fact-intensive inquiry, rather than a legal determination, *see Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066–67 (2020);
- the collateral order doctrine applies only narrowly, usually to review legal, rather than factual, determinations, *see Johnson v. Jones*, 515 U.S. 304, 307, 309–10, 313–18 (1995);
- qualified immunity protects only government officials, *see Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992), not private religious employers; and

- the “ministerial exception” is an affirmative defense, not a limitation on courts’ authority to hear Title VII cases, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012).

We cannot, and should not, ignore these well-established lines of Supreme Court precedent and, therefore, we reject Faith Christian’s (and the dissent’s) arguments for application of the collateral order doctrine here. We conclude, instead, that we lack jurisdiction over this interlocutory appeal and, therefore, DISMISS this appeal.

I. BACKGROUND

A. Relevant Facts

Faith Christian Academy is a Christian school offering Bible-based education from kindergarten through high school. The students and staff come from a wide array of religious perspectives.

Tucker began teaching high school science at the school in 2000. Later he also taught courses entitled “Leadership” and “Worldviews and World Religions.” In 2014, Faith Christian hired Tucker for the additional job of chaplain, a position also referred to as the Director of Student Life. In 2017, Tucker was assigned the additional task of planning Faith Christian’s weekly “Chapel Meetings.”

In January 2018, Tucker conducted a chapel meeting—he calls it a symposium—on race and faith. Although Faith Christian initially congratulated Tucker on the presentation, that presentation was not well-received by some parents and students. As a result, the school relieved Tucker of his duties preparing and

conducting weekly chapel meetings and soon thereafter removed him from his position as Director of Student Life. At the end of February 2018, the school also fired him from his teaching position.

B. Procedural Posture

Tucker filed a complaint with the Equal Employment Opportunity Commission and, after receiving a right-to-sue letter, sued Faith Christian. Tucker asserted two causes of action relevant here: 1) a claim under Title VII of the Civil Rights Act of 1964, alleging that the school fired him in retaliation for opposing a racially hostile environment; and 2) a Colorado common law claim for wrongful termination in violation of public policy.¹

At the outset of this litigation, Faith Christian moved to dismiss the action under Fed. R. Civ. P. 12(b)(6), asserting the “ministerial exception.” The exception is rooted in the First Amendment, which “bar[s] the government from interfering with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor*, 565 U.S. at 181; *see also Our Lady*, 140 S. Ct. at 2060–61. The “ministerial exception” is “not a jurisdictional bar” that might abort the traditional judicial process. *Hosanna-Tabor*, 565 U.S. at 195 n.4. Instead, it “operates as an affirmative defense to an otherwise cognizable claim . . . because the issue presented by the exception is ‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has ‘power to hear [the] case.’” *Id.* (quoting

¹ Tucker also asserted a claim under Title VI of the 1964 Civil Rights Act, which the district court dismissed. That dismissal is not at issue in this appeal.

Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 254 (2010)).

Because it is well established that a religious employer does not “enjoy a general immunity from secular laws,” *Our Lady*, 140 S. Ct. at 2060, the “ministerial exception” does not preclude discrimination claims brought by a religious employer’s non-ministerial employees. *See, e.g., Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (recognizing Title VII applies to a religious institution’s “secular employment decisions”), cited favorably in *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1245–46 (10th Cir. 2010). The “ministerial exception” is triggered only when the plaintiff-employee in a Title VII case qualifies as a “minister.”

Here, Faith Christian asserted its affirmative “ministerial exception” defense in a Rule 12(b)(6) motion to dismiss, but the district court converted that motion into one for summary judgment under Fed. R. Civ. P. 56. The court then permitted limited discovery only on the questions of whether Faith Christian is a religious employer entitled to assert the “ministerial exception” and whether Tucker qualified as a minister. After the parties addressed those questions, the district court denied Faith Christian summary judgment, ruling that, while Faith Christian could assert the “ministerial exception,” the question of “whether Mr. Tucker was a ‘minister’ within the meaning of the ‘ministerial exception’ is genuinely disputed on the evidence presented.” (Aplt. App. 284; *see also id.* (stating “that there is a genuine dispute of material fact as to whether Mr. Tucker was a ‘minister’”).) The district court later denied Faith Christian’s motion for recon-

sideration.² Faith Christian immediately appealed both decisions, invoking our jurisdiction under 28 U.S.C. § 1291 based on the collateral order doctrine.³

² There are at least three questions underlying the determination of whether the “ministerial exception” applies in a given case: 1) Is the employer a religious organization entitled to assert the “ministerial exception” defense? 2) Is the employee a “minister”? And 3) is the claim that the employee is asserting against the employer the type of claim that is subject to the “ministerial exception”? As to the first question, Tucker does not challenge on appeal the district court’s ruling that Faith Christian could invoke the “ministerial exception.” It is the second question—whether Tucker qualifies as a “minister—that is the subject of this appeal. As to the third question, no one disputes that Tucker’s Title VII and state law wrongful discharge claims are subject to the “ministerial exception.” *See Puri v. Khalsa*, 844 F.3d 1152, 1158 (9th Cir. 2017) (recognizing “ministerial exception” applies to state law causes of action “that would otherwise impinge on the church’s prerogative to choose its ministers or to exercise its religious beliefs in the context of employing its ministers.” (quoting *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999))); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (holding “ministerial exception can be asserted as a defense against state law claims”).

³ Faith Christian has not invoked 28 U.S.C. § 1292(b), which permits a litigant to ask the district court to certify that the interlocutory “order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

II. DISCUSSION

This case presents an important jurisdictional question of first impression for this Court: whether a decision denying a religious employer summary judgment on its “ministerial exception” defense constitutes an immediately appealable final order under the collateral order doctrine. Ultimately, we answer that question in the negative and conclude we lack appellate jurisdiction to consider this interlocutory appeal.

In reaching that conclusion, we: (A) address the scope of this appeal, which involves the “ministerial exception”; (B) discuss general collateral-order-doctrine principles, the only justification Faith Christian invokes in support of its interlocutory appeal; and (C) apply those collateral-order principles to the category of orders at issue here, orders denying summary judgment on the “ministerial exception” defense.

A. The Scope of This Appeal

We first review what is at issue in this appeal—and what is not. Namely, this appeal involves only Faith Christian’s affirmative defense under the “ministerial exception,” not a defense under the broader church autonomy doctrine. Although the two defenses share a common heritage, they are distinct defenses; we constrain our analysis here to the “ministerial exception.” We begin by reviewing the similarities and differences between the two defenses.

1. The “Ministerial Exception” and the Church Autonomy Doctrine

Both defenses are grounded in the First Amendment, which

protect[s] the right of churches and other religious institutions to decide matters “of faith and doctrine” without government intrusion. *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff [v. St. Nicholas Cathedral of Russian Orthodox Church]*, 344 U.S. [94,] 116 [(1952)]). . . .

The independence of religious institutions in matters of “faith and doctrine” is closely linked to independence in what we have termed “matters of church government.” [*Hosanna-Tabor*,] 565 U.S. at 186. This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions that are essential to the institution’s central mission. And a component of this autonomy is the selection of the individuals who play certain key roles.

Our Lady, 140 S. Ct. at 2060.

The “ministerial exception” is a narrower offshoot of the broader church autonomy doctrine; it only precludes employment discrimination claims brought by a “minister” against his religious employer.

[A] church’s independence on matters “of faith and doctrine” requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities. Without that power, a wayward minister’s preaching, teaching, and counseling could contradict the church’s tenets and lead the congre-

gation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.

Id. at 2060–61 (footnote omitted); *see also Hosanna-Tabor*, 565 U.S. at 196. The “ministerial exception,” then, is an exception to employment discrimination laws which would otherwise apply to a religious employer when the employment dispute involves a minister.

Like the church autonomy doctrine, the “ministerial exception” “operates as an affirmative defense to an otherwise cognizable claim.” *Hosanna-Tabor*, 565 U.S. at 195 n.4. While these defenses are related, the threshold question for determining when they apply differs. “Before the church autonomy doctrine is implicated, a threshold inquiry is whether the alleged misconduct is ‘rooted in religious belief.’” *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 657 (10th Cir. 2002) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). The “ministerial exception,” on the other hand, applies in one sense more broadly because it applies regardless of whether the dispute is rooted in religious belief, but the exception also applies more narrowly only to employment discrimination claims asserted by a minister. *See id.* at 654 n.2. The threshold determination for applying the “ministerial exception” is whether the plaintiff-employee qualifies as a “minister.” *See id.*

The Supreme Court has made clear, in both *Hosanna-Tabor* and *Our Lady*, that this threshold determination of whether an employee is a “minister” for purposes of the “ministerial exception” requires a fact-intensive inquiry into the specific circumstances of a given case. *See Our Lady*, 140 S. Ct. at 2067 (“call[ing]

on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception”); *see also id.* at 2063 (stating that, “[i]n determining whether a particular position falls within the *Hosanna-Tabor* exception, a variety of factors may be important.”); *id.* at 2066 (noting that in *Our Lady* “[t]here is abundant record evidence that [the plaintiffs-employees] both performed vital religious duties,” discussing that evidence at length); *Hosanna-Tabor*, 565 U.S. at 190–94 (considering, in significant detail, “all the circumstances of [the employee’s] employment”).

Following those Supreme Court decisions, a number of circuit courts have also recognized the fact-intensive nature of this inquiry. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657–58 (7th Cir. 2018) (per curiam) (stating that “whether Grussgott’s role as a Hebrew teacher can properly be considered ministerial is subject to a fact-intensive analysis” required by *Hosanna-Tabor*); *Fratello v. Archdiocese*, 863 F.3d 190, 206–10 (2d Cir. 2017) (conducting fact-intensive inquiry into whether employee was a minister); *Cannata v. Catholic Diocese*, 700 F.3d 169, 176 (5th Cir. 2012) (noting that “the *Hosanna-Tabor* Court engaged in a fact-intensive inquiry and explicitly rejected the adoption of a ‘rigid formula’ or bright-line test”); *E.E.O.C. v. Roman Catholic Diocese*, 213 F.3d 795, 801 (4th Cir. 2000) (pre-*Hosanna-Tabor*) (“While the ministerial exception promotes the most cherished principles of religious liberty, its contours are not unlimited and its application in a given case requires a fact-specific inquiry.”); *see also Clement v. Roman Catholic Diocese*, No. CV 16-117 Erie, 2017 WL

2619134, at *4 n.3 (W.D. Pa. June 16, 2017) (unreported) (stating that “the Supreme Court’s decision in *Hosanna-Tabor* makes clear that the application of the ministerial exception requires a factual inquiry to determine if the employee qualifies as a ‘minister’”). This court, too, has treated the question of whether an employee qualifies as a “minister” as a fact question. See *Skrzypczak*, 611 F.3d at 1243–44.

Contrary to all this authority, Faith Christian, as well as the dissent, deems the determination of whether an employee is a minister instead to present a question of law rather than fact. In reaching that conclusion, the dissent relies on three cases, none of which come from the United State Supreme Court. First, the dissent relies on *Conlon*, a case decided post-*Hosanna-Tabor* but before *Our Lady*. There, the Sixth Circuit stated that “whether the [ministerial] exception attaches at all is a pure question of law which this court must determine for itself.” 777 F.3d at 833 (6th Cir. 2015). *Conlon*, however, made that statement in a Fed. R. Civ. P. 12(b)(6) context, where every determination is a legal one. *Id.* Further, as previously noted, a number of other circuits courts, following the Supreme Court, have instead recognized the fact-intensive inquiry necessary to determine whether a plaintiff-employee was a “minister.”

Second, the dissent mentions *Skrzypczak*, 611 F.3d 1238 (10th Cir. 2010), a pre-*Hosanna-Tabor* case. A review of the *Skrzypczak* opinion indicates that the Tenth Circuit treated the question of whether the plaintiff-employee was a minister for purposes of the “ministerial exception” as one of fact. The Tenth Circuit, in that pre-*Hosanna-Tabor* case, applied the Fourth Circuit’s general standard for determining who

qualifies as a minister—“any employee who serves in a position that ‘is important to the spiritual and pastoral mission of the church.’” *Skrzypczak*, 611 F.3d at 1243 (quoting *Rayburn*, 772 F.2d at 1169 (4th Cir.)). In upholding summary judgment for the religious employer under that standard, *Skrzypczak* first considered the employer’s evidence of the plaintiff-employee’s job duties, determining that that “evidence . . . tends to show her position was not limited to a merely administrative role, but it also involved responsibilities that furthered the core of the spiritual mission of the Diocese.” 611 F.3d at 1243. That was sufficient evidence under the Fourth Circuit’s standard to prove that the plaintiff-employee was a minister, shifting the burden to the plaintiff-employee, in opposing summary judgment, to “bring forward specific facts showing a genuine issue for trial.” *Id.* (quoting *Kannady v. City of Kiowa*, 590 F.3d 1161, 1169 (10th Cir. 2010)). *Skrzypczak* concluded only that the plaintiff-employee there had not met her burden because the only evidence she proffered were three deficient affidavits:

All three affidavits contain identical language, beginning with the conclusion that “[Appellant’s] job was purely administrative,” and continuing with the statement, taken almost verbatim from *Rayburn*, that “[the job] in no way required or involved a primary function of teaching, spreading the faith, control of church governance, supervision of a religious order, or supervision or participation in religious ritual in worship.” (Appellant’s App. at 161–65.)

“To survive summary judgment, non-movant’s affidavits must be based upon personal knowledge and set forth facts that would be admissible in evidence; conclusory and self-serving affidavits are not sufficient.” *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir.1995) (internal quotation marks omitted). Despite Appellant’s contentions, these affidavits are exactly the type of conclusory affidavits that are insufficient to overcome summary judgment. Even if we accept [that] these affidavits are based on personal knowledge, they do not set forth any facts, admissible or otherwise, that a court could consider as raising a material issue of fact. Instead, each affidavit merely parrots a general rule that a court could consider in determining the ministerial exception’s application and then states, in the affiant’s opinion, the legal conclusion the court should reach. Accordingly, we hold the district court did not err in its determination that Appellant was a minister for purposes of the exception.

Id. at 1244. Although *Skrzypczak* uses the phrase “legal conclusion” in describing the plaintiff-employee’s deficient affidavits, the overall opinion treats the question of whether the plaintiff-employee qualified as a “minister” as a factual determination. Different from that case, here Tucker, in opposing summary judgment, submitted evidence to support his assertion that he was *not* a minister.

Lastly, the dissent relies on a pre-*Our Lady* case from the Kentucky Supreme Court, *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608–09 (Ky. 2014), which applied state law to conclude that

whether an employee is a minister is a question of law. That state-law case is not persuasive in the face of two U.S. Supreme Court cases, *Our Lady* and *Hosanna-Tabor*, as well as the Tenth Circuit decision in *Skrzypczak*, treating the determination of whether a religious entity’s employee is a minister as a fact-intensive inquiry.

The cases on which the dissent relies, then, are not persuasive. We, therefore, treat the question of whether Tucker is a minister, for purposes of applying the “ministerial exception,” as a fact-intensive inquiry rather than a straight legal conclusion.⁴

With this general legal framework in mind, we now turn to the circumstances of the case before us.

2. The Defense Asserted in This Case is Only a “Ministerial Exception” Defense and Not a Church Autonomy Defense

Faith Christian, in its converted summary judgment motion, asserted only a “ministerial exception” defense and, importantly, the limited discovery and

⁴ The dissent, as well as Faith Christian and amici, gloss over the fact that the threshold question that triggers the application of the exception—whether the plaintiff-employee qualifies as a minister—requires a fact-intensive inquiry. In light of that, there will often be cases (like the case before us) where the district court will be unable to resolve that threshold question at the motion-to-dismiss or summary-judgment stage of litigation. In those cases, the jury will have to resolve the factual disputes and decide whether an employee qualifies as a “minister” before the affirmative “ministerial exception” defense is triggered.

summary judgment pleadings focused only on that issue.⁵ In its motion for reconsideration, Faith Christian continued to assert the “ministerial exception” defense, but also for the first time referred, perfunctorily, to a defense under the broader church autonomy doctrine. On appeal, Faith Christian now relies on both defenses and, at times, lumps them together.

Faith Christian, however, has not adequately developed a factual record for asserting the church autonomy defense. In particular, there has been no record development on that defense’s necessary threshold question: whether the employment dispute between Tucker and Faith Christian is rooted in a difference in religious belief or doctrine. Further, the parties only briefly and very generally alluded to the nature of their dispute in their pleadings. In his amended complaint, for example, Tucker alleged that Faith Christian fired him in retaliation for Tucker opposing race discrimination at the school. Faith Christian asserted in its answer, filed after the district court denied Faith Christian summary judgment on the “ministerial exception,” that it fired Tucker because it disagreed with the biblical interpretations upon which he relied in his “Race and Faith” presentation. Faith Christian makes that argument again in its appellate briefs. Tucker counters that, prior to his firing, Faith Christian never raised concerns about any religious message he conveyed as part of the “Race and Faith” presentation and, instead, the school’s administration told Tucker that his firing was an eco-

⁵ In arguing on appeal that it has asserted a church autonomy defense all along, Faith Christian only points to several sentences in its converted summary judgment motion taken out of context.

nomic decision based on his offending too many tuition-paying parents and their children. Whether or not Faith Christian’s conflict with Tucker was rooted in religious belief, then, is directly disputed and the facts underlying that question have not yet been developed. Therefore, because Faith Christian did not adequately assert or develop a defense under the church autonomy doctrine in the district court, that defense is not properly before us. *See Rumsey Land Co. v. Res. Land Holdings, LLC (In re Rumsey Land Co.)*, 944 F.3d 1259, 1271 (10th Cir. 2019) (noting this Court will “not address arguments raised in the District Court in a perfunctory and underdeveloped manner”) (quotation marks omitted). Faith Christian argues in its reply brief that it cannot forfeit a defense under the church autonomy doctrine. (Aplt. Reply Br. 17 (citing *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (holding religious institution cannot “waive” “ministerial exception”).) We do not need to address that argument in this case because here the problem is not forfeiture. The problem here is instead that, because of the procedural posture of this case and because Faith Christian waited until its motion for reconsideration to refer, only perfunctorily, to the church autonomy doctrine, Faith has not adequately asserted or developed a defense under that doctrine. Neither party has yet had an adequate opportunity to address the threshold question presented by such a defense, whether the parties’ employment dispute is “rooted in religious belief,” *Bryce*, 289 F.3d

at 657 (quoting *Yoder*, 406 U.S. at 215).⁶ Here, therefore, we address only a “ministerial exception” defense, which applies only when a “minister” sues his or her religious employer for violating anti-discrimination employment laws.⁷

Having thus defined the scope of this appeal, we now turn to the legal question it presents: whether the collateral order doctrine permits Faith Christian’s immediate interlocutory appeal from the district court’s decision to deny summary judgment on the “ministerial exception” defense. Before answering that question, we first review the general principles of the collateral order doctrine.

B. The Collateral Order Doctrine Generally

The general principles of the collateral order doctrine are familiar. As an Article III court created by Congress, we “possess only such jurisdiction as is conferred by statute.” Edward H. Cooper, 15A *Federal Practice & Procedure* (“Wright & Miller”) § 3901 (2d ed. updated Apr. 2021). Here, the statutory basis for appellate jurisdiction is 28 U.S.C. § 1291, which

⁶ In a different context, the dissent notes that several circuits have held that a religious employer cannot waive (or forfeit) a “ministerial exception” defense. But this circuit has never addressed that question, and we need not do so here because there is no issue of waiver or forfeiture in the case before us.

⁷ Whether a religious employer can take an immediate appeal under the collateral order doctrine from a district court’s decision not to dismiss claims based on the church autonomy doctrine presents difficult questions that differ from the issues we must address here. Because the church autonomy doctrine is not at issue here, Faith Christian’s and the dissent’s reliance on cases addressing that doctrine and the principles underlying that doctrine are not helpful in resolving the issue presented in this appeal.

grants “courts of appeals . . . jurisdiction of appeals from all final decisions of the district courts.” The district court’s decision at issue here, denying Faith Christian summary judgment because there remain genuinely disputed issues of material fact that must be resolved by a fact-finder, obviously does not fit the usual definition of a “final decision”—“one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,” *Catlin v. United States*, 324 U.S. 229, 233 (1945).

Faith Christian instead invokes the collateral order doctrine, “an expansive interpretation of [§ 1291’s] finality requirement” first announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which allows appeals “from orders characterized as final . . . even though it may be clear that they do not terminate the action or any part of it.” Wright & Miller, 15A *Federal Practice & Procedure* § 3911. To be immediately appealable, such orders “must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (numbers added), *superseded on other grounds by rule as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1708–10 (2017).

Immediate appeals under the collateral order doctrine are disfavored; they “are the exception, not the rule” because

too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those

proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

Johnson, 515 U.S. at 309. Because of these concerns, the collateral order doctrine only applies to a “small class” of decisions “which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Cohen*, 337 U.S. at 546.

Courts, then, “must apply” the collateral order doctrine “with an eye towards preserving judicial economy and avoiding ‘the harassment and cost of a succession of separate appeals from the various rulings’ in a single case.” *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 664 (10th Cir. 2018) (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006)). Emphasizing how small the class of immediately appealable collateral orders is, this Court has noted that, “[i]n case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this ‘stringent’ test should be understood as ‘small,’ ‘modest,’ and ‘narrow.’” *Kell v. Benzon*, 925 F.3d 448, 452 (10th Cir. 2019) (quoting *United States v. Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010)).

Of particular relevance here, the Supreme Court has recognized that when, as here, the order being ap-

pealed involves the issue of whether there exists genuinely disputed fact questions, the benefit of an immediate appeal is likely outweighed by the cost of disrupting the ordinary course of litigation. In the qualified immunity context, for example, the Court has recognized the benefit of an immediate appeal from interlocutory orders denying government officials qualified immunity when review of that denial involves a legal question. *See Johnson*, 515 U.S. at 311–13 (discussing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). But, after weighing the costs and benefits of an immediate appeal, the Supreme Court determined that an immediate appeal from the denial of qualified immunity cannot be justified when the challenged order “resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.” *Id.* at 307 (emphasis added); *see also id.* at 313–18. In reaching that conclusion, the Supreme Court stated that “considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of ‘qualified immunity’ matters to cases presenting more abstract issues of law.” *Id.* at 317. That is because “the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily.” *Id.* at 316. Further, “questions about whether or not a record demonstrates a ‘genuine’ issue of fact for trial, if appealable, can consume inordinate amounts of appellate time,” which means “greater delay.” *Id.* And

the close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the

many instances in which it upholds a district court's decision denying summary judgment, may well be faced with approximately the same factual issue again, after trial, with just enough change brought about by the trial testimony[] to require it, once again, to canvass the record. That is to say, an interlocutory appeal concerning this kind of issue in a sense makes unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision.

Id. at 316–17. The Supreme Court, therefore, denied an immediate appeal from the category of orders denying summary judgment based on qualified immunity when that denial was based on the determination that there were genuinely disputed issues of material fact that remain to be resolved. *Id.* at 317. The Court reached that conclusion even while acknowledging that its decision “forces public officials to trial,” “[a]nd, to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits) that (the *Mitchell* Court held) militates in favor of immediate appeals” in the qualified-immunity context.⁸ *Id.*

⁸ There are cases in the qualified-immunity context where a court will construe disputed facts in the plaintiff's favor in order to answer the legal question of whether the plaintiff has asserted a clearly established constitutional violation. Here, on the other hand, the question of whether an employee is a “minister” is largely a factual question. The district court in this case held that based on the parties' competing evidence, a rational jury could find either that Tucker was or was not a “minister.” That is quintessentially a factual determination for the jury. Furthermore,

One other important point that we keep in mind when considering whether to apply the collateral order doctrine is that our focus is not on whether an immediate appeal should be available in a particular case, but instead we focus on whether an immediate appeal should be available for the *category* of orders at issue:

[W]e “decide appealability for categories of orders rather than individual orders.” *Johnson v. Jones*, 515 U.S. 304, 315 (1995). Thus, our task is not to look at the “individual case [and] engage in ad hoc balancing to decide issues of appealability.” *Id.* Instead, we must undertake a more general consideration of “the competing considerations underlying all questions of finality—the inconvenience and costs of piecemeal review on the one [hand] and the danger of denying justice by delay on the other.” *Id.* (citation omitted).

Los Lobos Renewable Power, 885 F.3d at 664. We must, then, evaluate appealability under the collateral order doctrine without regard to a “particular injustice” that may be “averted” by an immediate appeal in a given case. *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (quotation marks omitted); *see also Johnson*, 515 U.S. at 315 (“[W]e do not . .

that factual question at issue here is similar to the qualified-immunity question of fact that the Supreme Court declined to address as a collateral order in *Johnson*—whether there was sufficient evidence that a jury could find either that certain defendant police officers were, or were not, present when other police officers allegedly beat the plaintiff. *See* 515 U.S. at 307, 313.

. in each individual case engage in ad hoc balancing to decide issues of appealability.”).

For our purposes here, the relevant category is orders preliminarily denying a religious employer summary judgment on the “ministerial exception” defense because there exist genuinely disputed issues of fact that a jury must first resolve. Next, weighing whether the collateral order doctrine should apply to that category of orders, we conclude that these orders do not fall within the small, modest, and narrow class of cases capable of satisfying this stringent collateral-order test. *See Kell*, 925 F.3d at 452.⁹

C. The Collateral Order Doctrine Applied Here

It is Faith Christian’s burden to establish our jurisdiction to consider immediate appeals from this category of orders under the collateral order doctrine. *See Los Lobos Renewable Power*, 885 F.3d at 664. As previously stated,

⁹ The dissent makes clear that it deems the district court in this particular case to have erred in denying Faith Christian summary judgment on its affirmative “ministerial exception” defense. The dissent, for example, notes that in this case the district court failed adequately to identify exactly what factual disputes preclude summary judgment. We disagree. The district court clearly stated that, based on the parties’ competing evidence, which the court laid out in some detail, a reasonable jury could find either that Tucker was, or was not, a minister. Nonetheless, the dissent’s assertion that the district court erred in denying summary judgment in this particular case is the wrong focus for deciding whether the *category* of orders at issue here, orders denying a religious employer summary judgment on its affirmative “ministerial exception” defense because there remain material factual disputes that a jury must decide, should always be immediately appealable.

[t]o come within the “small class” of decisions excepted from the final-judgment rule by *Cohen*, the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand, 437 U.S. at 468 (1978) (applying *Cohen*, 337 U.S. 541). As explained next, Faith Christian can only meet the first and third *Cohen* requirements if we treat the “ministerial exception” as immunizing a religious employer, not just from liability, but from having to litigate at all its employee’s employment discrimination claims. Because we decline to afford the “ministerial exception” such expansive treatment, we conclude Faith Christian has not established our jurisdiction under the collateral order doctrine.

1. Faith Christian has established *Cohen*’s second requirement

Of these three requirements, *Cohen*’s second requirement is clearly satisfied here. There is no doubt that this category of orders—decisions denying a religious employer summary judgment on the “ministerial exception”—presents an important First Amendment issue, and that issue is separate from the merits of an employee’s discrimination claims.

2. Faith Christian has not established *Cohen*'s third requirement¹⁰

a. Faith Christian has failed to establish that this category of orders denying summary judgment will be effectively unreviewable on appeal from final judgment

We conclude that this category of orders, like most orders denying summary judgment, *see Ralston v. Cannon*, 884 F.3d 1060, 1066 (10th Cir. 2018), can be effectively reviewed in the usual course of litigation; that is, we can effectively review such an order on appeal after the conclusion of litigation in the district court, *see Dig. Equip.*, 511 U.S. at 868. In arguing to the contrary, Faith Christian asserts that the “ministerial exception” protects religious employers not just from liability based on its minister’s employment discrimination claims, but also from the burden of litigating such claims, and it is this protection against the burdens of litigation that will be lost without an immediate appeal. We reject that argument because Faith Christian is incorrect that the “ministerial exception” immunizes a religious employer from suit on employment discrimination claims.

As we have already indicated, the Supreme Court deems the “ministerial exception” to be, “not a juris-

¹⁰ We address *Cohen*'s third requirement before we address *Cohen*'s first requirement because our analysis on the first requirement rests on some of the same analysis pertaining to *Cohen*'s third requirement, and it seems to be the more efficient way to address Faith Christian's failure to satisfy either of these requirements.

dictional bar,” but instead to “operate[] as an affirmative defense to an otherwise cognizable claim . . . because the issue presented by the exception is ‘whether the allegations the plaintiff makes *entitle him to relief*,’ not whether the court has ‘power to hear [the] case.’” *Hosanna-Tabor*, 565 U.S. at 195 n.4 (quoting *Morrison*, 561 U.S. at 254) (emphasis added). *Hosanna-Tabor*, in recognizing the “ministerial exception,” further stated that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” *Id.* at 188. That language indicates that the “ministerial exception” protects religious employers from liability, but nothing there suggests a further protection from the burdens of litigation itself. See Peter J. Smith & Robert W. Tuttle, “Civil Procedure and the Ministerial Exception,” 86 Fordham L. Rev. 1847, 1881-82 (2018) (noting that, when “disputed questions of fact concerning the plaintiff’s status as a minister cannot be resolved at the summary judgment stage, . . . the matter proceeds to trial.”). Generally, any error a district court makes in failing to apply an affirmative defense foreclosing liability can be reviewed and corrected after final judgment has been entered in the case. See *id.* at 1881 (noting “fundamental value of the ministerial exception would not be entirely lost by

waiting for a final judgment before permitting an appeal”).^{11 12}

¹¹ *Hosanna-Tabor* indicated that “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, . . . interferes with the internal governance of the church.” 565 U.S. at 188. But requiring a religious employer to incur litigation costs to defend against claims asserted against it by an employee under a generally applicable employment discrimination statute does not punish a religious employer. It is, instead, the cost of living and doing business in a civilized and highly regulated society. See *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 173, 202, 204–05 (1985) (Stevens, J., concurring) (addressing citizen’s litigation costs incurred to challenge local government’s zoning decisions), overruled in part on other grounds by *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167–68 (2019); *HMK Corp. v. Cty. of Chesterfield*, 616 F. Supp. 667, 670–71 (E.D. Va. 1985). It bears repeating that religious institutions do not “enjoy a general immunity from secular laws.” *Our Lady*, 140 S. Ct. at 2060.

¹² Faith Christian argues that it might hypothetically be required to keep an unwanted minister during the pendency of this trial if it cannot raise a challenge to the district court order interlocutorily. But, of course, that issue is not present in this case because Faith Christian fired plaintiff summarily within days of hearing from disgruntled parents.

Further, Faith Christian has not presented evidence that this concern will typically be presented in other similar litigation scenarios. To the contrary, self-help would seem to be the norm for almost all such other situations.

Faith Christian responds that it might ultimately have to respond in damages to improper discharge, but of course that would be a consequence only after trial if the plaintiff is found not to have been a minister and that the discharge was improper under Title VII. If that situation prevails, of course, the church is simply being held properly to the same standards as all other institutions and employers in America. There is no allegation or evidence that alternatives to an interlocutory collateral-order appeal

The “ministerial exception” shares the same characteristics as numerous other defenses to liability that a church might assert in other kinds of litigation. “[V]irtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a ‘right not to stand trial.’” *Dig. Equip.*, 511 U.S. at 873. That includes orders denying summary judgment. *See id.* But allowing an immediate appeal from the denial of a dismissal based on all of these rules would eviscerate the congressionally mandated final judgment rule. *See id.*; Wright & Miller, 15A Federal Practice & Procedure § 3911.4.

Thus, even though other situations could just as convincingly be characterized as involving rules protecting against the burdens of going to trial, courts have almost always denied immediate appeals under the collateral order doctrine from the following: orders denying dismissal based on lack of subject matter jurisdiction, lack of personal jurisdiction, immunity from service of process, preclusion principles, an agency’s primary jurisdiction, forum non conveniens, speedy trial rights (in a criminal case), almost all denials of summary judgment, and the district court’s refusal to remand a civil case to state court, to name just a few. *See Dig. Equip.*, 511 U.S. at 873; Wright & Miller, 15A *Federal Practice & Procedure* §§ 3911.3, 3911.4.

now would be onerous to Faith Christian or, indeed, to most churches in America. Expedited litigation procedures such as the bifurcated procedures used here will often be adequate to address the concerns that Faith Christian raises.

This litany of analogous situations underscores that courts have jealously protected the narrow scope of the collateral order doctrine and for good reason:

The general lesson of these illustrations and still others is simple. The mere burden of submitting to trial proceedings that will be wasted if the appellant's position is correct does not support collateral order appeal. Nor is it enough to show that a wrong order may cause tactical disadvantages that cannot be undone even by a second trial. The final judgment rule rests on a determination that ordinarily these costs must be borne to support the greater benefits that generally flow from denying interlocutory appeal.

Wright & Miller, 15A *Federal Practice & Procedure* § 3911.4 (footnotes omitted). Those benefits include, among others, avoiding the delays and disruptions to litigation caused by piecemeal appeals and preventing unnecessary and repetitive appellate review. See *Johnson*, 515 U.S. at 309.

b. Faith Christian's analogy to qualified immunity is inaccurate

Faith Christian counters that the “ministerial exception” is no ordinary affirmative defense; it is one rooted in the First Amendment and, therefore, the denial of summary judgment on that defense warrants an immediate appeal. In support of that assertion, Faith Christian tries to draw an analogy between the category of orders at issue here—orders denying summary judgment to a religious employer on the “ministerial exception” because there remain factual disputes that a fact-finder must resolve—and a non-

church based category of orders for which courts do allow interlocutory appeals—when the district court denies a government official qualified immunity based on abstract questions of law. But that analogy is not helpful to Faith Christian because these two affirmative defenses—the “ministerial exception” and qualified immunity—are simply not at all similar.

Unlike the “ministerial exception,” the Supreme Court has explicitly recognized that qualified immunity protects government officials not only from liability, but also from the burdens of litigation itself. See *Mitchell*, 472 U.S. at 525–27. Because qualified immunity is predicated on “an *immunity from suit* rather than a mere defense to liability . . . , it is effectively lost if a case is erroneously permitted to go to trial.” *Id.* at 526. But Faith Christian has not cited any case holding that the “ministerial exception” similarly immunizes a private religious employer from the burdens of *litigating* employment discrimination claims brought against it by one of its ministers.¹³

In an analogous situation, the Seventh Circuit refused to permit an immediate appeal under the collateral order doctrine from an order denying a religious employer summary judgment on Title VII’s statutory exemptions and its general First Amendment defense. *Cf. Herx v. Diocese of Ft. Wayne-S. Bend, Inc.*, 772 F.3d 1085, 1088, 1090 (7th Cir. 2014). *Herx* reasoned that,

¹³ To the contrary, see Smith & Tuttle, 86 Fordham L. Rev. at 1881 (stating that “the ministerial exception, at bottom, is still a defense to liability rather than a comprehensive immunity from suit” and any error that the district court makes in not applying that exception can be reviewed effectively on appeal from final judgment).

“although the statutory and constitutional rights asserted in defense of this suit are undoubtedly important, the Diocese [the religious employer] has not established that the Title VII exemptions or the First Amendment more generally provides an immunity from trial, as opposed to an ordinary defense to liability.” *Id.* at 1090. Although *Herk* did not involve the “ministerial exception,” *id.* at 1091 n.1, it does support both our conclusions that the “ministerial exception” does not immunize a religious employer from litigating Title VII claims asserted against it by a minister and that orders denying summary judgment on the “ministerial exception” are not immediately appealable.

Faith Christian’s policy arguments for extending qualified immunity to private religious employers are also not persuasive. To be sure, this Court has previously noted some similarities between a religious employer’s First Amendment defenses and “a government official’s defense of qualified immunity.” *Bryce*, 289 F.3d at 654 (addressing church autonomy doctrine); *see also Skrzypczak*, 611 F.3d at 1242 (addressing “ministerial exception”). But in doing so, we were quick to note further that, “[o]f course, the doctrines and their inquiries are quite different, as are the reasons for addressing them early in the litigation process.” *Bryce*, 289 F.3d at 654 n.1. Qualified immunity applies to suits against government officials in an effort to protect the *public’s interest* in a *functioning government*. *See id.* To that end, qualified immunity seeks to avoid “the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.”

Mitchell, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)).¹⁴

Courts, however, “hesita[te] to extend immunity from suit to a private party without a statutory basis” to do so because “[i]mmunity from suit is a benefit typically only reserved for governmental officials.” *Gen. Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1182 (10th Cir. 2016). The Supreme Court has similarly stated that rationales underlying qualified immunity—“to safeguard government, and thereby to

¹⁴ For similar reasons, courts have recognized the need for immediate appeals under the collateral order doctrine from categories of orders denying a *government official’s* claim to absolute immunity. *See Mitchell*, 472 U.S. at 525 (citing *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). In recognizing both qualified and absolute immunity, the Supreme Court has “consistently held that government officials are entitled to some form of immunity from suits for damages” in order to protect “public officers . . . from undue interference with their duties and from potentially disabling threats of liability.” *Harlow*, 457 U.S. at 806. Absolute immunity applies to “officials whose special functions or constitutional status requires complete protection from suit,” like legislators acting in their legislative capacity, judges acting in their judicial capacity, and prosecutors and executive officers engaged in adjudicative functions, as well as the President of the United States. *Id.* “For executive officials in general, however, . . . qualified immunity represents the norm,” in an effort “to balance competing values: not only the importance of a damages remedy to protect the rights of citizens, but also ‘the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.’” *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). Courts also recognize immediate appeals under the collateral order doctrine from categories of orders denying a government’s claim to Eleventh Amendment immunity, *see P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993), as well as a *foreign government’s* claim to immunity, *see Herx*, 772 F.3d at 1090 (7th Cir.).

protect the public at large”—“are not transferable to private parties.” *Wyatt*, 504 U.S. at 168. The fact that the “ministerial exception” applies only to private religious organizations, then, counsels against treating the “ministerial exception” like an immunity from suit, under both Supreme Court and Tenth Circuit precedent.

The dissent incorrectly suggests that we are concerned about applying the collateral order doctrine generally in civil cases between private parties. Not so. As the cases cited by the dissent illustrate, immediately appealable collateral orders can arise in the course of private civil litigation.¹⁵ Our specific concern is instead with the dissent’s unprecedented extension of immunity to private religious organizations in order to protect them from the burdens of even litigating claims brought against them by employees alleging illegal employment discrimination. Since the dissent fails to establish the necessary predicate that the “ministerial exception” protects churches from even litigating a Title VII claim, it has no other basis to seek to apply the *Cohen* collateral order doctrine.

Treating the “ministerial exception” as protecting religious employers from the burdens of litigation based on the First Amendment does not make sense in the bigger picture of religious organizations and the

¹⁵ *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659 (10th Cir. 2018), is one such example. But that case otherwise has no relevance to the issues before us. It dealt with the application of a unique New Mexico statute providing expedited procedures in a narrow class of litigation described as “strategic lawsuits against public participation,” or “SLAPP.” *Id.* at 662. Here, of course, there is no SLAPP claim and obviously no need to apply the New Mexico law.

legal system. Although religious institutions enjoy some protections under the “ministerial exception,” religious institutions do not “enjoy a general immunity from secular laws.” *Our Lady*, 140 S. Ct. at 2060; *see also Ohio C.R. Comm’n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 628 (1986) (“Even religious schools cannot claim to be wholly free from some state regulation.”). Religious entities can be sued on myriad theories. *See Skrzypczak*, 611 F.3d at 1244–46 (discussing lawsuits that can and cannot be brought against religious organizations); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1039–40 (7th Cir. 2006) (same), overruled on other grounds by *Hosanna-Tabor*, 565 U.S. at 195 n.4 (holding “ministerial exception” is not jurisdictional).

As just one example, religious employers can be sued by their non-ministerial employees for violating anti-discrimination employment statutes. *See, e.g., Rayburn*, 772 F.2d at 1169. That highlights the importance of the merits question at issue in this appeal. If the employee is a minister, suit over the employment discrimination claims ends. But if the employee is not a minister, then those claims must be resolved according to our normal jurisprudential process.

In summary, Faith Christian has failed to cite any case specifically treating the “ministerial exception” as protecting a religious employer from litigation itself. Such a position is contrary to our legal system’s treatment of religious entities generally—they are protected by the First Amendment, certainly, but are generally not excused from complying with generally applicable government regulation or from being haled into court.

c. The grounds Faith Christian asserts for extending qualified immunity to a private religious employer are not persuasive

Faith Christian’s argument for an immediate appeal is premised on treating the “ministerial exception” like qualified immunity. The dissent adopts that argument. Both advance two justifications for extending qualified immunity from suit to private religious employers—*Hosanna-Tabor* treated the “ministerial exception” as an immunity from suit and the “ministerial exception” is a structural limitation on the court’s authority to act. Neither justification is a correct statement of the law.

i. *Hosanna-Tabor* did not treat the “ministerial exception” as immunizing a private religious employer from suit

Faith Christian contends that the Supreme Court, in first recognizing the “ministerial exception” in *Hosanna-Tabor*, treated the “ministerial exception” as immunizing religious employers, not just from liability, but from suit itself. *Hosanna-Tabor*, however, never addressed the “ministerial exception” in terms of an immunity of any kind. Instead, it treated the “ministerial exception” as an affirmative defense and never once referred to it as an immunity from suit.¹⁶ *Hosanna-Tabor*’s reasoning suggests only that the “ministerial exception” protects religious employers from *liability* under Title VII for employment discrimination claims asserted against the religious employer

¹⁶ Similarly, immunity is never mentioned or suggested by the Supreme Court in its later, closely related case of *Our Lady*.

by its ministers. Tellingly, *Hosanna-Tabor* held that the “ministerial exception” is “not a jurisdictional bar,” but instead “operates as an affirmative defense to an otherwise cognizable claim . . . because the issue presented by the exception is ‘*whether the allegations the plaintiff makes entitle him to relief*,’ not whether the court has ‘power to hear [the] case.’” 565 U.S. at 195 n.4 (quoting *Morrison*, 561 U.S. at 254) (emphasis added).

Hosanna-Tabor stated that it would interfere with a church’s “internal governance” to require the “church to accept or retain an unwanted minister, or punish[] a church for failing to do so.” *Id.* at 188. That reasoning, of course, does not preclude the need for a fact-finder first to determine whether the plaintiff is or is not in fact a minister. *Hosanna-Tabor* also held that to grant the relief the employee-minister sought in that case—reinstatement and damages—would violate the First Amendment, and it concluded that, *because the employee in that case was a minister*, “the First Amendment requires dismissal.” *Id.* at 194. All of that language from *Hosanna-Tabor* suggests that the “ministerial exception” is a defense that protects a religious employer from ultimate liability under Title VII from a plaintiff who is found to be a minister but not from the normal judicial process to make that predicate determination of whether the plaintiff-employee is in fact a minister.¹⁷

¹⁷ As noted previously, nothing in this litigation requires Faith Christian to employ an unwanted minister. It has the power, and has already exercised that power, to discharge Tucker. The only issue in this case is damages. If at trial Faith Christian shows

In arguing to the contrary, Faith Christian and the dissent rely on *Hosanna-Tabor*'s use of the word "bar" several times—i.e., stating that the ministerial exception "bars . . . suit" over a religious employer's decision to fire the plaintiff, *id.* at 196. According to Faith Christian, the use of the word "bar," without more, "establishes" that the "ministerial exception" immunizes a private religious employer from suit under Title VII. However, it would be odd indeed and contrary to the clear language and reasoning in *Hosanna-Tabor* if *Hosanna-Tabor* reached the unprecedented result advanced by Faith Christian, extending immunity from suit to private religious employers without expressly addressing and explaining its decision to do so. It would be odder still for the Court to do so simply by using such a generally applicable term as "bar." This is especially true in *Hosanna-Tabor*, where the Court expressly stated that the "ministerial exception" is "not a jurisdictional bar," but instead "operate[s] as an affirmative defense to an otherwise cognizable claim . . . because the issue presented by the exception is 'whether the allegations the plaintiff makes entitle him to relief,' *not whether the court has 'power to hear [the] case.'*" 565 U.S. at 195 n.4 (quoting *Morrison*, 561 U.S. at 254) (emphasis added).¹⁸

The Supreme Court uses the term "bar" in many different contexts. As just one example which unmistakably contradicts the dissent's reliance on the word

that the discharge was protected under the "ministerial exception" or if it is otherwise defensible, Faith Christian would not have to respond in damages for its decision.

¹⁸ The Supreme Court has more generally warned courts to be cautious when using the label "jurisdictional." See *Kontrick v. Ryan*, 540 U.S. 443, 454–55 (2004).

“bar” in this case, the Supreme Court in *Digital Equipment distinguished* orders holding “that an action is *barred* on claim preclusion principles” from orders involving an “entitlement to ‘avoid suit altogether,’” like qualified immunity. 511 U.S. at 873–75 (emphasis added) (quoting *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 501 (1989), and citing *Mitchell*, 472 U.S. 511).¹⁹

The dissent’s contention, that *Hosanna-Tabor’s* use of the word “bar” all by itself implicitly extended qualified immunity from suit to private religious employers is unpersuasive.²⁰

**ii. Faith Christian has not established
that the “ministerial exception” is a**

¹⁹ *Hosanna-Tabor* simply did not address whether any church defense immunizes a religious employer from litigation on a minister’s employment discrimination claims. A fair reading of that case as a whole does not suggest any conscious attempt by the Supreme Court to give the word “bar” the weight the dissent would give it. Neither the dissent nor the parties have cited any case giving *Hosanna-Tabor’s* use of the term “bar” the expansive and novel reading suggested by Faith Christian and the dissent. Nor have we found any such case. The dissent points to the Sixth Circuit’s *Conlon* decision. But *Conlon* did not address immunity. Instead, it relied on *Hosanna-Tabor* to hold that a religious employer cannot waive the application of the “ministerial exception” defense once it has been determined that the plaintiff-employee qualifies as a minister. 777 F.3d at 833–36. Neither the Supreme Court nor this Court has addressed that waiver question. But waiver, in any event, is not the same as an immunity from suit that Faith Christian seeks here.

²⁰ The dissent also relies on this court’s use of the term “adjudication” in *Bryce*, a pre-*Hosanna Tabor* Tenth Circuit case, 289 F.3d at 656. While *Bryce* discussed the “ministerial exception,” its ruling was based only on the church autonomy doctrine. *See id.* at 651, 658 n.2

**“structural” limitation on a court’s
authority sufficient to immunize
private religious employers from
suit under Title VII**

Reiterating, *Hosanna-Tabor* held that the “ministerial exception” is “not a jurisdictional bar” and does not implicate a court’s “power to hear [the] case.” 565 U.S. at 195 n.4 (quoting *Morrison*, 561 U.S. at 254). Faith Christian nevertheless attempts an end-run around this clear Supreme Court language, trying to make the same argument we have just rejected by dressing it up in different clothes—e.g., trying to advance the same argument this time under the rubric of a structural limitation on courts’ authority to rule on an employment discrimination claim. Faith Christian’s argument is still not persuasive.

**a. The three out-of-circuit cases on
which Faith Christian relies are
inapposite**

Faith Christian cites three cases from other circuits in support of its structural-limitations argument—*Conlon*, 777 F.3d 829 (6th Cir.); *Lee*, 903 F.3d 113 (3d Cir.); and *Tomic*, 442 F.3d 1036 (7th Cir.). None of these three cases are binding on us. But, in any event, each of them is distinguishable. None of the three address the question of whether the “ministerial exception” immunizes a religious employer from litigating employment discrimination claims. Instead, each of those cases addressed only the question of whether a religious employer could waive (or forfeit) a “ministerial exception” defense. Further, each of the three cases addressed the waiver question only after it was clear that the plaintiff-employee was a minis-

ter. That, too, differs from this case. Of greater concern, the specific language from those cases on which Faith Christian relies contradicts *Hosanna-Tabor*'s express language indicating that the "ministerial exception" does not implicate a court's power to hear an employment discrimination claim.

In *Conlon*, for example, the Sixth Circuit expressly stated that, before deciding whether a religious employer could "waive[]" its "ministerial exception" defense, the court first had to "consider whether the ministerial exception would otherwise apply to the[] facts" plaintiff alleged. 777 F.3d at 833. The Sixth Circuit then determined that the plaintiff-employee in that case was a minister and, thus, that the employer could assert the "ministerial exception." *Id.* at 832, 834–35. Only after that did *Conlon* cite the First Amendment and state the generally accepted principle that the "government cannot dictate to a religious organization who its spiritual leaders will be." *Id.* at 835–36. On that basis, *Conlon* rejected the plaintiff-employee's assertion that the employer had "waived" its "ministerial exception" defense, ruling that the "ministerial exception" cannot be waived." *Id.* at 836.

In *Lee*, a Third Circuit case, there was no dispute that the plaintiff-employee, the pastor of a Baptist church, qualified as a minister. Lee sued the church, alleging the church had breached its employment contract with Lee. 903 F.3d at 116–18. Lee moved for summary judgment and, in its defense, the Church responded by asserting several defenses, but not the "ministerial exception." *Id.* at 118 & n.2. It was the district court which, sua sponte, raised the "ministerial exception" and eventually granted the non-moving Church summary judgment on that basis. *Id.* at

118. The Third Circuit ruled that the employer had not “waived” the affirmative “ministerial exception” defense because it “is rooted in constitutional limits on judicial authority.” *Id.* at 118 n.4. Alternatively, the court noted that Lee did not argue waiver to the district court. *Id.*

In *Tomic*, a pre-*Hosanna-Tabor* case, the Seventh Circuit treated the “ministerial exception” as a jurisdictional limitation, *see* 442 F.3d at 1039, a proposition which the Supreme Court later rejected in *Hosanna-Tabor*, *see* 565 U.S. at 195 n.4. In a general discussion, *Tomic* noted “that federal courts cannot always avoid taking a stand on a religious question.” 442 F.3d at 1039. Where, for example, a church designated all of its employees, including the janitor, as a minister, a “court would have to determine whether under the actual law of the church in question . . . janitors really were ministers.” *Id.* But under the specific facts that the plaintiff-employee alleged in *Tomic*, the Seventh Circuit held that the plaintiff-employee, as the music director for a Catholic diocese, qualified as a minister. *Id.* at 1040–41. After reaching that conclusion, the Seventh Circuit considered “whether it makes a difference that the diocese represents itself as an ‘equal opportunity’ employer.” *Id.* at 1041. The court held it did not make a difference because “the ministerial exception, like the rest of the internal-affairs doctrine, is not subject to waiver or estoppel.” *Id.* at 1042.

None of these three out-of-circuit cases binds this Court. Furthermore, and of most concern, the language from each of these cases on which Faith Christian relies—language referring to the “ministerial ex-

ception” as a “structural” or a constitutional “limitation” on a court’s “authority”—contradicts *Hosanna-Tabor*’s language explicitly stating that the “ministerial exception” is not jurisdictional and does not implicate the question of “whether the court has ‘power to hear [the] case.’” 565 U.S. at 195 n.4 (quoting *Morrison*, 561 U.S. at 254). Moreover, although the post-*Hosanna-Tabor* cases of *Conlon* and *Lee* recognized that *Hosanna-Tabor* held that the “ministerial exception” is not jurisdictional, neither *Conlon* nor *Lee* acknowledged and addressed the Supreme Court’s further language indicating that the “ministerial exception” does not implicate a court’s “power to hear [the] case,” *id.* (quoting *Morrison*, 561 F.3d at 254). (Neither Faith Christian nor the dissent address this language from *Hosanna-Tabor*, either.)

Beyond that significant problem, none of these three cases address the question presented here, which is whether the category of orders denying a religious employer summary judgment on its “ministerial exception” defense should be immediately appealable. Nor do any of these three cases address whether the “ministerial exception” immunizes a religious employer from ever having to litigate its minister’s employment discrimination claims. Instead, the three cases cited by Faith Christian address only whether an employer can “waive” (or forfeit) its affirmative “ministerial exception” defense, once it has been determined that the plaintiff-employee is a minister. That waiver question, which neither the Supreme Court nor this Court has addressed, is not analogous to the immunity from suit Faith Christian seeks here. For myriad reasons, then, these three cases on which Faith Christian relies are not helpful.

b. The Establishment Clause requires that courts avoid only excessive entanglement

Faith Christian relies on the Establishment Clause’s admonition that courts avoid excessive entanglement with religion to argue that the “ministerial exception” is a “structural” limitation on a court’s authority to adjudicate an employment discrimination claim. But “[e]ntanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.” *Agostini v. Felton*, 521 U.S. 203, 233 (1997).

A district court’s decision to deny a religious employer summary judgment because there are disputed issues of fact material to whether or not the plaintiff-employee is a minister does not represent *excessive* entanglement. *See generally id.* (noting “[i]nteraction between church and state is inevitable”). Instead, the fact finder must determine whether the plaintiff-employee is a minister before deciding whether the “ministerial exception” applies in a given case. If the plaintiff-employee is not a minister, there is no entanglement with religion and the “ministerial exception” does not apply. Religious institutions do not “enjoy a general immunity from secular laws.” *Our Lady*, 140 S. Ct. at 2060. Instead, applying neutral and generally applicable laws to religious institutions ordinarily does not violate the First Amendment. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876–77 (2021) (citing cases). Faith Christian, thus, is subject to Title VII discrimination claims brought against it by a non-ministerial employee. *See Rayburn*, 772 F.3d at 1169 (4th Cir.). Requiring Faith Christian to litigate to resolution here the genuinely disputed predicate factual issue of whether or not Tucker is a minister does not

amount to an *excessive* entanglement of courts with religion. It is instead a necessary factual determination that will resolve whether the “ministerial exception” even applies in the first place. And, where there is a genuinely disputed factual issue as to whether an employee qualifies as a “minister,” a jury must resolve that predicate material factual dispute. That cannot be avoided in light of the fact-intensive nature of the question, as emphasized by the Supreme Court in both *Our Lady*, 140 S. Ct. at 2066–67, and *Hosanna-Tabor*, 565 U.S. at 190–94.

Faith Christian disagrees, asserting that allowing this case to proceed to merits discovery and possibly a trial will require the district court’s *excessive* entanglement with religion. But determining the narrow binary factual question of whether a particular plaintiff is or is not a minister of the defendant church is not excessive entanglement. If the determination is that the plaintiff is not a minister, requiring the church to stand trial on an employment discrimination claim, or indeed other secular claims, is not excessive entanglement or even entanglement at all. If Faith Christian were entitled to immunity here it would be “immunity by ipse dixit”—immunity because Faith Christian simply declared Tucker (and indeed nearly all of its employees) to be ministers.

If this case goes to trial, it does not reasonably mean that even a jury will ever be required to resolve any religious dispute. Instead, the district court could instruct the jury to decide first whether Tucker is a minister (without regard to whether he is a faithful or feckless minister); if Tucker is determined to be a minister, the jury’s inquiry ends. Only if the jury finds that Faith Christian failed to prove that Tucker is a

minister can the jury then decide the secular merits of Tucker’s Title VII (and Colorado law) claims.

To hold otherwise would place a religious employer above the law, and that is not the purpose of the “ministerial exception.”

c. Faith Christian has not cited any case where an interlocutory ruling denying dismissal of a claim against a party based on the Establishment Clause was immediately appealable

Faith Christian has not cited, nor have we found, any case permitting an immediate collateral-order appeal challenging a court’s decision to decline to dismiss secular claims based on the Establishment Clause’s prohibition against courts’ *excessive* entanglement with religion.

Faith Christian mentions *Whole Women’s Health v. Smith*, 896 F.3d 362 (5th Cir. 2018), but the circumstances at issue there were very different from this case. In *Smith*, the district court issued a discovery order requiring the Texas Conference of Catholic Bishops (“Conference”), which was not a party to the litigation, to produce its “internal communications.” *Id.* at 364. The Fifth Circuit permitted an immediate appeal from that decision under the collateral order doctrine because the contested discovery order conclusively determined that the non-party Conference had to turn over its internal communications and, because the discovery order was directed to a non-party, it was effectively unreviewable following a final judgment entered in the parties’ litigation. *Id.* at 367–69. That is a very different situation than the one presented

here, where a party-defendant (Faith Christian) seeks an immediate collateral-order appeal from the denial of summary judgment on its affirmative defense because there remain material factual disputes that a jury must decide. Here, Faith Christian can challenge that finding after final judgment if an adverse judgment is ultimately rendered against it.

d. Conclusion as to Faith Christian’s structural argument

Bringing this discussion full circle, *Hosanna-Tabor* expressly held that the “ministerial exception” is not jurisdictional. *See* 565 U.S.at 195 n.4. But even if, directly contrary to *Hosanna-Tabor*’s clear language, we treated the “ministerial exception” as jurisdictional, that would not entitle Faith Christian to an immediate appeal. Even decisions denying dismissal based on the lack of subject matter or personal jurisdiction are generally not immediately appealable. *See* 15A Wright & Miller §§ 3911.3, 3911.4.

Furthermore, even if, again contrary to *Hosanna-Tabor*’s express language, we instead relied on the Establishment Clause to treat the “ministerial exception” as a limitation on a court’s authority to adjudicate an employee’s discrimination claim, Faith Christian would still not be entitled to an immediate appeal. Any limitation the “ministerial exception” imposes is only conditional and would not be triggered unless and until the religious employer established as a matter of fact that the employee qualified as a minister. The Establishment Clause’s admonition that courts avoid excessive entanglement with religion would have no application if the employee was found not to be a minister. And, as already explained, and as emphasized by the Supreme Court in *Hosanna-Tabor*

and *Our Lady*, because the determination of whether or not an employee is a minister involves a fact-intensive inquiry, the denial of summary judgment on that issue because there are material factual disputes does not justify an immediate appeal under the collateral order doctrine.

Many of the arguments made by Faith Christian, the dissent and a number of amici to the contrary simply presuppose that the plaintiff-employee will always be a minister. Those arguments are not realistic. They ignore the possibility, presented here, that a district court will conclude that summary judgment cannot be entered for the religious employer because there are genuinely disputed material facts that a jury must resolve. If a jury's resolution of those facts indicates that the employee is not a minister, then the Establishment Clause is not implicated.

d. Conclusion as to *Cohen's* third requirement

We conclude that the “ministerial exception” is not analogous to qualified immunity and does not immunize religious employers from the burdens of litigation itself. While the “ministerial exception” does protect a religious employer from *liability* on claims asserted by a “*minister*” who alleges that the employer violated anti-discrimination employment laws, any error the district court makes in failing to apply that affirmative defense can be effectively reviewed and corrected through an appeal after final judgment is entered in the case.

3. Faith Christian also cannot meet *Cohen*'s first requirement, that the category of orders being appealed conclusively determine the disputed question

Because we conclude that Faith Christian has failed to establish that this category of orders satisfies the third *Cohen* prong, we need not address whether Faith Christian satisfied *Cohen*'s first prong—that the category of orders being appealed conclusively determine the disputed question, whether an employee qualifies as a minister. *See Coopers & Lybrand*, 437 U.S. at 468 (applying *Cohen*, 337 U.S. 541). But Faith Christian cannot satisfy *Cohen*'s first requirement either. It is clear that the district court denied summary judgment because a jury must resolve the genuinely disputed fact question of whether Tucker was a “minister”; that ruling unquestionably did not “*conclusively determine* the disputed question” of Tucker's ministerial status, *Coopers & Lybrand*, 437 U.S. at 468 (emphasis added). Instead, the district court's decision clearly contemplates further factual proceedings to resolve that disputed issue of fact of Tucker's ministerial status *vel non*.

As with the third *Cohen* requirement, again the dissent can only conclude that the first *Cohen* requirement is satisfied if the “ministerial exception” immunizes religious employers even from suit under Title VII. But, as explained in our discussion of the third

Cohen requirement, this is an incorrect characterization of the “ministerial exception.”²¹

²¹ Because Faith Christian has failed to meet either *Cohen*’s first or third requirements for immediate appeal under the collateral order doctrine, we have no interlocutory jurisdiction to address the merits of the district court’s decision to deny Faith Christian summary judgment on its “ministerial exception” defense. The dissent addresses the merits of that question and concludes the district court erred; that is, the dissent concludes that the factual question of whether Tucker was a “minister” should be taken from a jury and decided in the first instance by this court. We have two concerns about the dissent’s merits discussion. First, the dissent contends that the district court failed to identify specific factual disputes that preclude summary judgment. But that is not so. The district court laid out in extensive detail each side’s evidence on the question of whether Tucker was a minister (Aplt. App. 274–82) and then held that “whether Mr. Tucker was a ‘minister’ within the meaning of the ‘ministerial exception’ is genuinely disputed on the evidence presented” and that a reasonable jury considering that competing evidence could find either that Tucker was, or was not, a minister (*id.* at 284).

Second, the dissent asserts that it views that competing evidence in the light most favorable to Tucker, but then relies on Faith Christian’s evidence. As the district court explained the evidence, Faith Christian’s evidence was primarily self-serving documents describing Tucker’s position, like an extension agreement and teacher handbook, while Tucker’s evidence addressed the actual “facts and circumstances of his employment.” (Aplt. App. 284.) The district court noted that, if a jury believed Tucker’s evidence, the jury “could rationally” find that he was not a “minister.” *Id.* Furthermore, Faith Christian’s documents on which the dissent relies appear to classify all teachers and indeed all staff members as “ministers.” Such an indiscriminate blanket statement giving ministerial status to essentially its entire staff is contrary to the case-specific inquiry as to whether a given employee should be deemed a “minister” for purposes of the “ministerial exception.” See *Fratello*, 863 F.3d at 207 (2d Cir.) (noting that religious em-

III. CONCLUSION

The Supreme Court could of course extend the scope of the collateral order doctrine to allow interlocutory appeals of cases like the one before us. But until and unless that occurs, our task is to apply current existing law, which we have tried faithfully to do. Only a very small number of orders qualify categorically as immediately appealable under the collateral order doctrine. Faith Christian has not shown that the category of orders at issue here—decisions denying a religious employer summary judgment on the employer’s “ministerial exception” defense because of a genuine dispute of material issues of fact—cannot be effectively reviewed at the conclusion of the litigation. We, therefore, do not have jurisdiction under the collateral order doctrine to consider this appeal and, accordingly, DISMISS it for lack of jurisdiction.

ployer “cannot insulate itself from . . . liability by bestowing hollow ministerial titles upon many or all of its employees”); *see also Tomic*, 442 F.3d at 1039 (7th Cir.). We lack jurisdiction to consider the merits of the district court’s decision and so we do not address those merits in detail. But there are concerns about the dissent’s discussion of those merits.

Gregory Tucker v. Faith Bible Chapel, No. 20-1230
BACHARACH, J., dissenting

This case involves an employment dispute and the ministerial exception. This exception stems from the Religion Clauses of the First Amendment and bars courts from considering employment disputes between religious bodies and their ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). By barring consideration of these disputes, the ministerial exception protects the free exercise of religion and prevents judicial entanglement in religious matters. *Hosanna-Tabor*, 565 U.S. at 188.

The defendant (Faith Bible Chapel) sought summary judgment¹ based on the ministerial exception, arguing that the plaintiff (Mr. Gregory Tucker) had been employed as a minister. But the district court denied summary judgment and reconsideration.² Faith Bible appeals, arguing that

- appellate jurisdiction exists under the collateral-order doctrine and
- the ministerial exception bars relief.³

¹ Faith Bible moved to dismiss, and the district court converted the motion to one for summary judgment.

² The district court granted Faith Bible's motion for summary judgment on a claim under Title VI, but that claim does not bear on this appeal.

³ Faith Bible also asserts a church-autonomy defense, which the majority treats as underdeveloped. I express no opinion on the development of that defense.

The majority concludes that we lack jurisdiction, but I respectfully disagree. In my view, we have appellate jurisdiction under the collateral order doctrine. With jurisdiction, we should reverse because the undisputed evidence shows that Mr. Tucker was acting as a minister when his employment ended. So I respectfully dissent.

I. After his employment ended, Mr. Tucker sued.

Mr. Tucker worked as a teacher and as a Director of Student Life/Chaplain at a religious school, Faith Christian Academy. But parents of the students bristled when Mr. Tucker led a program on race and faith, and school officials later stripped Mr. Tucker of his position as a Director of Student Life/Chaplain. About a month later, school officials also terminated his employment as a teacher.

The termination led to a suit against the school's operator, Faith Bible, under Title VII and Colorado law for retaliating against Mr. Tucker's anti-racist statements. In response, Faith Bible attributes the termination to a disagreement about Mr. Tucker's interpretation of scriptural passages.

The substantive issue on appeal is whether a genuine dispute of material fact existed regarding Mr. Tucker's status as a minister.

II. We should consider all of Mr. Tucker's jurisdictional challenges.

Faith Bible argues that Mr. Tucker conceded multiple jurisdictional arguments by failing to respond to them when he briefed jurisdiction. But parties cannot waive challenges to appellate jurisdiction. *Tuck v.*

United Servs. Auto. Ass'n, 859 F.2d 842, 844 (10th Cir. 1988). So we should consider all of Mr. Tucker's jurisdictional challenges.

III. We should consider all of Mr. Tucker's jurisdictional challenges.

Consideration of these jurisdictional challenges turns on the nature of the ministerial exception. Mr. Tucker considers this exception like any ordinary affirmative defense, serving only the personal interests of private individuals to avoid personal liability for private wrongs. In my view, however, the ministerial exception also serves as a structural safeguard against judicial meddling in religious disputes. As a structural safeguard, the ministerial exception protects religious bodies from the suit itself—unlike most affirmative defenses that protect only against liability.

A. Affirmative defenses that immunize a party from suit must serve some value of a high order.

The nature of the ministerial exception matters because appellate jurisdiction ordinarily arises only after the district court has entered a final order. 28 U.S.C. § 1291. But some orders warrant earlier appellate review because they concern not just a defense against liability but also a “right not to stand trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This right exists only rarely, when it’s “embodied in a constitutional or statutory provision entitling a party to immunity from suit.” *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 874 (1994).

We proceed cautiously when characterizing a defense as a protection from the suit itself rather than

just liability. *Will v. Hallock*, 546 U.S. 345, 350 (2006). For this characterization, we consider whether delayed review would “imperil . . . a substantial public interest or some value of a high order.” *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will*, 546 U.S. at 352–53). The Supreme Court has identified values of a “high order” in defenses involving qualified immunity, absolute immunity, Eleventh Amendment immunity, and double jeopardy. *Will*, 546 U.S. at 352. These defenses serve values of a high order like the separation of powers, the efficiency of government, the discretion of governmental officials, the State’s dignitary interests, and the mitigation of power imbalances between governmental and private litigants. *Id.* at 352–53.

Consider qualified immunity, which shields government officials from suits for damages unless the official violates a clearly established federal constitutional or statutory right. The Supreme Court treats qualified immunity as “an immunity from suit rather than a mere defense to liability” because the costs of litigation “can be peculiarly disruptive of effective government.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)). Government can be disrupted by

- distracting “officials from their governmental duties,”
- “inhibit[ing] discretionary action,” and
- “deter[ing] . . . able people from public service.”

Id. (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)).

Consider also absolute immunity, which is an affirmative defense that prevents civil liability for official acts by certain governmental actors. *Nixon v. Fitzgerald*, 457 U.S. 731, 744–47, 755 (1982). This affirmative defense stems from the structural separation of powers among the branches of government. *Id.* at 748. Given the importance of this structural protection, the Supreme Court treats absolute immunity as immediately appealable. *Id.* at 742–43; *see also Will*, 546 U.S. at 352 (stating that immediate appealability in *Nixon v. Fitzgerald* was based on concern that delay of an appeal would compromise separation of powers).

And consider Eleventh Amendment immunity, which bars federal suits against states. *P. R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141, 144 (1993). To relieve states of burdensome suits and to ensure vindication of a state’s dignitary interests, the Supreme Court treats Eleventh Amendment immunity as immediately appealable, characterizing it as an affirmative defense protecting values of a high order. *Will*, 546 U.S. at 352–53.

A final example involves the Double Jeopardy Clause, which protects an individual from being punished twice for the same offense. *Abney v. United States*, 431 U.S. 651, 661 (1977). Immediate appellate review is needed because the government’s prosecutorial power can subject individuals “to embarrassment, expense and ordeal . . . to live in a continuing state of anxiety.” *Will*, 546 U.S. at 352 (quoting *Abney*, 431 U.S. at 661–62).

B. The ministerial exception protects values of a high order by carrying out a constitutional mandate and preserving the structural separation of church and state.

The ministerial exception also advances values of a high order, protecting religious bodies from burdensome litigation over religious doctrine and preserving the structural separation of church and state. These values compel courts to resolve application of the ministerial exception at an early stage of the litigation. *Id.* at 350–51.

The unique nature of the ministerial exception stems from its origins in the Free Exercise and Establishment Clauses of the First Amendment, which “protect the right of churches and other religious institutions to decide matters ‘of faith and doctrine’ without government intrusion.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (quoting *Hosanna-Tabor*, 565 U.S. at 186).

The First Amendment’s protection extends to religious bodies’ employment matters. Without limitations on judicial meddling in employment disputes, religious bodies might skew their employment decisions. For example, a religious body might hesitate to fire a minister even in the face of doctrinal disagreements. “There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.” *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). The potential cloud of litigation might also affect a religious body’s criteria for future vacancies in the ministry. See *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996).

The ministerial exception not only protects religious bodies from the need to skew their employment decisions, but also advances three structural values:

1. Protection of a religious body’s internal governance
2. Limitation on governmental power over religious matters
3. Prevention of judicial encroachment in matters of religion

First, in keeping with the Free Exercise Clause, the ministerial exception protects the internal governance of religious bodies by allowing them “to shape [their] own faith[s] and mission[s] through [the religious bodies’] appointments.” *Id.* The right to independently make employment decisions “ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical,’—is the church’s alone.” *Id.* at 194–95 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)); see also *Skrzypczak v. Roman Cath. Diocese*, 611 F.3d 1238, 1243 (10th Cir. 2010) (“The ministerial exception preserves a church’s ‘essential’ right to choose the people who will ‘preach its values, teach its message, and interpret its doctrines, both to its own membership and to the world at large,’ free from the interference of civil employment laws.” (quoting *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002))).

Second, under the Establishment Clause, the ministerial exception serves as a structural limit on governmental power over religious matters. See *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) (“The ministerial exception is

a structural limitation imposed on the government by the Religion Clauses.”); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (noting that the ministerial exception “is rooted in constitutional limits on judicial authority”); *see also* John Hart Ely, *Democracy & Distrust: A Theory of Judicial Review* 94 (1980) (arguing that the Religion Clauses perform a “structural or separation of powers function”). The Constitution’s structural limitation prohibits governmental involvement “in religious leadership disputes.” *Conlon*, 777 F.3d at 836; *see also* Peter J. Smith & Robert Tuttle, *Civil Procedure & the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1880–81 (2018) (noting that the ministerial exception is “best understood as an effectuation of the Establishment Clause’s limits on governmental authority to decide strictly and purely ecclesiastical matters” (citing *Hosanna-Tabor*, 565 U.S. at 188–89)); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 3–4 (1998) (arguing that the Establishment Clause serves as a “structural restraint on the government’s power to act on certain matters pertaining to religion”).

Third, the ministerial exception confines the judiciary to issues requiring expertise in law, preventing judicial encroachment in matters of religion. *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated in part on other grounds*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). By confining courts to legal disputes, the ministerial exception preserves the separation of religious and legal realms, preventing “secular

courts [from] taking on the additional role of religious courts, as if the United States were a theocracy.” *Id.*

Given these structural values, three circuits have held that the ministerial exception—unlike most other affirmative defenses—can’t be waived. *See Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (concluding that “the Church is not deemed to have waived [the ministerial exception] because the exception is rooted in constitutional limits on judicial authority”); *Conlon v. Inter-Varsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) (concluding that “the Constitution does not permit private parties to waive the First Amendment’s ministerial exception” because “[t]his constitutional protection is . . . structural”); *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (stating that “the ministerial exception . . . is not subject to waiver or estoppel”), *abrogated in part on other grounds*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). No circuit has reached a contrary conclusion.

The majority argues that the three opinions are distinguishable because they

- didn’t address whether the ministerial exception provides immunity from “litigation” (as opposed to immunity from liability),
- addressed only whether a religious body could “waive (or forfeit) a ‘ministerial exception defense,’” and
- addressed waiver only after explaining that the claimant was a minister.

These purported differences mean little.

The majority is incorrect as to the first purported difference: The Sixth Circuit *did* treat the ministerial exception as a bar against the suit itself. In *Conlon*, the Sixth Circuit concluded that the ministerial exception was no longer waivable because the Supreme Court’s opinion in *Hosanna-Tabor* had treated the ministerial exception as a bar to suit rather than just as a defense against liability. *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 181–89 (2012)); see pp. 15–16, below.

The second purported difference fails to consider the courts’ reasons for treating the ministerial exception as nonwaivable. In *Lee*, for example, the parties didn’t raise the ministerial exception. *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018). But the Third Circuit considered the ministerial exception nonwaivable because it “is rooted in constitutional limits on judicial authority.” *Id.* In *Conlon*, the Sixth Circuit interpreted *Hosanna-Tabor* to prevent courts from ever considering the ministerial exception as waived because it “is a structural limitation imposed on the government by the Religion Clauses.” *Conlon*, 777 F.3d at 836 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 181–89 (2012)). As the Third and Sixth Circuits explained, they disallowed waiver because of the ministerial exception’s structural character.

Finally, the majority states that the three courts discussed the merits (the claimant’s status as a min-

ister) before discussing the inability to waive the ministerial exception. This statement is incorrect because *Lee* discussed waiver simultaneously with the merits. *Lee*, 903 F.3d at 118–23. Regardless of the sequence of these issues, however, why would the courts’ organization of their opinions render the content distinguishable? The parties didn’t raise the ministerial exception in any of these cases, but each circuit held that the court had to address the issue anyway because of its unique structural quality, setting it apart from most other affirmative defenses.

C. Because the ministerial exception advances interests of a high order, the issue should be decided early in the litigation.

The ministerial exception thus protects interests of a high order by maintaining the structural division between religious and governmental realms. Given these important interests, early resolution is necessary to avoid costly, burdensome litigation between religious bodies and their ministers.⁴ See *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (stating that Title VII actions can be lengthy and subject churches to “subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers”); see also

⁴ The majority faults Faith Bible for failing to cite “any case permitting an immediate collateral-order appeal challenging a court’s decision to decline to dismiss secular claims based on the Establishment Clause’s prohibition against courts’ *excessive* entanglement with religion.” Maj. Op. at 45 (emphasis in original). But Mr. Tucker hasn’t cited any case to the contrary. That’s not surprising because this issue is one of first impression; there have been no circuit court cases deciding the issue either way.

EEOC v. Cath. Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (concluding that the EEOC’s two-year investigation into a minister’s claim, combined with extensive pretrial inquiries and a trial, “constituted an impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution”). And early resolution will soften the disruption into a religious body’s internal affairs. *See Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 982–83 (7th Cir. 2021) (expressing concern that litigation over the ministerial exception could “protract legal process” and “the very process of inquiry could ‘impinge on rights guaranteed by the Religion Clauses’” (quoting *Rayburn*, 772 F.2d at 1171 (4th Cir. 1985) and *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979))).

D. The Supreme Court has characterized the ministerial exception as a bar to the suit (rather than just as a defense against liability).

The Supreme Court held in *Hosanna-Tabor* that the “ministerial exception *bars . . . a suit*” over the religious body’s decision to fire the plaintiff. 565 U.S. at 196 (emphasis added).⁵ By using the words “bar” and “suit,” the Supreme Court has recognized the function

⁵ Similarly, our court discussed the issue in *Bryce v. Episcopal Church in the Diocese of Colorado*, stating that the ministerial exception “*prevents adjudication* of Title VII cases brought by ministers against churches.” *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002) (emphasis added). The majority argues we cannot rely on *Bryce* because the holding ultimately turned on the church autonomy doctrine. *See* Maj. Op. at 39 n.20. But there we considered the ministerial exception as a part of the church autonomy doctrine. *Id.* at 656.

of the ministerial exception as a protection against litigation itself (rather than just as a defense against liability).

The majority suggests that I'm putting too much stock in the Supreme Court's choice of a verb (*bar*). But I'm putting little stock in the verb *bar*. The Supreme Court concluded that the ministerial exception serves to "bar[] . . . a suit." *Hosanna Tabor*, 565 U.S. at 196. Substitute any synonym for *bar*, such as *prevent*. See Bryan A. Garner, *Garner's Dictionary of Legal Usage* 103 (3d ed. 2001) ("*Bar* means 'to prevent (often by legal obstacle).'",). The Supreme Court paired this verb with the direct object *suit*, which means "[a]ny proceeding by a party or parties against another in a court of law." *Suit*, *The Black Law Dictionary* (11th ed. 2019). The Supreme Court's language was unmistakable: It characterized the ministerial exception as a defense that would prevent the proceeding itself. I think that we should take the Supreme Court's choice of words at face value, for "a good rule of thumb for reading [the Supreme Court's] decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016).

The Sixth Circuit has addressed this aspect of *Hosanna-Tabor*. Prior to *Hosanna-Tabor*, the Sixth Circuit had held that a religious body could waive the ministerial exception. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007). But the Sixth Circuit later concluded that the ministerial exception was no longer waivable because *Hosanna-Tabor* had treated the ministerial exception as a bar to the suit itself. *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015).

For this conclusion, the court drew upon two of *Hosanna-Tabor*'s key passages:

1. "[T]he Establishment Clause . . . *prohibits* government involvement in ecclesiastical matters."
2. "It is '*impermissible* for the government to contradict a church's determination of who can act as its ministers.'"

Id. (alteration in original) (quoting *Hosanna-Tabor*, 132 S. Ct. at 704, 706).

Despite the Supreme Court's characterization of the ministerial exception as a bar to suit, Mr. Tucker argues that we should not construe the ministerial exception as "a jurisdictional bar." Appellee's Jurisdictional Memorandum at 11. He is correct: The ministerial exception doesn't prevent the district court from hearing the case. So the ministerial exception doesn't prevent jurisdiction over the subject-matter or the parties. In this respect, the ministerial exception resembles other nonjurisdictional defenses like qualified immunity and absolute immunity. *See Nevada v. Hicks*, 533 U.S. 353, 373 (2001) ("There is no authority whatsoever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction . . ."). Though these affirmative defenses aren't "jurisdictional" *in district court*, they trigger the collateral-order doctrine to create *appellate jurisdiction*. *See* Maj. Op. at 22 (qualified immunity); *id.* at 32 n.14 (absolute immunity).

E. These values are not undermined by Mr. Tucker's contrasts with other immunities.

The ministerial exception does bear some differences with other affirmative defenses like qualified immunity and absolute immunity. The primary difference involves waivability: Unlike those immunities, the ministerial exception is considered nonwaivable because of its structural character. *See Hicks*, 533 U.S. at 373; pp. 10–12, above.⁶ Mr. Tucker nonetheless suggests three other differences between the ministerial exception and other immunities. These differences prove little.

First, Mr. Tucker argues that the ministerial exception does not provide blanket immunity from all civil liability. He’s right about that. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020) (stating that the ministerial exception “does not mean that religious institutions enjoy a general immunity from secular laws”). Religious bodies remain subject to many civil and criminal laws. *See, e.g., Emp. Div., Dep’t of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990) (holding that the government may enforce neutral and generally applicable laws despite religious objections).

The ministerial exception involves only an immunity from trial in employment disputes between a religious body and its ministers. *See Our Lady of Guadalupe*, 140 S. Ct. at 2060 (“[The ministerial exception] does protect their autonomy with respect to . . . the selection of the individuals who play certain key

⁶ The Eleventh Amendment is jurisdictional, *Colby v. Herrick*, 849 F.3d 1273, 1278 (10th Cir. 2017), but it too can be waived. *Sutton v. Utah St. Sch. for the Deaf & Blind*, 173 F.3d 1226, 1233–34 (10th Cir. 1999). Though waivable, Eleventh Amendment immunity can still trigger the collateral-order doctrine. *See* pp. 5–6, above.

roles.”); *Skrzypczak v. Roman Cath. Diocese*, 611 F.3d 1238, 1246 (10th Cir. 2010) (concluding that the ministerial exception bars ministers’ pursuit of employment claims). The ministerial exception doesn’t shield religious bodies from all secular laws.

Because of this limitation, the majority points out that religious employers can be sued “by non-ministerial employees” for discriminating in employment. Maj. Op. at 35. But this distinction proves little. We protect a religious body’s authority over the employment of ministers because of the Religion Clauses. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (concluding that the First Amendment elevates the interest of religious bodies in choosing their ministers). So ministerial employees can’t sue even though other employees can. The distinction serves the structural purpose of the Religion Clauses, preventing judicial intrusion into a religious body’s employment of ministers. See Part III(B), above. On the other hand, employment of secular employees doesn’t implicate the structural purpose of the Religion Clauses.

Second, Mr. Tucker argues that the benefits from protections like qualified immunity should be reserved for government officials, not private parties.⁷ As the majority observes, however, the collateral-order doctrine applies to private parties as well as governmental parties. *Eisen v. Carlisle & Jacquelin*, 417

⁷ Mr. Tucker suggests that the ministerial exception should provide no immunity to religious bodies. But the Supreme Court has rejected that suggestion. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

U.S. 156 (1974); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). For example, we’ve recognized appellate jurisdiction under the collateral-order doctrine when private parties clashed over a state law. *Los Lobos Renewal Power LLC v. Americulture, Inc.*, 885 F.3d 659, 661 (10th Cir. 2018). Other circuits have also applied the collateral-order doctrine to appeals by private parties. *See Black v. Dixie Consumer Prods. LLC*, 835 F.3d 579, 583–84 (6th Cir. 2016) (stating that the Sixth Circuit and other federal appellate courts have frequently applied the collateral-order doctrine to private parties); *see also United States v. Bescond*, 7 F.4th 127, 131 (2d Cir. 2021) (applying the collateral-order doctrine in permitting an interlocutory appeal by a private party on the issue of fugitive status).

Finally, Mr. Tucker urges us to follow the Seventh Circuit Court of Appeals, stating that it has declined to apply the collateral-order doctrine to the ministerial exception. *See Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085 (7th Cir. 2014). As the majority observes, however, the Seventh Circuit didn’t address the applicability of the collateral-order doctrine to the ministerial exception. Maj. Op. at 31 (citing *Herx*, 772 F.3d at 1088, 1091 n.1).⁸

⁸ *Herx* lacks any persuasive value because it relied only on the religious body’s failure to present “a persuasive case” that the ministerial exception satisfied the collateral-order doctrine. *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1091 (7th Cir. 2014). For this conclusion, the Seventh Circuit relied on deficiencies in the briefing, stating that the religious body had focused mainly “on the merits,” spent “only a few sentences” on

In sum, the ministerial exception protects interests like those advanced by qualified immunity, absolute immunity, and Eleventh Amendment immunity. For example, the ministerial exception

- protects the First Amendment right of free exercise by insulating religious bodies from costly and burdensome litigation over purely religious decisions on who may serve as a minister and
- functions as a structural limitation, preserving religious independence and the separation of church and state.

These functions distinguish the ministerial exception from other run-of-the-mill affirmative defenses to liability. Given these differences, the ministerial exception protects not only against liability but also against the suit itself.

F. The majority errs by discounting the value of early judicial review based on unidentified factual disputes.

When addressing qualified immunity, district courts sometimes deny summary judgment based on factual disputes. *See Sawyers v. Norton*, 962 F.3d 1270, 1281 (10th Cir. 2020). The majority asserts that in this circumstance, the Supreme Court disallows “an immediate appeal” because the costs outweigh the benefits. Maj. Op. at 21–22. Based on this assertion, the majority argues that we should disallow an immediate appeal because the district court denied Faith

jurisdiction, and failed to cite relevant authority. *Id.* at 1090–91. In our appeal, however, the parties have fully briefed the applicability of the collateral-order doctrine.

Bible’s motion for summary judgment based on factual disputes. *Id.* at 23–24 n.8.

The majority’s argument starts with a faulty premise: The district court didn’t identify any factual disputes. So we need not disallow “an immediate appeal.” The majority disagrees, stating that the court did identify a factual dispute—Mr. Tucker’s status as a minister. But status as a minister is a question of law, not fact. *See Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015) (stating that “whether the [ministerial] exception attaches at all is a pure question of law”); *Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 608–09 (Kan. 2014) (“[W]e hold the determination of whether an employee of a religious institution is a ministerial employee is a question of law for the trial court, to be handled as a threshold matter.”).⁹ Granted, the inquiry is fact-dependent and considers the employee’s title, qualifications, and responsibilities. But the ultimate question of ministerial status entails a matter of law.

Though the district court found a disagreement over ministerial status, the court didn’t identify any evidentiary disputes over Mr. Tucker’s title, job, or duties. The court instead referred only to a disagreement as to “the totality of the facts and circumstances of

⁹ The majority states that we treated the ministerial exception as a factual question in *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238, 1243–44 (10th Cir. 2010). In *Skrzypczak*, however, we never addressed whether the ministerial exception involved a matter of law or fact. *See id.* We simply upheld the religious body’s motion for summary judgment, considering the evidence as to the claimant’s job description and responsibilities. *Id.* at 1243–46.

[Mr. Tucker's] employment." Appellant's App'x vol. 1, at 281.

In qualified immunity cases, when the district court doesn't identify any factual disputes, we

- "review the record to determine what facts the district court likely assumed," *Armijo ex rel., Chavez v. Wagon Mound Pub. Schools*, 159 F.3d 1253, 1261 (10th Cir. 1998), and
- "ask de novo whether sufficient evidence exists" for a conclusion that the plaintiff overcame qualified immunity, *Lewis v. Tripp*, 604 F.3d 1221, 1228 (10th Cir. 2010).

So when we consider qualified immunity, the district court's reliance on unidentified factual disputes won't prevent application of the collateral order doctrine. *Id.* The same is true here: Unidentified factual disputes don't prevent application of the collateral-order doctrine to the ministerial exception.

IV. The ministerial exception satisfies the collateral-order doctrine.

Generally, appellate jurisdiction exists only after the district court has issued a final order. 28 U.S.C. § 1291. But we can sometimes deem a narrow class of orders final even if they do not end the litigation. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 414 n.5 (2015) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). These orders are reviewable under the collateral-order doctrine. *Id.*

The collateral-order doctrine contains three elements:

1. The order conclusively determined an issue.
2. That issue is completely separate from the merits.
3. The decision on this issue would be effectively unreviewable after the final judgment.

Los Lobos Renewable Power, LLC v. Americulture, Inc., 885 F.3d 659, 664 (10th Cir. 2018). We apply these elements to categories of orders rather than to individual orders, weighing “the inconvenience and costs of piecemeal review” against “the danger of denying justice by delay on the other.” *Id.* (quoting *Johnson v. Jones*, 515 U.S. 304, 315 (1995)). “The latter end of that scale has often tipped in favor of constitutionally based immunities.” *Id.*

Given the district court’s ruling and the ministerial exception’s interests of a high order, the three elements of the collateral-order doctrine are met.

1. The district court’s order conclusively determined the applicability of the ministerial exception.

The first element requires a district court’s conclusive determination of the issue. *See* pp. 22–23, above. A district court conclusively decides an issue “if it is not subject to later review or revision by the district court.” *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 665 (10th Cir. 2018).

The district court’s decision conclusively determines the religious body’s immunity from suit. If the court were to defer consideration to the end of the case, the religious body would lose its protection from the trial itself. Subjected to suit, the religious body

could suffer judicial meddling in religious doctrine, expensive and time-consuming litigation over the content and importance of religious tenets, and blurring of the line between church and state. *See* Part III(B)–(C), above.

Mr. Tucker points out that the religious body could ultimately appeal when the case finishes. But that’s also true of qualified immunity, absolute immunity, and Eleventh Amendment immunity. Though the defendants might ultimately prevail based on these immunities, deferral of an appeal would conclusively determine the need to stand trial on the plaintiff’s claims. *See Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

Mr. Tucker also argues that the district court declined to decide the issue rather than conclusively deny application of the ministerial exception. The district court did say that it was deferring consideration of Mr. Tucker’s status as a minister. But the ruling effectively denied Faith Bible’s claim to immunity from suit. The ruling on the ministerial exception thus satisfies this element of the collateral-order doctrine. *See id.* at 537 (stating that “the court’s denial of summary judgment finally and conclusively determines the defendant’s claim of right not to *stand trial* on the plaintiff’s allegations” (emphasis in original)).

The majority does not definitively answer whether the first element is satisfied here. Instead, the majority states that the element is likely absent because of genuine issues of disputed fact. But the district court doesn’t identify any factual disputes. *See* Part III(F), above. So I would conclude that the district court’s order satisfied the first element, conclusively denying Faith Bible’s immunity from suit.

2. The applicability of the ministerial exception is completely separate from the merits of the employment dispute.

The second element entails complete separation from the merits. *See* pp. 22–23, above. Complete separation exists when the issue differs significantly “from the fact-related legal issues” underlying the merits of the plaintiff’s claim. *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 665 (10th Cir. 2018) (quoting *Johnson v. Jones*, 515 U.S. 304, 314 (1995)). The majority finds satisfaction of this element because the ministerial exception presents an important First Amendment issue, which is distinct from the merits of the underlying employment discrimination claim. Maj. Op. at 26. I agree.

3. If an appeal must await entry of a final order, the immunity from suit would become unreviewable.

The third element is satisfied when interlocutory review is needed because the matter would otherwise become unreviewable. *See* pp. 22–23, above.

Mr. Tucker points out that when the district court denies summary judgment on the ministerial exception, the defendant can reassert the issue later, moving for judgment as a matter of law or even filing a post-judgment motion. But that’s true of other defenses like qualified immunity or absolute immunity.

Though appellate courts can address the ministerial exception (like qualified immunity or absolute immunity) at the end of the case, deferral of the appeal

could subject the religious body to burdensome discovery, trial, and post-judgment motions. The eventual ability to appeal would thus come at a cost, protecting the religious body from liability but not from the suit itself. *See* Part III(B)–(C), above.

* * *

For these reasons, the denial of the ministerial exception on summary judgment satisfies the collateral-order doctrine. We thus have jurisdiction.

V. I would conduct de novo review of the denial of summary judgment.

On the merits, we should conduct de novo review. *Skrzypczak v. Roman Cath. Diocese*, 611 F.3d 1238, 1243 (10th Cir. 2010). For this review, we consider the evidence in the light most favorable to the nonmoving party (Mr. Tucker). *Id.* Summary judgment would be appropriate if “there is no genuine issue as to any material fact” and the movant (Faith Bible) “is entitled to judgment as a matter of law.” *Id.* (quoting Fed. R. Civ. P. 56(c)).

When applying this standard to assess qualified immunity, we credit the district court’s assessment of facts that a reasonable jury could find. *See Estate of Booker v. Gomez*, 745 F.3d 405, 409 (10th Cir. 2014). I would follow this approach, determining whether Mr. Tucker was a minister based on the district court’s assessment of facts that a reasonable jury could have found.

VI. The ministerial exception applies as a matter of law.

The ministerial exception bars courts from considering an employment claim brought by a minister against a religious body. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020). The parties do not dispute that Faith Bible is a religious body. So we need only consider whether Mr. Tucker was working as a minister.

A. Multiple factors bear on his status as a minister.

No rigid formula exists for determining whether an employee worked as a minister. *Hosanna-Tabor Evangelical Church & Sch. v. EEOC.*, 565 U.S. 171, 190 (2012). Without a rigid formula, we must consider the Supreme Court's two cases involving teachers at religious schools: *Hosanna-Tabor* and *Our Lady of Guadalupe*.

In *Hosanna-Tabor*, the Supreme Court considered four factors to characterize a religious school's teacher as a minister:

1. whether the school had held the teacher out as a minister,
2. what the teacher's title had been and what her religious education had entailed,
3. whether the teacher had held herself out as a minister, and
4. what the teacher's job responsibilities had been.

Id. at 191–92. In applying these factors, the Court observed that the school had held the teacher out as a minister, that she had retained the title of a “commissioned minister,” that she had identified as a minister “call[ed] to religious service,” and that her duties had “reflected a role in conveying the Church’s message and carrying out its mission.” *Id.* Given these circumstances, the Court regarded the teacher as a minister. *Id.*

In *Our Lady of Guadalupe*, the Supreme Court regarded two teachers at a religious school as ministers. 140 S. Ct. at 2049. The Court clarified that “a variety of factors may be important,” including factors beyond those considered in *Hosanna-Tabor*. *Id.* at 2063. The importance of the factors will vary from case to case. *Id.* And the “religious institution’s explanation [of an employee’s role] in the life of the religion in question is important,” but not dispositive. *Id.* at 2066. “What matters,” the Court explained, “is what an employee does.” *Id.* at 2064 (emphasis added). The Court explained that teachers at religious schools often act as ministers when fulfilling the school’s mission of instructing students in matters of faith:

The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work live at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

Id. at 2055.

In determining that the two teachers had worked as ministers, the Court considered three factors:

1. “[T]hey both [had] performed vital religious duties.”
2. They had been “obliged to provide instruction about the Catholic faith” and “to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.”
3. The religious school [had] “expressly [seen the two teachers] as playing a vital part in carrying out the mission of the church.”

Id. at 2066.

Relying on *Hosanna-Tabor* and *Our Lady of Guadalupe*, Faith Bible argues that Mr. Tucker worked as a minister in his capacities as a teacher and as a Director of Student Life/Chaplain.¹⁰ In addressing this argument, we credit the district court’s assessment of the facts that a reasonable jury could have found. *See Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013). The district court concluded that a reasonable jury could have found that under Mr. Tucker’s version, he hadn’t acted as a minister. Appellant’s

¹⁰ Mr. Tucker had lost his position as a Director of Student Life/Chaplain before his employment at the school came to an end. For about a month, he had served only as a teacher. *See* Part I, above.

The change led the panel to ask the parties about the pertinent time period for the ministerial exception. Was it (1) when Mr. Tucker was a director/chaplain and a teacher or (2) when he was just a teacher? I would not decide this issue because Mr. Tucker acted as a minister in both time periods. *See* Part VI(B)–(C), below.

App'x vol. 1, at 284. So I would credit Mr. Tucker's version and other undisputed facts as summarized in the district court's order. *Id.* at 277–82, ¶¶ 1–17.

B. As a Director of Student Life/Chaplain, Mr. Tucker was a minister.

Under Mr. Tucker's version and other undisputed facts, he qualified as a minister in his role as Director of Student Life/Chaplain.

Mr. Tucker testified that he had held himself out to the students not only as “the Director of Student Life,” but also as the “Chaplain.” *Id.* at 373. As the Chaplain, Mr. Tucker had acknowledged focusing on the students' “physical, rational, and spiritual wellbeing.” *Id.* His focus on spiritual wellbeing is reflected in

- his title and training,
- the school's explanation to Mr. Tucker of his role, and
- his responsibilities.

Title and Training

From August 2014 to January 2018, Mr. Tucker served as a Director of Student Life/Chaplain at Faith Christian Academy. Appellant's App'x vol. 1, at 278. The parties dispute whether

- Mr. Tucker had the primary title of “Director of Student Life” or “Chaplain” and
- Faith Bible told Mr. Tucker that he was not a minister for tax purposes.

Though Mr. Tucker disputes his primary title, he described his position as “Director of Student

Life/Chaplain” and admitted that his employment contract and extensions had referred to his job as “Chaplain.” *Id.* at 208–09, 271, 277, 280. These references bear significance because the Supreme Court has considered job titles in determining the ministerial status. *Our Lady of Guadalupe*, 140 S. Ct. at 2056–57; *Hosanna-Tabor*, 565 U.S. at 191. Mr. Tucker’s title as Chaplain reflects religious leadership.

The School’s Explanation of Mr. Tucker’s Role

The school’s explanation of Mr. Tucker’s role, though not dispositive, is “important.” *Our Lady of Guadalupe*, 140 S. Ct. at 2066.

In 2017, Mr. Tucker signed the school’s Extension Agreement for the position of Chaplain. The agreement states:

The Superintendent of Faith Christian Academy . . . discussed with Employee the necessity that the hand of the Lord be on Employee and that he/she exhibits the gift necessary to perform in the position of Chaplain. Employee expressed his/her belief that he/she has this gift and that God has called him/her to minister this gift at [the school].

Appellant’s App’x vol. 1, at 99, 275.

Under the extension agreement, the school required that the “hand of the Lord” be on Mr. Tucker as its “Chaplain.” Mr. Tucker thus accepted a call to minister to the school community, and the school held Mr. Tucker out as a religious leader.

Responsibilities

As a Director of Student Life/Chaplain, Mr. Tucker bore responsibility for religious leadership. He emphasizes that these responsibilities included

- organization of “religiously oriented” chapel services,
- spiritual guidance and counseling,
- endorsement of Christianity,
- integration of “a Christian worldview” in his teaching,
- “a passionate relationship with Jesus Christ,” and
- assistance to students in developing their relationships with Jesus Christ.

Appellee’s Jurisdictional Memorandum at 3, 5; Appellee’s Resp. Br. at 47. These characterizations are supported by the summary-judgment record, which showed Mr. Tucker’s organization of “weekly chapel meetings” consisting of “assemblies or symposiums” where people with a variety of religious or nonreligious perspectives would address “matters of interest at the school.” Appellant’s App’x vol. 1, at 281.

The chapels included some secular activities, like “announcements, awards, rallies, student election speeches, and other ordinary high school related matters.” *Id.* But Mr. Tucker describes the chapels as “religiously oriented discussion groups.” Appellee’s Jurisdictional Memorandum at 3.

In a presentation to students, Mr. Tucker described his duties as “the physical, relational, and

spiritual wellbeing” of students and planning “chapels, retreats, outreach projects, and student mentoring opportunities that are designed to provide opportunities for student spiritual growth.” Appellant’s App’x vol. 1, at 271.

Mr. Tucker’s extension agreement also required obedience to scripture and attendance at prayer sessions and church services. *Id.* at 100, 275. Though Mr. Tucker had some secular duties as a Director of Student Life/Chaplain, many aspects of his work were religious. See *Scharon v. St. Luke’s Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991) (stating that the position of “Chaplain” was “primarily a ‘ministerial’ position” despite the performance of some “secular activities in that role”); see also *Hosanna-Tabor*, 565 U.S. at 193 (rejecting the argument that ministers “perform exclusively religious functions” because “heads of congregations themselves often have a mix of duties, including secular ones”). Mr. Tucker had to organize religiously-oriented chapels and discussion groups “designed to provide opportunities for student spiritual growth.” Appellant’s App’x vol. 1, at 271. He was also responsible for spiritual counseling.

* * *

Based on all of the circumstances, I would conclude that the undisputed facts show that Mr. Tucker acted as a minister in his capacity as a Director of Student Life/Chaplain.

C. Mr. Tucker also served as a minister in his role as a teacher.

Mr. Tucker also qualified as a minister in his role as a teacher.

Title and Training

Mr. Tucker not only served as a Director of Student Life/Chaplain but also taught at the school from August 2000 to July 2006 and August 2010 to February 2018. *Id.* at 278–279. The school’s handbook gave teachers the title of “minister.” *Id.* at 276.

The title as a minister reflected “a significant degree of religious training.” *Hosanna-Tabor*, 565 U.S. at 191. When Mr. Tucker applied as a teacher, he stressed his credentials in the ministry, stating that

- he had participated in Campus Ministry, Campus Crusade for Christ, Young Life International, and Malibu Presbyterian college group leadership and worship team,
- he had worked “extensive[ly] . . . in ministry,”
- he was “a dedicated Christian,” and
- he had a “Christian philosophy of education.”

Appellant’s App’x vol. 2, at 471. His asserted credentials bore the traditional hallmarks of a job in the ministry.

In his declaration, Mr. Tucker denies “specific training in the Bible” in comparison to teachers who taught “Bible” as a subject. Appellant’s App’x vol. 1 at 206. But his own emphasis of his religious background and relevant credentials reflects an awareness of his religious duties. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 659–60 (7th Cir. 2018)

(concluding that the ministerial exception was supported by a teacher's touting of her experience in teaching religion).

Mr. Tucker insists that no religious training was required for his job. But the Supreme Court has stated that the ministerial exception doesn't require religious training. In *Our Lady of Guadalupe*, for example, the Supreme Court found satisfaction of the ministerial exception despite the claimant's "limited formal religious training." 140 S. Ct. at 2058. The Court explained that insistence "on rigid academic requirements could have a distorting effect" because "religious traditions may differ in the degree of formal religious training thought to be needed in order to teach." *Id.* at 2064. So the absence of requirements for religious training would not prevent application of the ministerial exception.

The School's Explanation of Mr. Tucker's Role

The teacher handbook also reflects the religious character of the job:

To become a teacher or full time worker at Faith Christian Academy is a calling from the Lord Jesus Christ to minister. You are joining this ministry, not as an employee, but as a minister to [the school's] students and families. [The school]'s ministry focus emphasizes the following items:

1. *[The school] desires to provide an academic program that is based on the scriptural principles found in the Word of God, the Holy Bible.* [Academy] teachers are committed to the integration of biblical truth within each aca-

demic and extracurricular discipline.¹¹ Additionally, teachers are responsible to facilitate godly character development, teach good study habits and encourage academic excellence. Each teacher must be thoroughly prepared and use effective instructional methods and techniques.

2. *Although [the school] is a Christian academic institution, an additional emphasis is placed upon the spiritual life of all students. [The school]’s desire is to train and lead students into attitudes and habits, which will bring them to Christ-like maturity. This includes encouraging all students to develop a prayer life, a passion to share to [sic] Gospel message, and characteristics such as honesty, humility, purity, faithfulness, love, and service. . . .*¹²

3. *All staff members must be aware of the importance of our ministry to one another. Each teacher needs to be open to the Holy Spirit to offer words of encouragement, prayer, and concern for one another.* It is important that teachers be willing to work as a team, make and receive positive suggestions, stand, as much as

¹¹ Mr. Tucker’s declaration echoes his understanding that he was instructed to “‘integrate’ a Christian worldview into my teaching.” Appellant’s App’x vol. 1. at 207.

¹² The omitted portion of this quotation addresses whether staff members must guide “students who may not yet be born again” toward “an abiding relationship with Christ.” Mr. Tucker states that he was told to let doubting students address their concerns with parents or pastors. Appellant’s App’x vol. 1, at 208. So we do not rely on this portion of the handbook.

possible, with fellow teachers (especially in times of hardship), and guard the reputation of others. Trusting in the Lord in areas of personal needs as well as school needs and looking to Him as the primary source of wisdom, help, knowledge, and strength is critical.

Appellant's App'x vol. 1, at 109, 276 (emphasis added).

Given the school's explanation of teachers' roles, the qualifications included religious dedication. For example, when Mr. Tucker applied, he had to say "[w]ithout mental or other reservation" that he believed in

- the divine inspiration and infallibility of the Bible,
- the existence of one God in the persons of God the Father, God the Son, and God the Holy Spirit,
- the virgin birth,
- the Lord Jesus Christ's deity, sinless humanity, atoning death, bodily resurrection, ascension to his Father's right hand, and future return in power and glory,
- the need for every person to receive the gift of eternal life from Jesus Christ in order to reach heaven,
- the ministry of the Holy Spirit,
- the church as the spiritual body headed by Christ,

- the principle of baptism through immersion, and
- the eternal existence of all people in heaven or hell.

Appellant's App'x vol. 2, at 419. These requirements reflect Faith Bible's consideration of teachers as religious leaders.

Responsibilities

Although Mr. Tucker referred to himself as a teacher rather than a minister, he taught at a Bible-based religious school. So he taught not only science, a secular subject, but also two classes in the Bible Department called "Leadership" and "Worldviews and World Religions." And Mr. Tucker's duties as a teacher included four religious responsibilities:

1. "Live in a vital relationship with God (Father, Son and Holy Spirit) as [the teacher] communicate[s] with Him through prayer and the Scriptures. John 15, Col. 3:25."
2. "Demonstrate daily a relationship with Jesus that is filled with grace and truth. John 1:14."
3. "To the greatest extent possible, live at peace with all, abstain from all appearance of evil, and refrain from gossip. Romans 12:18, 1 Thesalonians 5:16–18 & Proverbs 26:20."
4. "Discern and follow the leading of the Holy Spirit throughout the day. Gal. 5:16–18."

Id. at 213; *see also Our Lady of Guadalupe*, 140 S. Ct. at 2065 (noting that teachers at religious schools often perform religious functions). These religious responsibilities support ministerial status. *See Fratello v.*

Archdiocese of N.Y., 863 F.3d 190, 208 (2d Cir. 2017) (concluding that the substance of a lay principal’s duties supported the ministerial exception because they entailed “proficiency in religious leadership”).

We address not only Mr. Tucker’s responsibilities but also the criteria used to evaluate his performance in determining his ministerial status. *Our Lady of Guadalupe*, 140 S. Ct. at 2057; *Hosanna-Tabor*, 565 U.S. at 191. Mr. Tucker acknowledges that these criteria included consideration of his use of biblical principles and exhortation for his students to engage in worship and service. Appellant’s App’x vol. 1, at 208, 216 (“The staff member consistently illuminates Biblical principals [sic] related to course material in a manner which leads students to evaluate their personal worldview and/or challenges them to respond via worship, service, etc.”).

Mr. Tucker points out that he didn’t need to promote any particular Christian beliefs over others.¹³ He cites an out-of-circuit case, *Dole v. Shenandoah Baptist*, in arguing that teaching “all classes . . . from a pervasively religious perspective” and “subscrib[ing] to the Shenandoah statement of faith” were insufficient to trigger the ministerial exception. 899 F.2d 1329, 1396 (4th Cir. 1990).

Dole isn’t persuasive because it preceded *Hosanna-Tabor* and *Our Lady of Guadalupe*. Given the guidance from *Hosanna-Tabor* and *Our Lady of Guadalupe*, a court would need to consider Mr. Tucker’s obligation to teach from a Christian perspective, one

¹³ He also asserts that school officials told him not to teach particular doctrines. For this assertion, he presents no evidence.

that endorsed Christianity’s “worldview,” “integrate[d] a Christian worldview in his teachings,” and “endorse[d] Christianity in general terms.” Appellant’s App’x vol. 1 at 279–80; see *Hosanna-Tabor*, 565 U.S. at 192; *Our Lady of Guadalupe*, 140 S. Ct. at 2066. But Mr. Tucker went even further, for he acknowledged that his “main goal” was to educate students “to help them become more like Jesus Christ” because Christ was the “center” of his students’ education. Appellant’s App’x, vol. 2, at 320. Mr. Tucker’s stated goals support ministerial status.

D. The alleged denial of a tax benefit doesn’t prevent application of the ministerial exception.

On appeal, Mr. Tucker argues that a factual issue existed because Faith Bible had denied a tax benefit to him on the ground that he wasn’t a minister. Mr. Tucker’s appellate brief contained a single sentence addressing the issue, stating: “[W]hen he asked the School about a tax benefit available to ministers, he was expressly told he ‘did not qualify because [he] was not a minister.’” Appellee’s Corrected Resp. Br. at 45 (quoting Appellant’s App’x vol. 1, at 210).¹⁴ This sentence does not supply a meaningful reason to question Mr. Tucker’s status as a minister. See *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1122 n.7 (10th Cir. 2014) (noting that issues not adequately briefed will not be considered on appeal).

¹⁴ In this sentence, Mr. Tucker cites his statement of facts, where he said: “At one point, Tucker inquired about whether he could take a parsonage allowance and he was told he could not.” Appellant’s App’x vol. 1, at 173.

Even if we were to consider this assertion, it would not prevent summary judgment. Under the federal tax code, taxpayers enjoy a tax deduction if they

- qualify as “minister[s] of the gospel” and
- obtain compensation consisting of rental allowances or the rental value of the homes furnished to them as part of their salary.

26 U.S. § 107.

The requirements differ for the ministerial exception and the tax deduction. *See* Sally R. Wagenmaker, Ryan Oberly, & Paul Wintors, *Religious Tax Reclassification for Public Charities*, 33 *Taxation of Exempts* 34, 40 (2022) (stating that the requirements differ significantly for the ministerial exception and status under the tax code as a minister of the gospel). For example, status as a “minister of the gospel” requires an ordination, a commission, or a license “to perform sacerdotal functions.” *Kirk v. Commissioner*, 425 F.3d 492, 495 (D.C. Cir. 1970). No such requirement exists for the ministerial exception. *See Alice-Hernandez v. Cath. Bishop of Chi.*, 320 F.3d 698, 703 (7th Cir. 2003) (“In determining whether an employee is considered a minister for the purposes of applying [the ministerial] exception, we do not look to ordination but instead to the function of the position.”); *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 958 (9th Cir. 2004) (concluding that ordination is not required for the ministerial exception).

Even if Mr. Tucker were a “minister of the gospel” under the tax code, the tax deduction would be available only if his compensation package included free housing or a rental allowance. And he hasn’t alleged either free housing or a rental allowance. So Mr.

Tucker’s asserted ineligibility for the tax deduction lacks any bearing on application of the ministerial exception.

* * *

A religious body may be entitled to summary judgment under the ministerial exception even when the pertinent factors cut both ways. *See, e.g., Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 661 (7th Cir. 2018) (concluding that a religious body was entitled to summary judgment under the ministerial exception when “at most two of the four *Hosanna-Tabor* factors are present”); *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 835 (6th Cir. 2015) (stating that the court didn’t need to consider two factors because the “ministerial exception clearly applies” when “formal title and religious function . . . are present”). Here, though, all of the factors support application of the ministerial exception. Mr. Tucker bore the titles of chaplain and teacher: The job title “Chaplain” reflected a role as spiritual leader, and the school’s handbook regarded teachers as ministers. Mr. Tucker’s role as a religious leader was apparent not only from his job titles but also in his responsibilities as the Director of Student Life/Chaplain and as a teacher. And he touted his religious experience when applying for a job. Given the prominent role of religion in Mr. Tucker’s positions, he would qualify as a minister even under his version of the facts.

VII. Conclusion

I would conclude that

- jurisdiction exists under the collateral-order doctrine and

- Faith Bible enjoyed immunity under the ministerial exception.

Given these circumstances, I would reverse the denial of Faith Bible's motion for summary judgment.¹⁵

¹⁵ The parties agree that this conclusion applies equally to the claims under Title VII and Colorado law. See Maj. Op. at 9-10 n.2.

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FILED November 24, 2020
Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GREGORY TUCKER,

Plaintiff-Appellee,

v.

FAITH BIBLE CHAPEL
INTERNATIONAL, d/b/a Faith
Christian Academy, Inc.,

Defendant - Appellant.

No. 20-1230

(D.C. No. 1:19-
CV-01652-
RBJ-STV)

(D. Colo.)

EUGENE VOLOKH; ROBERT J.
PUSHAW; RICHARD W. GAR-
NETT; ROBERT COCHRAN;
ELIZABETH A. CLARK; THE AS-
SOCIATION OF CHRISTIAN
SCHOOLS INTERNATIONAL;
THE COLORADO CATHOLIC
CONFERENCE; RELIGIOUS LIB-
ERTY SCHOLARS

Amici Curiae

ORDER

Before **TYMKOVICH**, Chief Judge, and **EID**, Circuit
Judge.

Defendant-Appellant Faith Bible Chapel International (“Faith”) has filed a motion to stay the district court proceedings pending an interlocutory appeal of the denial of its motion for summary judgment. Plaintiff-Appellee Gregory Tucker opposes the motion. In addition, Faith has filed a motion to modify this court’s order entered on October 28, 2020, which extends the time for Mr. Tucker to file his response brief, to include a stay.

To resolve the stay motion, we consider the traditional stay factors: “(1) whether [Faith] has made a strong showing that [it] is likely to succeed on the merits; (2) whether [Faith] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the court’s] discretion.” *Id.* at 433-34.

Having carefully considered the stay motion, we conclude Faith has made a sufficient showing to justify issuance of a stay pending resolution of the interlocutory appeal. Accordingly, we grant the motion for a stay. We deny the motion to modify the October 28 order as moot. All proceedings in district court are stayed pending further order of this court. The interlocutory appeal will be set for oral argument once briefing is complete.

Entered for the Court

/s/ Christopher M. Wolpert

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO

Judge R. Brooke Jackson

Civil Action No 19-cv-01652-RBJ

GREGORY TUCKER,

Plaintiff,

v.

FAITH BIBLE CHAPEL INTERNATIONAL d/b/a
Faith Christian Academy Inc.,

Defendant.

ORDER on MOTION FOR SUMMARY JUDGMENT

Gregory Tucker was for many years a science teacher at Faith Christian Academy in Arvada, Colorado. In 2014 he was given additional responsibilities as either Director of Student Life or Chaplain (disputed) at the school. He was fired on February 26, 2019, after some parents, students and ultimately administrators objected to a “chapel” he organized and held a month earlier. Mr. Tucker then brought this action under Titles VI and VII of the Civil Rights Act of 1964 and Colorado common law, claiming that he was terminated in retaliation for opposing racial harassment at the school.¹ The defendant moved to dismiss the complaint, claiming that the “ministerial exception” bars the suit. As discussed herein, the ministerial exception precludes

¹ Plaintiff does not oppose dismissal of his Title VI claim.

the application of anti-discrimination laws to employment decisions made by religious organization with respect to their own ministers.

At plaintiff's request, and because the motion was supported by three attached exhibits, the Court elected to convert the motion to dismiss to a motion for summary judgment. *See* ECF No. 32. The Court has considered the parties' briefs and now grants the motion in part and denies it in part.

FACTS

The following is not intended to be a comprehensive statement of all the evidence presented with the parties' briefs, but it is enough for purposes of this order.

A. Defendant's Evidence.

Defendant's motion and exhibits include the following admissible evidence:

1. The primary purpose for which the defendant, Faith Bible Chapel International, was formed was "to propagate the Gospel of our Lord and Saviour Jesus Christ among all people who are susceptible to the Gospel by recruiting, educating, and supporting Christian workers throughout the United States and in foreign countries; to preach, teach, witness, and disseminate the Gospel according to Holy Writ on a non-sectarian, and interdenominational basis; to establish, support, maintain, and conduct schools, conferences, and assemblies for worship, religious, educational, and charitable work. ... Notwithstanding anything herein set forth, the corporation shall not engage in any activities which are not directly in furtherance of its primary religious, educational, and

charitable purposes.” ECF No. 41-1 (Articles of Incorporation) at 1, §II.

2. Faith Bible Chapel International operates the Faith Christian Academy. The “vision statement” of the Faith Christian Academy, according to its 2017-2018 Teacher Handbook, was “inspiring and equipping students with an excellent education, as they use their unique gifts to passionately represent Christ.” ECF No. 25-2 at 6. Its “mission statement” was “By providing a biblically integrated education, Faith Christian Academy ... guides students to discover and develop their unique spiritual, mental, creative and physical gifts, so that they may glorify God and serve others through the power of the Holy Spirit. In an atmosphere of grace and truth, we partner with parents and churches, as we empower students to fulfill God’s purpose for their lives.” *Id.*

3. For many years Gregory Tucker was employed as a teacher at Faith Christian Academy. He received additional responsibilities as Chaplain beginning in 2014.

4. On February 16, 2017 Faith Christian Academy and Mr. Tucker entered into an Extension Agreement, extending his employment as “Chaplain” for the August 6, 2017 to August 4, 2018 school year. ECF No. 25-1. The agreement states, among other things: “The Superintendent of Faith Christian Academy or his designee (‘Superintendent’) discussed with Employee the necessity that the hand of the Lord be on Employee and that he/she exhibits the gift necessary to perform in the position of Chaplain. Employee expressed his/her belief that he/she has this gift and that God has called him/her to minister this gift at FCA.” *Id.* at 1, §II. It notes that “Employee is currently assigned to

a/an **Chaplain** position.” *Id.*, §IV (emphasis in original).

5. The Extension Agreement also states that the employee is required to attend faculty prayer sessions; to attend “a Christian, Bible believing church regularly;” and to “abide by and be subject to the scriptural and other principles and policies stated in the FBCI/FCA handbooks.” *Id.* at 1-2, §V, ¶¶2, 4 and 5.

6. The Faith Christian Academy Teacher Handbook in effect for the 2017-2018 school year states:

To become a teacher or full time worker at Faith Christian Academy is a calling from the Lord Jesus Christ to minister. You are joining this ministry, not as an employee, but as a minister to FCA students and families. FCA’s ministry focus emphasizes the following items:

1. FCA desires to provide an academic program that is based on the scriptural principles found in the Word of God, the Holy Bible. FCA teachers are committed to the integration of biblical truth within each academic and extracurricular discipline. Additionally, teachers are responsible to facilitate godly character development, teach good study habits and encourage academic excellence. Each teacher must be thoroughly prepared and use effective instructional methods and techniques.

2. Although FCA is a Christian academic institution, an additional emphasis is placed upon the spiritual life of all students. FCA’s desire is to train and lead students into attitudes and habits, which will bring them to

Christ-like maturity. This includes encouraging all students to develop a prayer life, a passion to share the Gospel message, and characteristics such as honesty, humility, purity, faithfulness, love, and service. For students who may not yet be born again, or are new believers in Christ, all staff members will pray, teach, and set an example, seeking opportunities and the empowering of the Holy Spirit to lead them to experience an abiding relationship with Christ.

3. All staff members must be aware of the importance of our ministry to one another. Each teacher needs to be open to the Holy Spirit to offer words of encouragement, prayer, and concern for one another. It is important that teachers be willing to work as a team, make and receive positive suggestions, stand, as much as possible, with fellow teachers (especially in times of hardship), and guard the reputation of others. Trusting in the Lord in areas of personal needs as well as school needs and looking to Him as the primary source of wisdom, help, knowledge, and strength is critical.

ECF No. 25-2 at 8.

7. As Chaplain Mr. Tucker organized a chapel service referred to by him as the “Race and Faith Chapel.” The chapel was held on January 12, 2018.

8. The chapel was not well received by some students and parents.

9. In a letter to students, parents, and teachers dated February 6, 2018, Mr. Tucker stated, “The Bible repeatedly explains the kingdom of God as made up of

a diverse group of people from every tribe, language, people, and nation (Rev. 9, John 11). My prayer was that this [Race and Faith Chapel] would be a step toward recognizing and appreciating this beautiful picture.” *Id.* at 2.

10. During his deposition Mr. Tucker acknowledged that he had a minor degree in Religious Studies, which required that he take religious classes, and that when he applied for a position at FCA, he indicated that he would be comfortable teaching certain Bible classes, but not others. *Id.* (Depo. At 10: 2-10; 49:1-4; 50:20-22).

11. Mr. Tucker was also asked at his deposition. “And so you were holding yourself out to the students as being the Director of Student Life and also Chaplain, correct?” He answered, “Yes.” ECF No. 46-4 (Depo. at 77:10–13).

12. In an introductory PowerPoint that Mr. Tucker presented to his classes in 2017, he described his position for class periods 1-4 as “Director of Student Life/Chaplain,” with job duties including to “focus on the physical, relational, and spiritual wellbeing of students” and to plan “chapels, retreats, outreach projects, and student mentoring opportunities that are designed to create opportunities for student spiritual growth.” ECF No. 46-2 at 3. For periods 5-7 his duties were to teach Sophomore/Senior Bible leadership and Junior Bible Worldview and Apologetics. *Id.*

B. Plaintiff's Evidence.

Plaintiff's evidence can be divided into two groups: evidence suggesting that defendant is not a religious organization, and evidence that Mr. Tucker's positions did not qualify for the ministerial exception.

Religious organization.

1. Faith Bible Chapel International is a non-profit corporation governed by a Board of Directors that oversees all its enterprises. ECF No. 41-1 at 1 (Articles of Incorporation) and 41-2 and 3 (Bylaws).

2. The Bylaws do not set forth ecclesiastical policies, regulations, or standards, nor do they grant the Board the power to ordain or otherwise commission clergy. Id. (Bylaws).

3. Its business operations include the Faith Christian Academy but also a publication operation, a coffee shop, a church, an American Girls Heritage troop, and others, each carried out as a distinct enterprise operating under its own tradename. ECF No. 41-4 at 2 (Colorado Secretary of State business listing).

4. The school is managed by a superintendent, and the church is managed by a Senior Pastor, both of whom report to the Board, but neither of whom reports to the other. Deposition of Andrew Hasz, ECF No. 41-5 at 50:20-53:9; Deposition of Douglas Newcomb, ECF No. 41-6 at 9:14-10:6.

5. Spiritual affairs of the church are also managed by a group of elders (although members of the Board must also be elders). ECF No. 41-3 (Elder Guidelines) at 1-2.

Mr. Tucker's Positions.

6. Gregory Tucker was a teacher at Faith Christian Academy from August 2000 to July 2006 and from August 2010 to February 2018. Declaration of Gregory Tucker, ECF No. 41-7 at ¶2. He also was Director of Student Life beginning in August 2014. In

approximately January 2018 he was demoted from the position of Director of Student Life and was stripped of the responsibility of organizing weekly chapel meetings. *Id.* at ¶31. When his employment was terminated by Faith Christian Academy in February 2018 his only position was that of teacher. *Id.*

7. Mr. Tucker understood that there was an entity “somewhat related” to the Faith Christian Academy called Faith Church that was led by ordained pastors, but the pastors were not his supervisors, and he rarely, if ever, interacted with them. *Id.* at ¶4.

8. Mr. Tucker was hired to teach biology, physics and chemistry, and he did so throughout his tenure at Faith Christian Academy. He relied on the same textbooks that were used in public schools. There was no theology, nor was there any “distinct or unique Christian principle that I was required to teach in conjunction with the secular content of these subjects.” *Id.* at ¶6.

9. He also taught classes in “Leadership” and “Worldviews and World Religions,” but although he taught that Christianity represented a credible worldview, he was required “to avoid the advancement of one Christian perspective over another because there were many Christian perspectives, as well as non-Christian perspectives, represented in the school.” *Id.* at ¶7.

10. He “did not have any specific training in the Bible and therefore was not qualified to teach any classes that involved instruction regarding the Bible or theology. Teachers who did teach classes regarding the Bible and theology typically had specific training

or education in that field, like a seminary education or ordination.” *Id.* at ¶8.

11. Most of his students were not members of the Faith Church. Doctrinal and theological perspectives among students and teachers varied and included conservative evangelical, liberal evangelical, Lutheran, Catholic, Baptist, Presbyterian, and Mormon; and there were students who had non-Christian views including Buddhism, Hinduism, and atheism. Most teachers attended churches other than Faith Church and were affiliated with different Christian denominations that often held theological beliefs quite different from those promoted by Faith Church. *Id.* at ¶¶9-11.

12. He was instructed to integrate a Christian worldview in his teachings but was not provided any training, instruction or literature as to what that worldview should be, other than Bible-oriented. He was never required to teach a class in religious doctrine or to set aside time in his classes specifically dedicated to a religious message. He was told not to preach but to encourage students to think through their own perceived versions of Christianity and to consult their parents about specific theological matters. He was expected to “endorse Christianity in general terms, set a good moral example, and allow a Christian worldview to influence [his] teaching,” but he was “encouraged to avoid delivering messages on church doctrine or theology.” *Id.* at ¶¶14-15, 18.

13. In August 2014 he was promoted and assumed duties in addition to teaching. He still was informally referred to as teacher, but his formal title most commonly was Director of Student Life. His contract and extensions referred to the position as “Chaplain,”

but other than in those documents he was never referred to as Chaplain by students, teachers or administrators. He was asked whether he preferred the title of Director of Student Life, Dean of Student Life, or Chaplain, and he chose Director of Student Life because that title had no religious connotation. His email signature, business cards, and updated job description all used that title. He believes that the use of the title “Chaplain” would have been “disingenuous” because he was not an ordained clergy member. *Id.* at ¶¶21-22.

14. As Director of Student Life he helped students find service and mentoring opportunities; supported parents who had questions about their child’s growth and achievements; met with students concerning discipline issues; and promoted a positive student environment. He counseled students concerning behavior but did not counsel or discipline students concerning theological principles or principles of faith expressed by Faith Church. *Id.* at ¶24.

15. In his last year he was responsible for organizing weekly “Chapel Meetings.” These were “assemblies or symposiums where people who held a variety of religious perspectives (or sometimes non-religious perspectives) would speak on matters of interest to the school.” *Id.* at ¶¶25-26. These meetings would also include announcements, awards, rallies, student election speeches, and other ordinary high school-related matters. *Id.* The school administration explicitly communicated that these meetings were not regarded as church. *Id.* at ¶27.

16. Mr. Walker has never heard superintendents, principals, teachers, administrative staff, students, parents, or anyone else refer to teachers or the

Director of Student Life as “ministers.” He is aware from documents produced in this litigation that Faith Bible Chapel International describes itself as a collection of ministries, but he is unaware of any instance when the Faith Cristian Academy was ever held out to the public as a ministry of Faith Church, nor has he ever heard anyone refer to the school that way internally. *Id.* at ¶29-30.

17. He once heard that there was a tax deduction available to ministers to assist with housing costs and asked the then-Superintendent whether he qualified, but he was told that he did not qualify because he was not a minister. *Id.* at ¶29.

STANDARD OF REVIEW

The Court may grant summary judgment if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party has the burden to show that there is an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party must “designate specific facts showing that there is a genuine issue for trial.” *Id.* at 324. A fact is material “if under the substantive law it is essential to the proper disposition of the claim.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. The Court will examine the factual record and make reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.

Concrete Works of Colo., Inc. v. City and Cty. of Denver, 36 F.3d 1513, 1517 (10th Cir. 1994).

ANALYSIS AND CONCLUSIONS

The First Amendment's Establishment and Free Exercise clauses "bar the government from interfering with the decisions of a religious group to fire one of its own ministers." *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 181 (2012). In *Hosanna-Tabor* the Court applied this "ministerial exception" to a suit alleging discrimination in employment for the first time. *Id.* at 188. A "called" teacher who taught kindergarten and fourth grade in an elementary school operated by a congregation of the Lutheran Church developed narcolepsy and ultimately was fired. She claimed that she was terminated in violation of the Americans with Disabilities Act. The district court granted summary judgment dismissing her claim under the "ministerial exception." The Sixth Circuit reversed, emphasizing that she taught the same classes as "lay" teachers in the school. The Supreme Court reversed the court of appeals and upheld the dismissal. Significantly, the Court made it clear that it was not adopting "a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. Rather, the Court identified four circumstances that collectively contributed to its decision in that specific case: (1) the school held the teacher out as a minister, (2) her title as a minister "reflected a significant degree of religious training followed by a formal process of commissioning;" (3) the teacher held herself out as a minister in several ways, i.e., "by accepting the formal call to service, according to its terms," and claiming a special housing tax

allowance available only to ministers, and proclaiming that she felt that God was leading her to serve in the “teaching ministry;” and (4) her job duties “reflected a role in conveying the Church’s message and carrying out its mission.” *Id.* at 191-92.

The Court further identified three errors in the analysis of the Sixth Circuit: it assigned no relevance to the fact that the teacher was a commissioned minister; it assigned too much weight to the fact that the teacher taught the same courses as lay teachers; and it placed too much emphasis on the relative portion of the teacher’s day spent teaching secular subjects. *Id.* at 192- 94.

In the present case I am inclined to agree with defendant’s argument that it (and in particular the Faith Christian Academy that is the focus of this case) qualifies as a religious group or organization. However, I find that whether Mr. Tucker was a “minister” within the meaning of the “ministerial” exception” is genuinely disputed on the evidence presented. Defendant’s position is substantially grounded in the wording of documents, most notably the extension agreement that characterized Mr. Tucker as “chaplain” and the handbook which purports to make all teachers and other full-time employees “ministers.” To be sure, those documents are relevant to the issue. But the substance of Mr. Tucker’s position turns on the totality of the facts and circumstances of his employment, and he has come forward with facts that, if believed by the jury, could rationally support the opposite conclusion. Two Ninth Circuit cases involving, as did *Hosanna-Tabor*, the application of the ministerial exception to schoolteachers are presently before the Supreme

Court: *Biel v. St. James School*, 911 F.3d 603 (9th Cir. 2018), and *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir. April 30, 2019) (unpublished). I am informed that the cases were argued on May 11, 2020. The Court's resolution of those cases may well further explain and define the ministerial exception in the schoolteacher context. However, this case is close to a year old and has not yet proceeded even to the Scheduling Conference stage. Convinced as I am that there is a genuine dispute of material fact as to whether Mr. Tucker was a "minister," both before and after his demotion in January 2018, I find no compelling reason to further delay the resolution of the pending motion.

Finally, I acknowledge defendant's heavy emphasis on the Tenth Circuit's decision in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010), and in particular, its statement that the minister exception "extends to any employee who serves in a position that 'is important to the spiritual and pastoral mission of the church.'" *Id.* at 1243 (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir.1985)). In that case the court, affirming the district court's grant of summary judgment, examined the facts and circumstances of the plaintiff's employment. The examination of the facts was hampered by plaintiff's failure to provide a personal affidavit explaining her job duties and functions. Based on the defendant's evidence the court agreed with the district court that her position, though including some administrative responsibilities, "furthered the core of the spiritual mission of the Diocese." *Id.*

Summary disposition, whether in *Skrzypczak*, or the court's earlier decision in *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), or the Supreme Court's later holding in *Hosanna-Tabor*, turns on whether the facts and circumstances presented raise a genuine dispute of material fact. Because I have found that the facts and circumstances in the record of this case do show that there are genuine disputes of material fact, I am satisfied that summary disposition of this case is inappropriate under the standards set in all these cases.

ORDER

1. Defendant's motion to dismiss, converted by the Court to a motion for summary judgment [ECF No. 25], is GRANTED IN PART AND DENIED IN PART. It is granted to the extent that the Court dismisses plaintiff's Second Claim which was brought under 42 U.S.C. § 2000d (Title VI). The motion is otherwise denied.

2. The parties are directed to contact Chambers by email within 14 days to set a Scheduling Conference and to submit a proposed Scheduling Order. Depending on whether and, if so, what restrictions related to the coronavirus pandemic are still in place, the Court will either schedule an in-person Scheduling Conference, or conduct the conference by video teleconference, or simply review and modify, if necessary, the parties' proposed order.

DATED this 18th day of May, 2020.

114a

BY THE COURT:

/s/ R. Brooke Jackson

R. Brooke Jackson

United States District Judge

115a

U.S. District Court – District of Colorado

District of Colorado (Denver)

CIVIL DOCKET FOR
CASE #: 1:19-cv-01652-RBJ-STV

Tucker v. Faith Bible Chapel International

Assigned to: Judge R. Brooke Jackson

Referred to: Magistrate Judge Scott T. Varholak

Case in other court: 10th Circuit Court of Appeals,
20-01230

Cause: 41:2000e Job Discrimination (Employment)

Date Filed	#	Docket Text
9/14/2020	77	ORDER denying <u>56</u> MOTION for Reconsideration re <u>52</u> Order on Motion to Dismiss for Failure to State a Claim. By Judge R. Brooke Jackson on 9/14/2020. Text Only Entry (rbjsec.) (Entered: 09/14/2020)

FILED November 15, 2022
Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GREGORY TUCKER,

Plaintiff-Appellee,

v.

FAITH BIBLE CHAPEL
INTERNATIONAL, d/b/a Faith
Christian Academy, Inc.,

Defendant - Appellant.

No. 20-1230

(D.C. No. 1:19-
CV-01652-
RBJ-STV)

(D. Colo.)

EUGENE VOLOKH; ROBERT J.
PUSHAW; RICHARD W. GAR-
NETT; ROBERT COCHRAN;
ELIZABETH A. CLARK; THE AS-
SOCIATION OF CHRISTIAN
SCHOOLS INTERNATIONAL;
THE COLORADO CATHOLIC
CONFERENCE; RELIGIOUS LIB-
ERTY SCHOLARS; JEWISH COA-
LITION FOR RELIGIOUS LIB-
ERTY; PROFESSOR ASMA UD-
DIN; NATIONAL WOMEN'S LAW
CENTER; AMERICAN FEDERA-
TION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES;
AMERICAN SEXUAL HEATH AS-
SOCIATION; CALIFORNIA

WOMEN LAWYERS; DC COALITION AGAINST DOMESTIC VIOLENCE; DESIREE ALLIANCE; EQUAL RIGHTS ADVOCATES; EQUALITY CALIFORNIA; EQUITY FORWARD; FORGE, INC.; GLBTQ LEGAL ADVOCATES & DEFENDERS; HUMAN RIGHTS CAMPAIGN; IN OUR OWN VOICE; NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA; KWH LAW CENTER FOR SOCIAL JUSTICE AND CHANGE; LATINOJUSTICE PRLDEF; LEGAL AID AT WORK; LEGAL VOICE; MUSLIMS FOR PROGRESSIVE VALUES; NARAL PRO-CHOICE AMERICA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NEW YORK LAWYERS FOR THE PUBLIC INTEREST; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; REPRODUCTIVE JUSTICE ACTION COLLECTIVE; SERVICE EMPLOYEES INTERNATIONAL UNION; SPARK REPRODUCTIVE JUSTICE NOW!,

INC.; UJIMA INC.; THE NATIONAL CENTER ON VIOLENCE AGAINST WOMEN IN THE BLACK COMMUNITY; WOMEN EMPLOYED; WOMEN LAWYERS ON GUARD INC.; WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; WOMEN'S BAR ASSOCIATION OF THE STATES OF NEW YORK; WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS; THE WOMEN'S LAW CENTER OF MARYLAND; WOMAN'S LAW PROJECT; WV FREE; CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND THE INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION; BENEDICTINE COLLEGE, INC.; THOMAS C. BERG; MARK E. CHOPKO; CHRISTIAN LEGAL SOCIETY; CARL H. ESBECK; DOUGLAS LAYCOCK; THE CARDINAL NEWMAN SOCIETY; THE LUTHERAN CHURCH-MISSOURI SYNOD; ROBERT W. TUTTLE,

Amici Curiae

ORDER

Before **HARTZ, TYMKOVICH, MATHESON, BACHARACH, PHILLIPS, McHUGH, MORITZ, EID, CARSON, and ROSSMAN**, Circuit Judges.*

This matter is before the court on *Defendant-Appellant's Petition for Rehearing En Banc* ("Petition"). We also have a response from Appellee, and a reply from Appellant.

The Petition, response, and reply were circulated to all non-recused judges of the court who are in regular active service, and a poll was called. A majority of the participating judges voted to deny the Petition. *See* Fed. R. App. P. 35(a). Consequently, the Petition is DENIED. Judges Tymkovich, Bacharach, Eid, and Carson voted to grant en banc rehearing. Judge Ebel has filed a separate concurrence in support of the denial of en banc rehearing, which is joined by Judge McHugh. Judge Bacharach has filed a separate dissent, which is joined by Judges Tymkovich and Eid.

The pending motions for leave to file amicus briefs are GRANTED, as is the *Unopposed Motion to Withdraw Amicus Party Maur Hill-Mount Academy's Joiner in Amicus Brief and for Leave to File Substitute Brief* ("Motion to Withdraw"). The Clerk's Office shall delete the proposed amicus brief submitted with the June 28, 2022 *Unopposed Motion for Leave to File Amicus Brief in Support of Appellant Faith Bible Chapel's*

* The Honorable Jerome A. Holmes is recused in this matter and did not participate in consideration of the Petition.

Petition for Rehearing En Banc by Association of Christian Schools International, Colorado Catholic Conference, Lutheran Church-Missouri Synod, The Cardinal Newman Society, Benedictine College, and Maur Hill-Mount Academy, and replace it with the substitute amicus brief submitted with the Motion to Withdraw.

Entered for the Court,

/s/ Christopher M. Wolpert

CHRISTOPHER M. WOLPERT, Clerk

Entered for the Court

EBEL, J. Authoring Judge’s Statement Supporting
Order Denying En Banc Review

The only question presented in this case is whether, under Cohen’s collateral order doctrine,¹ Defendant Faith Bible Chapel International (“Faith Christian”) is entitled to an immediate appeal from the district court’s interlocutory ruling denying Faith Christian summary judgment on its affirmative ministerial exception defense because there are genuinely disputed issues of material fact as to whether Plaintiff Gregory Tucker qualifies as a minister for purposes of the exception. Our panel decision denying Faith Christian an immediate appeal is consistent with well-established lines of Supreme Court precedent and does not create any circuit split.

First and foremost, our decision is consistent with the Supreme Court’s long line of cases permitting an interlocutory appeal under *Cohen* in only limited circumstances, as a narrow exception to Congress’s requirement in 28 U.S.C § 1291 that appeals be taken only from final judgments that end litigation. *See, e.g., Will v. Hallock*, 546 U.S. 345, 349–50 (2006); *Johnson v. Jones*, 515 U.S. 304, 309 (1995). The Supreme Court has consistently admonished circuit courts against expanding the availability of interlocutory *Cohen* appeals. *See Kell v. Benzon*, 925 F.3d 448, 452 (10th Cir. 2018). Our decision heeds the Court’s admonitions.

The Supreme Court has permitted interlocutory appeals under *Cohen* in very limited situations, but only to permit early review of legal, rather than factual, questions, *see Johnson*, 515 U.S. at 307, 309–18.

¹ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Supreme Court has specifically denied an immediate appeal to challenge an interlocutory ruling denying summary judgment because there was sufficient evidence for the case to survive summary judgment and proceed to trial. *See id.* at 307, 313–18. That is exactly the issue Faith Christians seeks to appeal immediately in our case.

In *Johnson*, the Supreme Court denied an immediate appeal from a decision denying summary judgment because there remained disputed issues of material fact. The Supreme Court concluded that the costs of delay, expense and disruption of allowing interlocutory appeals in the midst of ongoing litigation outweighed the benefits of an interlocutory appeal. *See id.* Those same costs support our conclusion not to permit an immediate appeal in our case.

Here, those costs stem in part from the fact that the question of whether an employee qualifies as a minister involves a case-by-case fact-intensive inquiry, as the Supreme Court has clearly recognized. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063, 2066–67 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190–94 (2012). Our panel decision is consistent with the Supreme Court’s recognition of the fact-intensive nature of the inquiry into whether a religious employee should be deemed a minister. Contrary to this Supreme Court authority, the dissent from the denial of en banc rehearing (“dissent”) incorrectly insists that this case presents only a legal issue.

The dissent also contradicts the Supreme Court by positing that the ministerial exception presents a structural limitation on courts’ authority to hear employment cases. To the contrary, the Supreme Court

has explained “that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar . . . because the issue presented by the exception is ‘whether the allegations the plaintiff makes entitle him to relief,’ not whether the court has ‘power to hear [the] case.’” *Hosanna-Tabor*, 565 U.S. 195 n.4 (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010)).

Our panel decision, then, is consistent with well-established lines of Supreme Court precedent. Our decision also does not create any circuit split. It appears that no other circuit has addressed the specific question presented here—whether a religious employer is entitled to an immediate appeal under *Cohen* from a district court’s interlocutory ruling denying the employer summary judgment on its affirmative ministerial exception defense because there are genuinely disputed issues of material fact as to whether the employee qualifies as a minister. Further, Justice Alito, joined by Justices Thomas, Kavanaugh and Barrett, lends support to our position by recognizing, as we did, that a district court’s interlocutory decision declining to apply the ministerial exception defense can be effectively reviewed following the entry of final judgment ending the litigation. *See Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 955 (2022) (Alito, J.; statement respecting denial of certiorari). In light of that, an interlocutory appeal is not warranted under *Cohen*.

Furthermore, the Second Circuit, in addressing the separate but related affirmative church autonomy defense, recently reached the same conclusion as our panel, holding that a religious employer was not entitled to an immediate collateral-order appeal from the

denial of a motion to dismiss based on that defense. *See Belya v. Kapral*, 45 F.4th 621, 625 (2d Cir. 2022).

There is, then, no circuit split on the narrow procedural issue presented in this case. What little authority there is instead unanimously supports our decision. Notwithstanding that authority, the dissent, instead, cites three cases which address a completely different question—whether a religious employer can waive, or forfeit, its affirmative ministerial exception defense by failing to raise it.² Each of those three cases addressed waiver only after determining that the employee qualified as a minister, which is the threshold question at issue in our case. Whatever general principles one might glean from these waiver cases, they do not govern here and they do not address the question presented in our appeal. Furthermore, in *Tomic*, the Seventh Circuit treated the ministerial exception as a jurisdictional bar, a position the Supreme Court later rejected in *Hosanna-Tabor*. The three cases on which the dissent relies, then, do not undercut the well-established Supreme Court case law that compels our decision to deny an interlocutory appeal.

I would end with three practical points. First, there will be no judicial “meddling” with religion if a factfinder ultimately determines that Tucker is not a minister, because religious employers are amenable to employment discrimination claims brought by non-ministerial employees. That is the factual question still to

² The dissent cites to *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113 (3d Cir. 2018); *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir. 2015); and *Tomic v. Catholic Diocese*, 442 F.3d 1036 (7th Cir. 2006), abrogated in part by *Hosanna-Tabor*, 565 U.S. at 195 n.4.

be determined in our case. The dissent's analysis starts with the incorrect (and contested) premise that Tucker should be deemed a minister.

Second, although we must decide whether to apply *Cohen* to the category of cases at issue here, see *Johnson*, 515 U.S. at 304, 315, this particular case is not one where the religious employer is currently being harmed by what the dissent refers to as a “renegade” minister. Tucker, whether or not a minister, has already long since been fired.

Third, although we have held that a religious employer is not entitled under the collateral order doctrine to an immediate appeal from the denial of summary judgment on its affirmative ministerial exception defense when there are genuine disputes of material fact, we do not foreclose other avenues for immediate appeal in appropriate cases, such as seeking certification for an interlocutory appeal under 28 U.S.C. § 1292(b), or appealing the denial of a preliminary injunction under § 1292(a)(1).

Because the panel majority's opinion was consistent with well-established case law, does not create a circuit split, and does not unduly encumber religious organizations, the en banc court appropriately denied en banc consideration.

Gregory Tucker v. Faith Bible Chapel International, d/b/a Faith Christian Academy, Inc., Case No. 20-1230

BACHARACH, J., dissenting from the denial of en banc consideration.

Parties ordinarily can't appeal until the district court enters a final judgment. *See* 28 U.S.C. § 1291. A narrow exception exists under the collateral-order doctrine, which recognizes appellate jurisdiction over collateral issues even before the entry of a final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 524–25 (1985).

This appeal involves a religious body's invocation of the collateral-order doctrine to appeal the denial of summary judgment on the ministerial exception. The panel majority rejected that effort, treating the ministerial exception like other affirmative defenses reviewed by appellate courts after final judgment.

In my view, that treatment reflects a fundamental misconception of the ministerial exception. Though most defenses protect only against liability, the ministerial exception protects a religious body from the suit itself. Without that protection, religious bodies will inevitably incur protracted litigation over matters of religion. The stakes are exceptionally important for religious bodies deciding whom to hire or fire.

These stakes arise from the structural role of the ministerial exception in limiting governmental power over religious matters. *See Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) (“The ministerial exception is a structural limitation imposed on the government by the Religion Clauses.”); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (noting that the ministerial exception “is rooted in constitutional limits on judicial authority”); *see also* John Hart Ely, *Democracy & Distrust: A Theory of Judicial Review* 94 (1980) (arguing that the Religion Clauses perform a “structural or separation of powers func-

tion”); Peter J. Smith & Robert W. Tuttle, *Civil Procedure & the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1880–81 (2018) (noting that the ministerial exception is “best understood as an effectuation of the Establishment Clause’s limits on governmental authority to decide strictly and purely ecclesiastical matters” (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012))); Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 3–4 (1998) (arguing that the Establishment Clause serves as a “structural restraint on the government’s power to act on certain matters pertaining to religion”).

Given the structural role of the ministerial exception, the Supreme Court held that the “ministerial exception *bars . . . a suit*” over the religious body’s decision to fire the plaintiff. *Hosanna-Tabor*, 565 U.S. at 196 (emphasis added). Despite the Supreme Court’s characterization of the ministerial exception as a bar to the *suit* itself, the panel majority interprets the ministerial exception as a mere defense against *liability*.

In interpreting the ministerial exception this way, the panel majority breaks from the only circuit to apply *Hosanna-Tabor*’s characterization of the ministerial exception. Prior to *Hosanna-Tabor*, the Sixth Circuit had held that a religious body could waive the ministerial exception. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007). But the Sixth Circuit later concluded that the ministerial exception was no longer waivable because *Hosanna-Tabor* had treated the ministerial exception as a bar to the suit itself. *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015). For this

conclusion, the court drew upon two of *Hosanna-Tabor*'s key passages:

1. “[T]he Establishment Clause . . . *prohibits* government involvement in ecclesiastical matters.”
2. “It is ‘impermissible for the government to contradict a church’s determination of who can act as its ministers.’”

Id. (alteration in original) (quoting *Hosanna-Tabor*, 565 U.S. at 185, 189).

The panel majority skirts this reasoning in *Hosanna-Tabor*, pointing to the Supreme Court’s observation elsewhere that the ministerial exception doesn’t divest the district court of jurisdiction.¹ See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012). But our issue doesn’t involve jurisdiction in district court. In fact, the panel majority elsewhere observes that characterization of an issue as jurisdictional doesn’t bear on appealability under the collateral-order doctrine. See *Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021, 1038 (10th Cir. 2022) (observing that orders denying dismissal based on subject-matter jurisdiction don’t trigger the collateral-order doctrine); see also *Gray v. Baker*, 399 F.3d 1241, 1245 (10th Cir. 2005) (“[T]he fact that the district court’s order arguably concerns its own subject matter jurisdiction . . . is not sufficient, standing alone, to bring the district court’s order within the scope of the collateral order doctrine.”).

¹ The Second Circuit recently took the same approach, concluding that the collateral-order doctrine doesn’t cover the church-autonomy doctrine because it isn’t jurisdictional. *Belya v. Kapral*, 45 F.4th 621, 633 (2d Cir. 2022).

Conversely, even when affirmative defenses aren't jurisdictional in district court, they may trigger the collateral-order doctrine. For example, absolute immunity and qualified immunity aren't jurisdictional in district court. *See Nevada v. Hicks*, 533 U.S. 353, 373 (2001) ("There is no authority whatsoever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction . . ."). But these affirmative defenses can still trigger the collateral-order doctrine to create appellate jurisdiction. *See Tucker*, 36 F.4th at 1025–26, 1039 n.14 (observing that issues involving absolute immunity and qualified immunity may trigger the collateral-order doctrine).

Though absolute immunity and qualified immunity may trigger the collateral-order doctrine, they are waivable. *See Yellen v. Cooper*, 828 F.2d 1471, 1476 n.1 (10th Cir. 1987). That isn't true for the ministerial exception, for three circuits have recognized the ability of courts to consider the ministerial exception sua sponte and beyond the power of a party to waive. *See Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) (concluding that "the Church is not deemed to have waived [the ministerial exception] because the exception is rooted in constitutional limits on judicial authority"); *Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015) (concluding that "the Constitution does not permit private parties to waive the First Amendment's ministerial exception" because "[t]his constitutional protection is . . . structural"); *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006) (stating that "the ministerial exception . . . is not subject to waiver or estoppel"), abrogated in part on

other grounds, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

Given its structural role, the ministerial exception protects religious bodies from suits brought by employees who lead “important religious ceremonies or rituals.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring). Determining the importance of a religious ceremony or ritual inevitably entwines the courts in ecclesiastical doctrine. For example, the ministerial exception may apply to matters of education because of the central role of education in many religions, including Islam, Protestantism, Judaism, and Seventh-Day Adventism. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064–66 (2020).

By deferring the chance to appeal, the panel majority subjects religious bodies to time-consuming and expensive litigation over the religious importance of the roles occupied by countless employees. However the courts weigh these roles in individual cases, the litigation itself enmeshes the courts in ecclesiastical disputes.

Given the inevitable intrusion into matters of religion, the panel majority acknowledges the importance of the issue of appealability in matters involving the ministerial exception. *Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021, 1028 (10th Cir. 2022) (“This case presents an important jurisdictional question of first impression for this Court: whether a decision denying a religious employer summary judgment on its ‘ministerial exception’ defense constitutes an immediately appealable final order under the collateral order doctrine.”). The importance of the issue is also reflected in the many amicus briefs from states’ attorneys general,

religious organizations, and scholars, decrying the impact of the panel majority's treatment of the ministerial exception.

But the panel majority downplays the impact of delayed review, pointing out that a religious body can appeal once the district court has entered a final judgment. The impact of this delay on religious bodies is not difficult to imagine: The majority's approach will often require deferral of an appellate decision while religious bodies endure discovery, pretrial motion practice, trial practice, and even post-judgment litigation. *See Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (stating that Title VII actions can be lengthy and subject churches to "subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers"); *see also EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (concluding that the EEOC's two-year investigation into a minister's claim, combined with extensive pretrial inquiries and a trial, "constituted an impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution"); *Demkovich v. St. Andrew the Apostle Par.*, 3 F.4th 968, 982, 983 (7th Cir. 2021) (en banc) (expressing concern that litigation over the ministerial exception could "protract[] [the] legal process" and "the very process of inquiry . . . may 'impinge on rights guaranteed by the Religion Clauses'" (quoting *Rayburn*, 772 F.2d at 1171 (4th Cir. 1985) and *NLRB v. Cath. Bishop of Chi.*, 440 U.S. 490, 502 (1979))).

Given these burdens from the litigation itself, religious bodies will undoubtedly hesitate before deciding

whether to suspend or fire renegade ministers. *See Rayburn*, 772 F.2d at 1171 (“There is the danger that churches, wary of EEOC or judicial review of their decisions, might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.”); *see also Cath. Univ. of Am.*, 83 F.3d at 467 (stating that the potential cloud of litigation could affect a religious body’s criteria in filling future ministerial vacancies).

The panel majority defends these burdens based on its narrow conception of the ministerial exception. To the majority, the exception protects only against liability, not the litigation itself. For this conception of the ministerial exception, the panel majority relies on a law review article coauthored by Professor Robert Tuttle. *Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021, 1037, 1039 n.13 (10th Cir. 2022) (citing Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847 (2018)). In my view, the panel majority has misinterpreted this article. There Professor Tuttle argues that “application of the collateral-order doctrine in this context would better guard against Establishment Clause violations by trial courts than would the standard requirement of a final judgment before appeal.” Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1881 (2018).

Professor Tuttle has also coauthored one of the numerous amici briefs urging rehearing en banc, arguing there that

- “the First Amendment supports early resolution of the ministerial exception as a threshold legal issue, subject to interlocutory appeal,” Brief of Religious Liberty Scholars as Amici Curiae in Support of Appellant at 3 (June 28, 2022),
- “[a]llowing litigation to continue when the lower court should have recognized the constitutional import of the ministerial exception will compound the injury. . . the Supreme Court in *Hosanna-Tabor* found must not occur in litigation in full,” *id.* at 4, and
- “the ministerial exception closely resembles qualified immunity by protecting from burdens of merits litigation when the trial court should have granted the immunity or defense early in the case,” *id.* at 10.

Other amici share Professor Tuttle’s concerns. Fearing the burdens of litigation on ecclesiastical decisions, sixteen states have implored us to convene en banc to revisit the role of the ministerial exception and the applicability of the collateral-order doctrine. *See* Brief of States of Oklahoma et al. as Amici Curiae in Support of Defendant-Appellant’s Petition for Rehearing En Banc (June 28, 2022).

The panel majority not only requires religious bodies to spend years and fortunes litigating who are ministers and who aren’t, but also treats this intrinsically religious question as a typical fact-issue that will “often” require a trial rather than resolution through dispositive motions. *Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021, 1031 n.8, 1035 n.8 (10th Cir. 2022). This

characterization will undoubtedly prolong judicial meddling in religious matters.

Until now, every federal or state appellate court to address the issue has characterized ministerial status as a question of law. See *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (“The status of employees as ministers for purposes of *McClure* [*v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972)] remains a legal conclusion for this court.”); *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015) (stating that “whether the [ministerial] exception attaches at all is a pure question of law”); *Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 608–09 (Kan. 2014) (“[W]e hold the determination of whether an employee of a religious institution is a ministerial employee is a question of law for the trial court, to be handled as a threshold matter.”); *Weishuhn v. Lansing Catholic Diocese*, 787 N.W.2d 513, 517 (Mich. App. 2010) (characterizing the applicability of the ministerial exception as a “question of law”); *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 895 (Tex. App. 2000) (“Whether a person is a ‘minister’ for the purpose of determining the applicability of the ‘ministerial exception’ to judicial review of employment decisions is a question of law.”), *rev. denied* (2001); see also *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002) (concluding that “[a] claim of immunity from suit under the First Amendment” entails an issue of law).

The panel majority bucks that treatment, making us the only appellate court in the country to classify the ministerial exception as an issue of fact. This classification makes summary adjudication less likely, ex-

tending judicial entanglement in ecclesiastical matters before religious bodies can obtain appellate decisions. See *John Deere Ins. Co. v. Shamrock Indus., Inc.*, 929 F.2d 413, 417 (8th Cir. 1991) (stating that classification of an issue as a matter of law makes a case involving that issue “particularly amenable to summary judgment”). The majority’s deferral of appellate review thus extends judicial meddling in religious matters—the very evil that underlays recognition of the ministerial exception.

Consider how the majority treats ministerial status in our case as a question that will “often” turn on a factual dispute. *Tucker v. Faith Bible Chapel Int’l*, 36 F.4th 1021, 1037, 1031 n.4 (10th Cir. 2022). In Mr. Tucker’s own appellate brief supporting appellate jurisdiction, he argues that his responsibilities as “Chaplain” included

- organization of “religiously oriented” chapel services,
- spiritual guidance and counseling,
- endorsement of Christianity,
- integration of “a Christian worldview” in his teaching,
- “a passionate relationship with Jesus Christ,” and
- assistance to students in developing their relationships with Jesus Christ.

Appellee’s Jurisdictional Memorandum at 3, 5; Appellee’s Resp. Br. at 47. Despite Mr. Tucker’s own characterization of his job as a religious leader, the majority suggests in dicta that the religious body’s identical characterization improperly relies on “self-

serving documents” as opposed to Mr. Tucker’s evidence involving “the actual ‘facts and circumstances of his employment.’” *Tucker*, 36 F.4th at 1047 n.21.

As Mr. Tucker and Faith Bible agree, these so-called “self-serving documents” accurately describe the job. This agreed description aside, the record establishes that Mr. Tucker was hired only because he’d provided written assurances that he believed in

- the divine inspiration and infallibility of the Bible,
- the existence of one God in the persons of God the Father, God the Son, and God the Holy Spirit,
- the virgin birth,
- the Lord Jesus Christ’s deity, sinless humanity, atoning death, bodily resurrection, ascension to his Father’s right hand, and future return in power and glory,
- the need for every person to receive the gift of eternal life from Jesus Christ in order to reach heaven,
- the ministry of the Holy Spirit,
- the church as the spiritual body headed by Christ,
- the principle of baptism through immersion, and
- the eternal existence of all people in heaven or hell.

Appellant’s App’x vol. 2, at 419.

The majority’s characterization of the ministerial exception serves not only to protract litigation for religious bodies wanting to hire, fire, or change ministers,

but also to minimize the possibility of summary judgment on the issue of ministerial status. These consequences implicate important structural issues at the heart of the Religion Clauses.

In my view, we should heed the concerns expressed by the many amici fearful of how our decision limits the ability of religious bodies to make ministerial decisions based on ecclesiastical doctrine. Given the extent and legitimacy of those concerns, we should have convened en banc to address the appealability of the district court's ruling on the ministerial exception.

FILED June 7, 2022
Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GREGORY TUCKER,

Plaintiff-Appellee,

v.

FAITH BIBLE CHAPEL
INTERNATIONAL, d/b/a Faith
Christian Academy, Inc.,

Defendant - Appellant.

EUGENE VOLOKH, et al;

Amici Curiae

No. 20-1230

(D.C. No. 1:19-
CV-01652-
RBJ-STV)

(D. Colo.)

JUDGMENT

Before **BACHARACH**, **EBEL**, and **McHUGH**,
Circuit Judges.

This case originated in the District of Colorado and
was argued by counsel.

It is the judgment of the court that the appeal is
dismissed.

Entered for the Court

/s/ Christopher M. Wolpert

CHRISTOPHER M. WOLPERT, Clerk

28 U.S.C. 1291 provides:

§ 1291. Final decisions of district court

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

* * *

42 U.S.C. 2000e-3(a) provides:

§ 2000e-3(a). Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-01652

GREGORY TUCKER,

Plaintiff,

v.

FAITH BIBLE CHAPEL INTERNATIONAL, a
Colorado non-profit corporation,

Defendant.

**FIRST AMENDED COMPLAINT AND JURY
DEMAND**

Plaintiff, Gregory Tucker, by and through his counsel, Peter G. Friesen, Bradley A. Levin, Elisabeth L. Owen, and Elizabeth A. Walker of LEVIN SITCOFF PC, for his First Amended Complaint and Jury Demand against Defendant Faith Bible Chapel International, a Colorado nonprofit corporation, states and alleges as follows:

INTRODUCTION

1. This action arises from Defendant Faith Bible Chapel International's ("FBCI") racially discriminatory termination of Plaintiff Gregory Tucker ("Tucker") from employment as a teacher and dean at Faith Christian High School ("FCHS").

2. FBCI was motivated to terminate Tucker because of his opposition to racial discrimination and harassment directed against him, as the father of a

black daughter, and against racial minority students who attended the school. Specifically, Tucker organized a symposium to discuss racist behavior within the school with the intention of eliminating it. In direct response to Tucker's organization of the symposium, FBCI, acting through its agents, fired Tucker on February 26, 2018.

3. Tucker had been given authority to organize the symposium and was at first praised for it by the school's administration. However, after the symposium, students and parents who were guilty of the most racially incendiary behavior within the school were offended by the implied message that they were guilty of racism, and called for Tucker's termination. FBCI eventually succumbed to the pressure applied by these students and parents and fired Tucker.

4. In the process of terminating Tucker, FBCI attempted to shield itself from the outrage expressed among parents who supported him by fabricating a false and pretextual basis for Tucker's termination: that Tucker was guilty of gross insubordination. FBCI publicly represented that it had confronted Tucker with accusations of his supposed gross insubordination and that Tucker had voluntarily resigned in the face of them. It was not true either that Tucker had committed gross insubordination or that Tucker voluntarily resigned.

* * *

16. FBCI conducts its business affairs in Arvada, Colorado.

* * *

64. Shortly after being given responsibility for planning Chapel Meetings in June 2017, Tucker decided to dedicate one such meeting to discussing race and faith with the FCHS student body and teachers (the “Race and Faith Chapel”).

65. Tucker planned the Race and Faith Chapel to take place the Friday before MLK Day weekend 2018, which was January 12, 2018.

66. In a staff meeting held on January 5, 2018, Tucker communicated his plans for the Race and Faith Chapel to the FCHS faculty. The faculty, as well as Cook, were supportive.

67. On January 9, 2018, Tucker emailed all FCHS parents to explain that the Race and Faith Chapel would be held on January 12, 2018. In response to parent requests, Tucker agreed to livestream the event through FCHS’ internal video streaming service so that interested parents could also watch the Race and Faith Chapel.

68. After Tucker sent his January 9, 2018 email to FCHS parents, Cook and Hasz texted Tucker offering their support for the Race and Faith Chapel.

69. On January 12, 2018, the Race and Faith Chapel was held as planned.

70. There, a panel of invited speakers, which Tucker moderated, discussed racism at the school and possible ways for students to be more respectful of one another.

71. One of the Race and Faith Chapel speakers was an FCHS alumnus.

72. After the Race and Faith Chapel concluded, both Hasz and Cook expressed to Tucker that they

were happy with the substance and content of the Race and Faith Chapel.

* * *

80. Following Hasz and Cook's meeting with Tucker, Hasz and Cook sent an email to all parents apologizing for the content and tone of the Race and Faith Chapel. In the email, Hasz and Cook blamed Tucker for a supposedly flawed message and announced that Tucker's role in organizing the Race and Faith Chapel would be investigated. Before the email was sent, Tucker told Hasz and Cook, via phone, that he disagreed with its content and distribution. After the email was sent, Tucker again expressed his disagreement with its circulation via email and in person.

* * *

92. On January 19, 2019, Hasz and Cook met with Tucker. Hasz and Cook told Tucker that, in response to parent complaints, he would no longer have the responsibility of planning Chapel Meetings. Hasz and Cook also told Tucker that he was banned from speaking in front of students at future Chapel Meetings.

* * *

100. In the January 26, 2018 meeting Tucker expressed his frustration to Hasz and Cook that the Chapel planning responsibilities had been taken away from him as the consequence of a small group of parents reacting negatively to his efforts to address racism at FCHS.

101. Subsequently, on January 28, 2018, Tucker sent an email to Cook, Hasz, and an FBCI Board

member expressing frustration that he was no longer responsible for Chapel Meeting planning responsibilities and banned from speaking in front of the student body.

102. On or about January 29, 2018, Tucker again met with Cook and Hasz, and this time they were joined by Newcomb.

103. Newcomb attacked the content of the Race and Faith Chapel, belittled the alumnus who spoke on the panel of presenters at the Race and Faith Chapel, and told Tucker, "Sorry if this sounds harsh, Gregg, but this is a business, and if we lose a dozen students, teachers start losing their jobs."

104. Tucker requested that Newcomb permit him to meet with the Board as a whole, and Newcomb told him that would not be possible.

105. On January 30, 2018, Cook spoke with Tucker privately. In tears, Cook apologized to Tucker for the way that Tucker was being treated and for not better supporting Tucker. Cook said that he was trying to balance the way that he felt about the situation personally with submitting to those who were in a position of greater authority.

106. On February 6, 2018, Tucker sent a letter to a handful of parents to explain his view of the events to that point and to express his commitment toward FCHS and toward eradicating racism in the school.

107. Tucker sent a copy of this letter to Hasz and Cook, both of whom agreed with Tucker's sending the letter.

108. Nevertheless, between February 6 and 15, 2018, Tucker had a series of conversations with Hasz

and Cook in which it became clear that FBCI was becoming increasingly adverse to Tucker.

109. For instance, on February 6, 2018, Tucker met with Hasz to discuss his future at FCHS. Hasz indicated to Tucker that he may not be “a good fit” for the school. Hasz confirmed that the reason for that was because of negative parent reaction to the Race and Faith Chapel.

110. On February 13, 2018, Hasz requested that Tucker explain feedback that Tucker received when he met with minority students and alumni in 2017, as discussed in paragraph 64, above. Tucker provided Hasz with many examples of racism that he learned about during those meetings. Tucker also referenced incidents Tucker had previously complained of, to Hasz, in Fall 2016. Hasz responded, via email, to the effect of “thanks.”

111. On February 15, 2018, FCHS held parent-teacher conferences. During the conferences, Hasz met with Tucker and told him that he was polarizing for many parents, that he could not be trusted in the classroom, and that he was no longer a “good fit” at the school. Hasz explained that, consequently, Tucker’s employment contract would not be renewed after it expired at the end of that school year.

112. Immediately after he met with Hasz, a number of faculty members asked Tucker how the meeting had gone, and Tucker told them that his teaching contract would not be renewed. Tucker’s colleagues suggested that all faculty have a meeting (to which they referred as a “family meeting”) to discuss this turn of events, and also encouraged

Tucker to send an email to the faculty to explain his contract termination.

113. Tucker sent such an email on February 17, 2018.

114. Subsequently, one of Hasz's sons, himself a student at FCHS, discussed Tucker's email on social media and described it as "insubordinate." Presumably, Hasz's son learned of the email from Hasz himself.

115. On February 19, 2018, parents and faculty supportive of Tucker circulated a petition requesting that the FCA administration address racism at FCHS and that Tucker not be demoted or terminated. The petition was signed by hundreds of then-current FCHS students, teachers, parents, and alumni. Many of the signatories included comments with their signatures discussing racism at FCHS and offering their support of Tucker.

116. After Tucker sent his February 17, 2018 email to the FCHS faculty, FBCI decided to terminate Tucker's employment effective immediately. Thus, on February 26, 2018, Hasz and Cook met with Tucker and told him that his employment was terminated.

117. FBCI was motivated to fire Tucker by his opposition to the racially hostile and discriminatory environment at FCHS and in an effort to appease certain parents of FCHS students. In the February 26, 2018 meeting, Hasz openly admitted that Tucker was being fired for his role in organizing the Race and Faith Chapel and because of parent backlash to the event.

118. In the meeting, Hasz also asked Tucker to agree to a joint statement that he said explained the reasons for Tucker's termination.

119. The joint statement said that Tucker "mutually agreed" to resign and that the decision had "nothing to do with race and equality." Tucker did not agree to the joint statement because he viewed it as inaccurate and incomplete. Tucker clearly explained to Hasz and Cook that his reason for refusing to sign the joint statement was that he had not committed, nor had he ever before that day been accused of committing, insubordination.

120. Immediately following the termination of Tucker's employment, Hasz sent an email to the parents of all 1,000+ students at FCHS and falsely claimed Tucker had mutually agreed to resign. Hasz further falsely represented that Tucker's termination had "nothing to do with the topic of race or equality."

121. Though Hasz said in his email that it was "ongoing differences" that led to the purported "mutual agreement" that Tucker would resign, Hasz did not identify those differences in his email.

122. The next day, Hasz told the faculty, wrongly, that Tucker had resigned and that the reason was that he had been guilty of insubordination.

123. Hasz further informed the faculty that any person who signed the petition circulated in opposition to racism and in support of Tucker, discussed above, was likewise guilty of insubordination. At that point, five faculty members had signed the petition. One of the faculty signatories openly admitted to Hasz and Cook that she had signed it and offered her resignation for insubordination if they wanted. Hasz and Cook did

not accept her resignation and she remained employed at FCHS.

124. In both public and private settings, Hasz has continued to misrepresent the basis for Tucker's termination. Hasz has repeatedly stated that Tucker voluntarily resigned for reasons unrelated to the Race and Faith Chapel, which is untrue.

125. On May 25, 2018, Tucker filed complaints with the Colorado Civil Rights Division and the Equal Employment Opportunity Commission ("EEOC"). Tucker received his right to sue notice from the EEOC on April 30, 2019.

FIRST CLAIM FOR RELIEF
(Retaliation in violation of 42 U.S.C. Section 2000e-3(a))

126. Tucker incorporates by reference all preceding paragraphs of this First Amended Complaint as if fully set forth herein.

127. Tucker engaged in protected activity under 42 U.S.C. Section 2000e(a) by opposing a racially hostile environment. Specifically, the environment at Tucker's place of employment was hostile toward Tucker as the white father of a black daughter, and toward racially diverse students. Racial insults directed against Tucker personally and, additionally, racially hostile acts and insults directed at others, created a racially intimidating environment that interfered with the effective discharge of Tucker's duties and responsibilities as a high school teacher and Dean.

128. Tucker opposed this hostile work environment by telling school administrators about it and

requesting that they remedy it, by organizing the Race and Faith Chapel to address the racial hostility directly with students, and by opposing FBCI's efforts to minimize the impact of the Race and Faith Chapel after it occurred.

129. Tucker fell within the zone of interest of those protected under Title VII because he himself was an FBCI employee entitled to Title VII protection and because he was a teacher and Dean. In his role as teacher and Dean, Tucker's employment responsibilities included ensuring the welfare of students who were subject to racial harassment at the school.

130. Opposing racial harassment was important to Tucker as an employee-victim of such harassment and because protecting students from racial harassment was an important aspect of his job.

131. As a direct response to Tucker's opposition to racial harassment, FBCI retaliated against Tucker through a series of wrongful acts: 1) it removed Tucker from his position as Chapel director; 2) it removed him from his position as Dean; 3) it gave Tucker notice that his contract would not be renewed at the end of the year; and 4) it then terminated his employment.

132. Tucker's opposition to racial harassment was a motivating factor in his termination, and he would not have been terminated but for his opposition to racial harassment.

133. As a result of a course of retaliatory conduct and Tucker's ultimate termination, Tucker was damaged. Tucker's damages include emotional distress, loss of emotional value of his work, and loss of salary and other employment benefits, the value of

which shall be proven at trial and determined by a jury.

134. FBCI's retaliatory conduct was wanton, fraudulent, and malicious and done with an intent to harm Tucker. FBCI's intent to harm Tucker is evidenced, in part, by its agents' public statements about him known by FCBI to be false. FCBI's conduct thereby entitles Tucker to an award of exemplary damages.

* * *

WHEREFORE, Plaintiff Gregory Tucker respectfully requests that this Court enter judgment in his favor and against Defendant Faith Bible Chapel International and award him all relief allowed by law, including but not limited to the following:

- (a) All appropriate relief, including available equitable injunctive relief;
- (b) Compensatory and consequential damages as allowed by law in an amount to be determined at trial;
- (c) Punitive damages as allowed by law and in an amount to be determined at trial;
- (d) Attorneys' fees and the costs associated with this action, including expert witness fees, as allowed by law;
- (f) Pre- and post-judgment interest at the appropriate lawful rate; and
- (g) Any further relief that this court deems just and proper, and any other relief as allowed by law.

151a

**PLAINTIFF RESPECTFULLY REQUESTS A
TRIAL BY JURY ON EACH OF THE ABOVE-
STATED CLAIMS.**

Dated this 3rd day of September, 2019.

* * *

Chaplain Employment Agreement

Tucker v. Faith Bible Chapel

No. 1:19-cv-01652, Dkt. 25-1

**FAITH CHRISTIAN ACADEMY FULL-TIME
Chaplain
EMPLOYMENT AGREEMENT/EXTENSION
AGREEMENT–2017 - 2018**

On February 16, 2017, THE PARTIES, Faith Christian Academy (“FCA”) and “**Gregory Tucker**” (Employee), have entered into this: ☐ Employment Agreement / ☒ Extension Agreement (as indicated, the “Agreement”), on the terms below.

I. GENERAL

The Superintendent of Faith Christian Academy or his designee (“Superintendent”) discussed with Employee the necessity that the hand of the Lord be upon Employee and that he/she exhibits the gift necessary to perform in the position of **Chaplain**. Employee has expressed his/her belief that he/she has this gift and that God has called him/her to minister this gift at FCA.

II. VISION

“Inspiring and equipping students with an excellent education, as they use their unique gifts to passionately represent Christ.

III. MISSION

By providing a biblically integrated education, Faith Christian Academy guides students to discover and develop their unique spiritual, mental, creative and physical gifts, so that they may glorify God and serve others through this power of the Holy Spirit. In

an atmosphere of grace and truth, we partner with parents and churches, as we empower students to fulfill God's purpose for their lives.

IV. AREAS OF RESPONSIBILITY

It is presumed by Employee and the Superintendent that Employee will either teach at the grade level and in the subjects discussed, or will perform other duties as contemplated by the parties at the time of execution hereof. Notwithstanding the contemplation of the parties in this regard, during the term hereof Employee agrees to teach any grade level, subject matter and combination of classes or to perform other duties as may be required by the Superintendent in his sole and absolute discretion. Employee understands that he/she may not actually teach or work in the positions originally contemplated. Employee agrees that any changes in assignments or positions required by the Superintendent will not be considered a change to less favorable working conditions. Employee is currently assigned to a/an **Chaplain** position.

V. DUTIES AND RESPONSIBILITIES

Employee shall well and faithfully serve FCA in the position assigned, and shall devote his/her time, attention and energies to that position, including, but not limited to, the following:

1. Employee shall work the days indicated on the FCA school calendar, or such other number of days set forth on that calendar, as it may be amended from time to time. Such workdays include, without limitation, face-to-face days with students, parent-teacher conferences, teacher in-service days, and required summer hours.

2. Employee shall attend all required faculty meetings and faculty prayer sessions. Absence from any of these other FCA functions at which attendance is required shall be approved in advance by the FCA school principal, whenever practicable.

3. Employee shall be thoroughly prepared for his/her work responsibilities, required meetings, and all other FCA functions as set forth herein or as otherwise required.

4. Employee shall attend a Christian, Bible believing church regularly and have daily devotion times for prayer and Bible study.

5. Employee shall abide by and be subject to the scriptural and other principles and policies stated in the FBCI/FCA handbooks.

VI. EFFECTIVE DATES

☐ This is the initial Employment Agreement for Employee. It is effective beginning ____ and shall continue in full force and effect through ____ (“Initial Term”).

☒ This is an Extension Agreement, and it extends the term of Employees’ employment and contains such other changes in provision as set forth herein. This Extension Agreement is effective beginning **August 6, 2017**, and shall continue in full force and effect through **August 4, 2018**.

Each extension of the term shall be memorialized in an Extension Agreement and be referred to as an “Extension Term.” Extensions of the term shall be at the discretion of the Superintendent; there is no promise that any extension(s) will be granted.

NOTWITHSTANDING THE INITIAL TERM OR ANY EXTENSION TERM OF THIS AGREEMENT, EMPLOYEE MAY BE TERMINATED AT ANY TIME BY THE SUPERINTENDENT, IN HIS SOLE AND ABSOLUTE DISCRETION, WITH OR WITHOUT CAUSE. EMPLOYEE SPECIFICALLY ACKNOWLEDGES THAT HE/SHE IS AN AT-WILL EMPLOYEE AND THAT THERE HAVE BEEN NO PROMISES OF CONTINUED EMPLOYMENT FROM FCA OR ANY OF ITS AGENTS OR REPRESENTATIVES.

VII. COMPENSATION

Subject to Adjustments, Employee shall receive base salary/rate of pay ("Base Salary") in the amount of:

[REDACTED] Per Annum

Colorado or ACSI Certificate

Extra Class

[REDACTED] TOTAL

The Base Salary is payable to bi-weekly installments subject, however, to Employee's termination before the end of the Initial Term, or any Extension Term, in which event Employee shall be paid only through his/her last date of work.

In addition to his/her Base Salary, Employee shall be paid for extra-curricular assignments, if applicable.

This is a full-time position and as such Employee is currently eligible for benefits as outlined by Human Resources.

The extracurricular assignment compensation ("ECC") and additional benefits addressed, if any, in

this section do not include any agreement between Employee and FCA related to coaching or any other involvement in sports at FCA, is any, which shall be by separate agreement.

Employee understands that his / her Base Salary and ECC may be reduced, increased or otherwise adjusted, and that available benefits may be reduced, eliminated, improved, or otherwise adjusted (collectively, the “Adjustments”), all in the sole discretion of Faith Bible Chapel International at any time without prior notice.

VIII. COMPLETE AGREEMENT

This agreement, which incorporates the Employment Agreement (if this is not the initial Employment Agreement) and any prior Extension Agreements, is the complete agreement between the parties. There are no oral agreements between the parties. If this Agreement is an Extension Agreement, the terms in this Agreement shall control in the event of any conflict with the terms in the Employment Agreement and any prior Extension Agreement. Employee acknowledges and represents that he/she has not relied upon any representation with respect to the subject matter of this Agreement except as set forth herein and that he/she has relied upon his/her own judgment in entering into this Agreement.

Employee acknowledges and represents that he/she has not been induced to enter into this Agreement as a result of any representations by FCA, its agents or representatives, regarding the availability of coaching or other additional employment opportunities at FCA.

IX. REPRESENTATIONS

FCA and Faith Bible Chapel International have relied upon Employee's representations made in the Employee employment application and interview(s) with regard to the Employee's education, work experience, Christian beliefs, and commitment to God's Word and the teachings of His Son, Jesus Christ, in offering **Chaplain** employment at FCA. Employee's representations to FCA are a material factor in its entering into this Agreement.

X. SIGNATURES

EMPLOYEE

Date: 3/20/17

Gregory Tucker

Signature

Street Address: [REDACTED]

City, State, ZIP: [REDACTED]

FAITH CHRISTIAN ACADEMY

Date: 8/29/17

Brian Wall

Brian Wall, Superintendent

Date: 8-29-17

Doug Newcomb

Doug Newcomb, CFO/Treasurer, FBCI

**Excerpts from Faith Christian Academy
Teacher Handbook**
Tucker v. Faith Bible Chapel
No. 1:19-cv-01652, Dkt. 25-2

FAITH CHRISTIAN ACADEMY
*Preparing students to impact
the world for Christ...*

Teacher Handbook
2017-2018
Revised July 2017

* * *

Faith Christian Academy Vision Statement

Inspiring and equipping students with an excellent education, as they use their unique gifts to passionately represent Christ.

Mission Statement

By providing a biblically integrated education, Faith Christian Academy (FC Academy) guides students to discover and develop their unique spiritual, mental, creative and physical gifts, so that they may glorify God and serve others through the power of the Holy Spirit. In an atmosphere of grace and truth, we partner with parents and churches, as we empower students to fulfill God's purpose for their lives.

Core Values

- Every student will be encouraged to develop an increasingly vital relationship with Jesus, in which He becomes both Lord and

friend.

- All subjects will be taught from a Biblical perspective, emphasizing that all truth is God's truth and that Jesus Christ is the ultimate source of wisdom.
- All teaching will focus upon transforming student lives, flowing out of a caring student/teacher relationship.
- The Holy Spirit will be given freedom to direct all activities at FC Academy.
- Education will be directed toward body, soul, and spirit with educational experiences constructed to promote growth in each of the three domains.
- Every student will be encouraged to participate in service projects and mission experiences.
- Character education will be central to the curriculum.
- Teachers have the right to teach, while students have the right to learn. Teachers and administrators will partner to protect these rights, allowing no student to disrupt the teaching/learning process.
- FCA will facilitate effective teaching strategies that engage every student and lead students to specific learning objectives.
- FCA is committed to teach students how to think critically, discerning truth from error.
- Extra-curricular activities including athletics, fine arts, technology, leadership

and various clubs are integral to the total educational experience of FCA students and will be interwoven throughout the educational program.

- FCA will maintain a strong commitment to excellence in every program offered.

Student Outcomes

Faith Christian Academy Students...

- Are prepared to articulate the Gospel message and defend the Christian Worldview, while understanding opposing worldviews and commit to be disciples who make disciples as they participate in the great commission.
- Will become skillful contributors in the workplace as they demonstrate academic competence in preparation for post high school training and vocation in the following disciplines: reading, writing, speaking, listening, math, science, social studies, English, arts, technology, languages and Bible literacy.
- Are committed to life-long learning, and possess the skills to inquire, logically solve problems and make wise decisions that lead to healthy personal relationships in all areas of life.
- Discover and embrace God's physical, mental, spiritual, emotional and creative design and purpose; understanding that their vocational work is an expression of the nature and attributes of God.

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- Respect and extend biblical hospitality to others, including those from different cultures, impacting their generation through love and service.
- Embrace their identity in Jesus Christ, as they are led by the Holy Spirit in grace and truth to live in a dynamic, maturing, personal relationship with Jesus, and become active unifying members in the body of Christ, godly examples at home and in the workplace.
- Appreciate all of God's creation and practice responsible stewardship of time, talents and resources in ways that glorify God.

Having accepted Jesus as my Savior

I choose to live by

Finding my IDENTITY in Christ

Allowing GRACE to transform me

Inviting the HOLY SPIRIT to guide me

Taking God's LOVE into my world

Having confidence in God's PURPOSE for my life

II Corinthians 5:7

<p>FAITH CHRISTIAN ACADEMY does not discriminate on the basis of race, color, national or ethnic origin in administration of its educational policies, admissions policies, scholarship, athletic and other school-administered programs.</p>

Philosophy and Purpose

God has ordained three basic institutions – the home, the church, and the state (civil authority). In His plan, parents have the primary responsibility for training and educating their children, while the church/Christian school shares an important supportive role. FCA believes that the school is to be an extension of the home with authority delegated to it from the parents/guardian. In a Christian school, such as Faith Christian Academy, there can be unity of purpose between home and school. At FCA, all teaching is presented from a biblical worldview, always directing the student's focus to Jesus Christ who alone is the source of life, wisdom, and eternal salvation. He alone can lead a student into the proper path (Psalm 25:4-5). A vital relationship with the Lord will greatly enhance academic, social, intellectual, and physical development.

The entire FCA staff is committed to provide the full curriculum - body (physical), soul (intellectual), and spirit (spiritual). FCA's goal is to support the biblical mandate given to parents regarding their children; "bring them up in the training and admonition of the Lord" (Ephesians 6:4). Young people need the continuity of ONE message – focusing upon a biblical worldview about life, creation and education. By presenting a biblical worldview in each of these areas, FCA desires that students will increasingly develop the character of Jesus Christ, "growing in wisdom, and stature, and in favor with God and men" (Luke 2:52). Scripture strongly emphasizes that parents/guardian and teachers are called to "train up a child in the way he should go, and when he is old he will not depart from it" (Proverbs 22:6).

Statement of Faith

The following beliefs (convictions) are firmly upheld by all staff members of Faith Christian Academy:

- The Bible is the inspired, inerrant Word of God; it is the authoritative source of truth (2 Timothy 3:16; 2 Peter 1:20- 21; Hebrews 4:12).
- One of the divine mysteries that we accept by faith is that God is triune, three distinct persons, yet one God (Matthew 28:18-20; Matthew 3:16,17).
- Jesus, who is true God and true man, is the only way of salvation having made full and complete payment for all the sins of all people when He died on the cross at Calvary. His resurrection is proof that the Father accepted this payment (I John 4:2,15; John 3:16; I John 1:7).
- The Holy Spirit brings believers to faith in Jesus, keeps them in the faith day by day, and continually works to produce spiritual maturity. God invites believers to cooperate with Him as He develops spiritual fruit in each life (1 Corinthians 12:3; 1 Corinthians, 6:11; Galatians 5:22-24).
- God has not rejected Israel. Therefore, for the sake of God, we offer friendship and support to Jewish people throughout the world (2 Chronicles 9:8; Psalms 98:3; Isaiah 44:21; Ezekiel 37:28; Romans 11:25; Jeremiah 31:2).
- God has ordained marriage between one man and one woman (Genesis 2:24, Matthew 19:4-6, Ephesians 5:31).

- God is the creator of all things. Mankind is the pinnacle of His creation, and human life begins at conception (Genesis 1, Psalm 100:3, Isaiah 64:8, Psalm 139:13-16, Jeremiah 1:5).
- It is both a privilege and a duty to share the good news of salvation with all people who, because of their sins, are separated from God. Salvation occurs when an individual personally accepts this payment for their sins. Apart from faith in Jesus Christ, each person is destined for eternal torment in the lake of fire (Matthew 28:18-20; Acts 1:8; Luke 24:46,47).
- The gifts of the Holy Spirit are available today. We believe these gifts include healing, miracles, supernatural wisdom and knowledge, prophetic words and speaking in tongues. FCA teaches that the baptism of the Holy Spirit is available to all born-again believers as God's gift of power to witness and to live a victorious Christian life (Romans 11:29; 1 Corinthians 12:1-11; 1 Corinthians 14; Mark 1:8; Matthew 3:11).
- Parents/guardians have the God-given responsibility to bring their children up in the training and admonition of the Lord (Ephesians 6:4; Deuteronomy 6:4-9; Proverbs 22:6).
- Prayer is a vital part of every Christian's life and may be expressed as praise, thanksgiving, intercession and supplication (1 Thessalonians 5:16-22; James 1:5-8; James 5:13-18; 1 Timothy 2:1-4).

- Those who are in a right relationship with Jesus will consistently participate in the local church (Acts 1:14; Acts 2:42, 46, 47).
- In our essential beliefs, we have unity (Ephesians 4:4-6, John 17:21). In non-essential beliefs, we have liberty (Romans 14:1,4,12,22, Galatians 5:1). In all our beliefs, we show love (I Corinthians 13:2, Galatians 5:13).

The Concept of Ministry

To become a teacher or full-time worker at Faith Christian Academy is a calling from the Lord Jesus Christ to minister. You are joining this ministry, not as an employee, but as a minister to FCA students and families.

FCA's ministry focus emphasizes the following items:

1. FCA desires to provide an academic program that is based on the scriptural principles found in the Word of God, the Holy Bible. FCA teachers are committed to the integration of biblical truth within each academic and extra-curricular discipline. Additionally, teachers are responsible to facilitate godly character development, teach good study habits and encourage academic excellence. Each teacher must be thoroughly prepared and use effective instructional methods and techniques.
2. Although FCA is a Christian academic institution, an additional emphasis is placed upon the spiritual life of all students. FCA's desire is to train and lead students into attitudes and habits, which will bring them to Christ-like maturity. This includes

encouraging all students to develop a prayer life, a passion to share the Gospel message, and characteristics such as honesty, humility, purity, faithfulness, love, and service. For students who may not yet be born again, or are new believers in Christ, all staff members will pray, teach, and set an example, seeking opportunities and the empowering of the Holy Spirit to lead them to experience an abiding relationship with Christ.

3. All staff members must be aware of the importance of our ministry to one another. Each teacher needs to be open to the Holy Spirit to offer words of encouragement, prayer, and concern for one another. It is important that teachers be willing to work as a team, make and receive positive suggestions, stand, as much as possible, with fellow teachers (especially in times of hardship), and guard the reputation of others. Trusting in the Lord in areas of personal needs as well as school needs and looking to Him as the primary source of wisdom, help, knowledge, and strength is critical.

Educational Approach

Faith Christian Academy stands firmly upon the historic truth claims and moral foundations of Christianity. These include, but are not limited to, the biblical definition of marriage, the sanctity of human life, the attendant boundaries of sexuality and moral conduct, and the clear biblical teaching that gender is both sacred and established by God's design. Parents or the legal guardians who choose to enroll their children at Faith Christian Academy are agreeing to support these and other basic biblical values derived from historical Christianity and the relevant Christian

positions embraced by Faith Bible Chapel International, under whose authority the Academy rests. Parents understand and agree that Faith Christian Academy will teach these principles and biblical values.

Additionally, the leadership of Faith Christian Academy urges parents to recognize their scriptural responsibility (Deuteronomy 6:1-9, Psalm 78:5 & 6, Proverbs 22:6) to provide their children with a Christian education and to understand that the primary responsibility for this task rests with the parents (Ephesians 6:4). FCA was founded and continues to operate upon the biblical values and the desire and commitment for Bible-believing Christian parents who enroll their children in an intentionally Christian environment.

Faith Christian Academy will consider admission for students from all families who are willing to support FCA's philosophy of Christian education, student conduct requirements, and the school's above-stated positions and who are willing to allow and support their children to be educated and influenced in an intentionally Christian environment.

Continued enrollment at Faith Christian Academy is contingent upon this same understanding and support.

Only a life properly focused on Jesus can function properly and reach fulfillment. Therefore, the educational process of FCA strives to develop proper personal relationships with Jesus Christ. Teaching becomes a ministry, and must be led by the Holy Spirit for only He can grant this success.

Learning facts and skills is important, and must not

be neglected. Learning leads to true wisdom, which is the personal development of God-pleasing attitudes, values, priorities, and goals. Using knowledge that is informed by God's biblical principles enables students to think critically and creatively, using God's Word, the Holy Bible, as their source of truth.

Although learning is an individualized activity, teaching must be effective in the classroom setting. Teachers and staff members must constantly be sensitive to meet the individual needs of students, just as our Savior did and still does.

The four key words of 2 Timothy 3:16: teaching, reproof, correction, and instruction can be effectively applied to summarize the teaching methods used by Faith Christian Academy. First, it is the love of Jesus overflowing in our hearts that makes it possible to effectively use these methods to enable the hearts and lives of students to be positively touched and changed (1 Corinthians 13).

- **TEACHING** includes, but is not limited to the following strategies: communication, lectures, labs, demonstrations, applied learning, textbooks, media, and group work (Teaching is only one of the four necessary processes). Teachers need to continually enhance the curriculum standards and objectives to meet the needs of individual students.
- **REPROOF** includes consequences for actions including all forms of discipline, private counsel, withholding privileges and written code violations.
- **CORRECTION** is intended to be non-guilt

producing counsel and redirection that students may need while their character development is “in process.” Correction is useful to help students develop a greater understanding of right and wrong, as clearly defined in God’s Word.

- **INSTRUCTION** (in righteousness) is the final process. Knowledge and training given to students becomes part of them. Godly training is always under the control and direction of the Holy Spirit. Only He can internalize the principles of Scripture into one’s lifestyle.

Teachers are to train students by word, principle, and godly example, persistent and consistent counsel enabling them to focus on God-pleasing attitudes, values, and activities that will help them to mature in their relationship with Christ. Teachers and staff members must recognize that their actions and attitudes toward students often communicate even more than their words.

One of the most important areas of training is encouraging students to accept correction and discipline, and to profit from it in preparation for future fruitfulness in God’s kingdom.

Faculty and Staff

Teacher Job Description

Job Title: K-12 Teacher

Reports To: Campus Principal

Qualifications

- Bachelor’s degree from an accredited college/university
- Valid ACSI or Colorado initial or professional

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teacher's licensure or intent to obtain professional licensure

- Demonstrate competency in all academic areas assigned to teach
- Be able to perform each essential duty responsibly and satisfactorily

Professional Responsibilities and Duties

- Live in a vital relationship with God (Father, Son and Holy Spirit), as you communicate with Him through prayer and the Scriptures. John 15; Col. 3:23
- Demonstrate daily a relationship with Jesus that is filled with grace and truth. John 1:14
- To the greatest extent possible, live at peace with all, abstain from all appearance of evil, and refrain from gossip. Romans 12:18, 1 Thessalonians 5:16-18 & Proverbs 26:20
- Discern and follow the leading of the Holy Spirit throughout the day. Gal. 5:16-18
- Be punctual, neat, appropriately and modestly dressed.
- Demonstrate resourcefulness and expertise in the following areas: relationships, team building, teacher leadership, communication, conflict resolution, creativity, problem solving, time management, and making wise decisions.
- Participate in the continuous school improvement process, including the accreditation process.

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- For each course that you will be teaching, the following should be completed and submitted for review to your campus principal.
 - a. Post weekly lesson plans, classroom resources and homework assignments in RenWeb by the designated time at the respective campus.
 - b. Course description, syllabus, and an updated curriculum map according to the rubric established within Curriculum Trak, for each course that you will be teaching. Each of these should be completed by the first Friday of in-service week.
 - c. Classroom management plan including rules, procedures, consequences and rewards. These also are to be submitted by the first Friday of in-service week.
 - d. Update spiritual and professional goals submitted in RenWeb, along with an updated short biography and personal testimony/statement of faith; by the first day of in-service.
 - e. Substitute emergency plan; by last day of in-service.
 - f. Bank day request forms; at least one week prior to taking a personal day.
- Prepare and implement Essential Student Outcomes and ESO assessments.
- At the completion of each semester, ensure that Expected Student Outcomes scores have been recorded.

- Complete classroom resource inventories and prepare grade level/departmental budgets.
- Participate in ongoing curriculum development.
- Prepare subject year-at-a-glance's, and write curriculum maps based on national standards and objectives utilizing clear criteria for evaluating lessons.
- Implement research-based instructional strategies, targets and methods using resources such as "Teach Like a Champion," "The First Days of School" and other sources that will enable multi-sensory instruction, individual small group instruction, cooperative learning, and Socratic Instruction.
- Utilize technology as a supplemental tool to support instruction.
- Under the direction of the Holy Spirit integrate Scriptural concepts, truths, and application into the instruction within all disciplines.
- Utilize ongoing formative and summative assessments to inform, modify and adapt curriculum and instructional practices that will meet various learning styles and student needs.
- K-5 teachers will use "The Daily Five" when teaching literacy.
- Differentiate instruction for learners based upon learning styles including Whole Brain Activities.

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- Attend all faculty meetings, workshops, and other required professional meetings.
- Attend all parent-teacher conferences.
- Punctually attend regularly scheduled morning/afternoon meetings.
- To maintain a safe and positive learning environment, punctually and proactively monitor students in a variety of educational environments (drop-off, pick-up, cafeteria, playground, hallways, restrooms, field trips and school activities).
- Steward school furniture, materials and resources well by maintaining an orderly educational atmosphere in the classroom.
- Develop and display meaningful classroom décor.
- Obtain principal approval for all media, including those used for classroom rewards and inside recess (K-5). Media use must be linked to curricular objectives.
- Consistently practice effective communication with parents/guardians orally and in writing formally (Parent Teacher Conferences) and informally by responding to calls/emails within a 24-hour time frame.
- Punctually submit attendance and grades according to your campus policy.
- Work collaboratively with grade level/departmental colleagues, including administrators and intervention staff, to support student achievement goals and

professional development.

- Apply intervention procedures including anecdotal records which may include specific strategies already noted for student intervention.
- Complete professional development responsibilities that include staff walk through observations, continuous school improvement, accreditation, and the maintenance of a current Colorado or ACSI teaching credential.
- Pursue best practices in teaching by remaining current regarding educational research. Practice self-reflection and willingly engage in administrative classroom observations.
- Ethically administer standardized assessments, as well as formative and summative school assessments.
- Interpret and analyze student performance data.
- Submit orders for books and materials for the next school year in conjunction with department heads.
- Share recommendations with principals and department heads for improving the curriculum. Assist department heads in developing curriculum and budgets for the coming school year.
- Be familiar with the teacher and student handbooks, supporting and enforcing all school policies and procedures.

- Seek to support students involved in extracurricular activities by attending events whenever possible.
- Perform all other duties as assigned.

Language Skills

- Ability to read and interpret documents such as handbooks, crisis plans, policies, evaluations, standardized testing results, curriculum maps and materials, and any other student assessment documents.
- Ability to effectively document classroom observations (walk-throughs), and analyze data to improve instructional practices.
- Ability to correspond with staff from all levels.
- Ability to speak effectively in large and small group settings with various audiences.

Reasoning Ability

- Ability to apply common sense understanding and problem-solving strategies to carry out instructions furnished in written, oral, or diagram form.

Physical Demands

While performing duties of this job,

- The employee is regularly required to talk and hear.
- The employee is frequently required to sit and reach with hands and arms.
- The employee is required to regularly stand and walk.

- The employee must occasionally lift and/or move up to 50 pounds.
- Specific vision abilities required by this job include close vision, distance vision, color vision, peripheral vision, depth perception, and the ability to adjust focus.

Work Environment

- Extended schedules may be required when specific needs arise.
- Work may consist of (10) plus hour days with work on weekends required from time to time.
- Since Faith Christian Academy is a dynamic school pursuing excellence and best practices in education, this makes flexibility and the ability to adjust to changing work environments essential, as well as, adaptation to new educational principles values, and a shifting culture. Adaptability to change is crucial.

Chain of Command

Since parents delegate the authority at FCA, it is vitally important that open communication be maintained between parents and staff members.

General disciplinary action involving student behavior will be handled by the teachers. Situations

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in which student behavior becomes inappropriately chronic or flagrant will be referred to a building administrator.

FCA willingly receives constructive criticism or suggestions concerning ways in which the school

might be improved or information concerning problems which may exist. It is the policy of the FBCI Board of Directors that problems, criticisms, or suggestions be taken up first with the administration. Specifically, parents are directed to use the following line of communication: teacher, principal, superintendent and finally the FCA Advisory Board, moving only to the next level if satisfactory progress has not been accomplished.

FCA is a ministry of FBCI; therefore, the Board of Directors of FBCI, under God's direction, is the final authority for the school. The FBCI Board of Directors has delegated the responsibility of day to day operations to the FCA Superintendent and his administrative team. Additionally, the FBCI Board of Directors has appointed an FCA Advisory Board, all of whom are also born again and have stated their support of the FCA statement of faith. The FBCI Board of Directors is responsible for hiring the FCA Superintendent and for approving the annual FCA budget. Oversight of all other areas of school operation has been delegated to the Superintendent and his administrative team.

Honor Code

FAITH CHRISTIAN ACADEMY HONOR CODE

Faith Christian Academy ("FCA") was founded as and is committed to maintaining a Christian educational ministry which offers me a life-style of commitment to Jesus Christ as my personal Savior and Lord. I, _____, therefore, commit to be a

person of integrity in my attitude and relationship with my Lord and Savior Jesus Christ, with fellow students, teachers, and in the community in which I live.

With Jesus' help, I am committing myself...

1. **To wholeheartedly develop my God-given spiritual, intellectual, and physical gifts to honor and glorify God.** I Corinthians 10:31 – “therefore, whether you eat or drink, or whatever you do, do all to the glory of God.” See also Matthew 25:14-30.
2. **To cultivate positive relationships with others by speaking words that edify, seeking to love others as I love myself.** (To speak truthful words that bless and do not curse, and to refrain from gossip.) I Thessalonians 3:12 – “and may the Lord make you increase and abound in love to one another and to all, just as we do to you.” Colossians 4:6 – “Let your conversation be always full of grace, seasoned with salt, so that you may know how to answer everyone.”
3. **In obedience, to seek, understand and follow God's will for my life.** Psalm 119:33, 35 – “Teach me, O Lord, to follow your decrees; then I will keep them to the end. Direct me in the path of your commands, for there I find delight.”
4. **To participate in FCA Chapels and extracurricular activities.** Psalm 95:6 – “Oh come, let us worship and bow down; let us kneel before the Lord our Maker.” Romans 12:1 – “Therefore, I urge you brothers, in view of God's mercy, to offer your bodies as living sacrifices,

holy and pleasing to God – this is your spiritual act of worship.”

5. **To be actively involved in my home church, attend church regularly, and do what I can to support the ministry of my church.** Hebrews 10:25 – “...not forsaking the assembling of ourselves together, as is the manner of some, but exhorting one another, and so much the more as you see the day approaching.
6. **To submit to correction and will seek forgiveness when necessary.** I John 1:9 – “If we confess our sins, He is faithful and just to forgive us our sins and to cleanse us from all unrighteousness.”
7. **To trust Jesus for direction and help in living an obedient life.** Romans 8:11 – “But if the Spirit of Him who raised Jesus from the dead dwells in you, He who raised Christ from the dead will also give life to your mortal bodies through His Spirit who dwells in you.” Philippians 4:13 – “I can do all things through Christ who strengthens me.” Zechariah 4:6 – “...not by might nor by power, but by My Spirit, says the Lord of hosts.”
8. **To keep my total being under subjection from all biblically and or legally defined immoral and or illegal acts and habits.** To this end I will not use any illegal substance; I will not participate in sexual immorality including but not limited to heterosexual, homosexual and transsexual behavior; I will not drink alcoholic beverages of any kind; I will not use tobacco, marijuana, or any kind of vape pen; I will not

cheat, steal or vandalize; I will not engage in other behavior that is contrary to the rules and regulations listed in the FCA Student Handbook. I Corinthians 9:25-27 – “and everyone who competes for the prize is temperate in all things. Now they do it to obtain a perishable crown, but we for an imperishable crown. Therefore, I run thus: not with uncertainty. Thus, I fight: not as one who beats the air. But I discipline my body and bring it into subjection, lest, when I have preached to others, I myself should become disqualified.” See also I Corinthians 6:19.

Faith Christian Academy stands firmly upon the historic truth claims and moral foundations of Christianity. These include, but are not limited to, the biblical definition of marriage, the sanctity of human life, the attendant boundaries of sexuality and moral conduct, and the clear biblical teaching that gender is both sacred and established by God’s design. Parents or the legal guardians who choose to enroll their children at Faith Christian Academy are agreeing to support these and other basic biblical values derived from historical Christianity and the relevant Christian positions embraced by Faith Bible Chapel International, under whose authority the Academy rests. Parents understand and agree that Faith Christian Academy will teach these principles and biblical values.

Additionally, the leadership of Faith Christian Academy urges parents to recognize their scriptural responsibility (Deuteronomy 6:1-9, Psalm 78:5 & 6, Proverbs 22:6) to provide their children with a Christian education and to

understand that the primary responsibility for this task rests with the parents (Ephesians 6:4). Faith Christian Academy was founded and continues to operate upon the biblical values and the desire and commitment for Bible-believing Christian parents who enroll their children in an intentionally Christian environment.

Faith Christian Academy will consider admission for students from all families who are willing to support FCA's philosophy of Christian education, student conduct requirements, and the school's above-stated positions and who are willing to allow their children to be educated and influenced in an intentionally Christian environment.

Continued enrollment at Faith Christian Academy is contingent upon this same understanding and support.

I understand that my signature below indicates my desire to fulfill the Code of Honor and is prerequisite for my attendance at FC Academy. I also understand that any violation of the items listed under #8 of the Honor Code on or off campus occurring at any time during my enrollment at FCA (includes but is not limited to summers, weekends, evenings, holidays, etc.) will result in permanent Honor Code Probation and may be grounds for immediate disenrollment from FCA, in the school's sole discretion.

Student Signature

Date

My signature indicates my approval of the commitment my Student is signing.

Parent/Legal Guardian Signature

Date

Parent/Legal Guardian Signature

Date

* * *

Ministry Leadership Expectations

While working at Faith Christian Academy, you will be visible and viewed as a member of leadership. We require that each staff member commit to certain lifestyle expectations, be in a position to effectively minister to others, and be maturing as a believer. At a minimum this means you:

- Attend a biblically based church on a regular basis.
- Support your local church by investing time talent and treasure as the Lord leads.
- Commit willingly to refrain from the following activities including but not limited to: abusing prescription drugs or alcohol; use of tobacco, marijuana, or illegal drugs; habitual gambling; distributing alcohol, tobacco or illegal drugs; engaging in, promoting or condoning pornography or any kind of sexual impurity; breaking any criminal laws or contributing to the delinquency of minors.

Rationale and Protocol for Conflict Resolution

1. Galatians 5:14 & 15 - The entire law is summed up in a single command: “Love your neighbor as yourself.” If you keep on biting and devouring each other, watch out or you will be destroyed by each other.
 - *If we choose to ignore the second greatest commandment that Jesus has given us, we will indeed bite and devour each other, even as Christians.*
2. John 13:13-15 - “You call me ‘Teacher’ and ‘Lord,’ and rightly so, for that is what I am. Now that I, your Lord and Teacher, have washed your feet, you also should wash one another’s feet. I have set you an example that you should do as I have done for you.”
 - *Jesus washed the disciples’ feet because they were dirty, smelled terribly, and left unwashed would have made dinner quite unpleasant at best, and at worst a sanitary nightmare. Spiritually speaking, if we wish to maintain a healthy community, we as leaders must embrace the conflict resolution process for the same reasons. It will not always be pleasant, but is vital to preserve relationships along with the overall health of our FCA community. Why would the world want to come to Christ, if His followers cannot live in peace?*
3. Song of Solomon 2:15: Prevent the Little Foxes from spoiling the Vines.

- *Most conflicts begin as small resolvable situations, but if left unresolved begin to fester and expand into complex issues that become extremely difficult to solve and ultimately create bitter, broken relationships.*

ACTION POINTS – STRATEGIES TO RESOLVE CONFLICT

4. Matt 5:23 & 24 - “Therefore, if you are offering your gift at the altar and there remember that your brother has something against you, leave your gift there in front of the altar. First go and be reconciled to your brother; then come and offer your gift.”
 - *The only hope to resolve any conflict is for one of the parties involved to humble themselves, and initiate the reconciliation process with the offended. As mature believers and servants of Christ, when we become aware that we have wittingly or unwittingly given offense, or contributed in some way to a conflict, we must accept our responsibility to become the first person to humble ourselves and reach out to our parents and students.*
5. James 4:10 – “Humble yourselves before the Lord and He will lift you up.”
 - *This precludes us from defending ourselves or holding on to our rights to be treated fairly or respectfully. Where appropriate, we should be ready and willing to acknowledge to our parents and students where we were wrong, and ask them for*

forgiveness for the offense that we have given, wittingly or unwittingly.

6. James 1:19 & 20 - "My dear brothers, take note of this: Everyone should be quick to listen, slow to speak and slow to become angry, for man's anger does not bring about the righteous life that God desires."
 - *My first and repeated response to a parent, student, or teacher who is expressing concern or frustration with me regarding something that I did or did not do, should be to actively listen to the concern through the ears and emotions of the person who is sharing with me. I must always be listening for the ounce of truth or applicability within their concern amidst what may be pounds of unnecessary or unfounded criticism, misunderstanding or undeserved judgment. The moment that I allow myself to express defensiveness or anger, no matter how justifiable my position may be, is the moment that I lose my ability to facilitate God's righteous desires in the situation.*
 - *Be an active listener – To be an active listener means to restate what you believe that another person is saying and how that makes them feel. If you are accurate in your understanding of what they are saying, then you can, using "I" messages, respond with your thoughts and feelings.*
7. Proverbs 15:1 – "A gentle word turns away wrath, but harsh words stir up anger."

- *If I need to respond initially to a person who is confronting me, my words must be calm, gentle, and not emotionally loaded. Often my emotions in that initial point of conflict would lead me to respond harshly. I simply cannot allow that to happen and, if necessary, may need to give myself some time or space before responding at all.*
 - *When I receive an angry email, it is vital to wait until the next day before responding to the content of the email. If the email is at all lengthy or involves one or more issues that evoke strong emotions to the author or myself, it is better to schedule a face to face meeting rather than risking a written response, which can easily be misunderstood or analyzed critically and used against me. I might respond initially to the email with language such as the following: “I understand your concern and believe that it would be helpful to me if I could personally speak with you at your convenience and understand your concerns in more detail. When could we sit down together to discuss this further?”*
8. Col 4:6 – “Let your conversation be gracious and effective (seasoned with salt – truth) so that you will have the right answer for everyone.”
- *If you receive an email alerting you to a conflict situation in which you believe a clarifying email may be appropriate and helpful toward resolution, it is important to share the email with your campus*

principal or athletic director, understanding that they have absolute edit or veto power as they review and approve the final wording before you would send the email.

- *If a face-to-face conference is scheduled that could become potentially volatile, be sure that a campus principal or designated administrator can be present. It is important that we speak the truth in love. After listening actively, it is appropriate, using “I messages,” to communicate an offense that the parent may have given to us or simply sharing how we are viewing the conflict.*
9. Heb 12:14 & 15 – “Make every effort to live in peace with all men and to be holy; without holiness, no one will see the Lord. See to it that no one misses the grace of God and that no bitter root grows up to cause trouble and defile many.”
- *Regardless of what is said to us, or whether the conflict is fully resolved to our satisfaction, we must resist the temptation to take comments personally, or hold on to any form of bitterness or resentment. We must live constantly in a state of release or forgiveness in the same way that Jesus releases and forgives us. It is important to realize that not all conflicts will be 100% resolved to everyone’s satisfaction. Regardless of that reality, we must commit to love our fellow believers and live in peace with them no matter what the outcome.*

* * *

Chapel

Student chapels are held every week as scheduling permits. Student supervision must be provided as students move through the building to and from chapel. Teachers are required to attend all chapel services, take attendance, and sit with their students. Chapel is a time for staff and students alike to hear from the Lord and to draw together spiritually. Schoolwork or homework may not be done during chapel.

* * *

Position Regarding the Holy Spirit

Faith Christian Academy is a school founded upon the desire to acknowledge the Holy Spirit in every activity and to give Him complete freedom to direct all school activities. The FCA Statement of Faith declares that it is the Holy Spirit who brings us to faith in Jesus, keeps us in the faith day by day, and works constantly to bring us into spiritual maturity. Additionally, it is stated that we are to submit to the Holy Spirit and cooperate with Him as He produces spiritual fruit in our lives.

(I Corinthians 12:3 “Therefore I tell you that no one who is speaking by the Spirit of God says, ‘Jesus be cursed,’ and no one can say, ‘Jesus is Lord,’ except by the Holy Spirit.” I Corinthians 6:11 “And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God.” Galatians 5:22 – 25 “But the fruit of the Spirit is love, joy, peace, patience, kindness, goodness,

faithfulness, gentleness and self- control. Against such things there is no law. Those who belong to Christ Jesus have crucified the sinful nature with its passions and desires. Since we live by the Spirit, let us keep in step with the Spirit.”)

Furthermore, FCA’s Statement of Faith indicates that the gifts of the Holy Spirit are available today. Hence, the gifts mentioned above, are all vital manifestations in the lives of modern day believers just as they were at the outset of the church age, as documented in the book of Acts. Additionally, our Faith statement asserts that the baptism of the Holy Spirit (including the prayer language of tongues and all gifts) is available to all born-again believers as God’s gift of power to witness and lead a victorious Christian life. Romans 11:29; 1 Corinthians 12:1-11; 1 Corinthians 14; Mark 1:8, Matthew 3:11.

In light of these basic convictions enumerated in the FCA Statement of Faith and considering the fact that Faith Christian Academy currently serves students from over 170 different churches, many of whom view the work and ministry of the Holy Spirit from varying perspectives, how should this most important subject be presented in Bible classes and Chapels? The following is written with the intent of clarifying in more detail the numerous areas regarding the person and work of the Holy Spirit in which the majority of Christians agree. Additionally, this paper is designed to provide a framework within which students and teachers may discuss, understand and experience all that the Holy Spirit wishes to accomplish in each life.

* * *

While recognizing that a wide array of believers are represented at Faith Christian Academy, the school itself will teach about the Holy Spirit from the position discussed above. However, it is the responsibility of every Bible teacher through presentations and class discussions to help each student more fully develop his/her own understanding and experience regarding the work of the Holy Spirit based upon Scripture. The goal is to focus upon who the Holy Spirit is, His role in the life of the believer, and the various blessings that come when the believer allows the Holy Spirit to have increasingly greater control of his/her life. Regarding the actual interpretation of the “Baptism” of the Holy Spirit and speaking in tongues, the perspective of the student, parents/guardian, and pastor will be respected.

Tucker's Open Letter
Tucker v. Faith Bible Chapel
No. 1:19-cv-01652, Dkt. 41-10

2/6/18

Friends in the Faith Christian community,

The last few weeks have undoubtedly been the most difficult weeks of my life. Ironically, they have also been the most inspiring and fulfilling weeks of my life. I have never felt so hated and misunderstood, yet at the same time I have never felt so loved and encouraged. And I stand here today confident that God has been, and will continue to be, in all of that.

Many have reached out to Mercy or I to ask how we're doing. I am sorry if we have not responded. We have been pretty quiet as we prayerfully and diligently walk through this, but I thought it might be good (and easier) to share a sort of "open letter" that explains my perspective of what has transpired, how I've navigated it, and what I hope will come out of it.

Let me start by saying I love Faith Christian Academy. I have spent the better part of my adult life working here and I love the mission, the students, the faculty(!), the parents, and even this quirky building we're in. I am all FOR this place and have seen how it has impacted the lives of countless students through the years. And I have grown in my own faith here through my relationships with students, parents, faculty, and administration. This is why I am grieved to see the division and anger that has boiled over in the last few weeks, rippling out into our surrounding community. This is why I am saddened by the grossly inaccurate caricature of myself, the panel

participants, and the actual chapel that has been spread by some. My hope is that in writing this I can bring some clarity and unity.

While I've taught at Faith for the last 18 years and been the Director of Student Life for the last three years, this was the first year that I took over the primary role as chapel coordinator. While I didn't have any major overhauls planned, I did hope to introduce some tweaks to the format and scheduling in response to student and teacher feedback that we have received through the years that I hoped would improve student engagement. The last few years the highest ranked chapels were those that related to testimonies or stories. With that in mind, I decided to put an emphasis on alumni speakers, and others from different walks of life, to hear how their faith informs their lives, how it has helped them navigate life after high school, and ultimately point our students back to the gospel and how that impacts the entirety of their lives. I believe we have been successful in that. The feedback we've received from students, parents, faculty, and administration regarding the chapels this year has been overwhelmingly positive.

Regarding this particular chapel ("Race and Faith"), it had been on my heart for a number of years to address this issue with our student body. Having spent four years on the mission field in the Dominican Republic, being the father of a biracial family, and living in a diverse neighborhood in downtown Denver, the issue of racial reconciliation is deeply important to me. But these things were only partially my motivation. As I mentioned in the introduction of the chapel, the urgency of addressing it was really brought to light a little over a year ago when we had a number of

disturbing instances of racism here at the high school. While this isn't the medium to share the details, they were blatant, unsettling, and had a profound impact on how many of our minority students were feeling at the school.

After a great meeting with Mr. Wall and Mr. Hasz where we discussed steps we could take to deal with this issue, I spent the next year reaching out and talking with some of our current minority students, as well as alumni, to hear about their experiences at Faith. It was sobering. While they of course didn't claim everyone at Faith to be racist, and while many still had good friends and experiences, they talked honestly about struggles with social and cultural stigmas, of students and teachers who they felt had ignored, or even normalized racist and sexist comments, and of an overall insensitivity, ignorance, and apathy when it came to issues of race, culture, and ethnicity. This did include a number of specific experiences they shared with me. The bottom line was, in general, I realized we had not done a good job of dealing with these issues as a school. In light of this, while I understood the difficulty of the subject, I knew that if we truly desired God's kingdom, we had to confront the realities of prejudice and racism at our school and even ask Him to bring them to light in our own lives.

So after MUCH thought and prayer, I decided that doing a chapel on the Friday before MLK weekend would be a fitting time to address it and start the conversation. I put it on the schedule at the beginning of the year in August. That schedule was shared publicly, and I began the process of planning. Having been part of a multi-ethnic church downtown

(Providence Bible Church), I began by speaking with the pastor there, Jason Janz. Not only does Pastor Janz have a number of connections with Faith (former classmate of Mrs. Joplin, former student of Mr. Twedell, friend of Mr. Hellwig, and former speaker at chapel 3 years ago), he has a ton of experience with this issue. He has a master's degree in theology, has worked as a pastor since 1996, is currently the pastor at an ethnically diverse church in northeast downtown Denver, and has a passion for helping the poor and challenging the church to move toward racial reconciliation and justice in our cities and churches, having spoken on it in a variety of settings over the last decade.

While a number of different ideas were discussed for the chapel, and again after much prayer, I thought a good "first exposure" into the topic could be to hear from perspectives of people who came from similar environments to most of our students and have them talk about their experiences in engaging with this issue. I thought this approach could set it up nicely for digging deeper and amplifying the minority voices in our community in the future. Overall my hope was that this could be the beginning of our school doing a better job of addressing this issue. As I said in my introduction to the chapel, I was hoping we could do a better job of addressing inappropriate racial, ethnic, or sexist comments and jokes, a better job of recognizing and raising awareness of the complex systems that work against minorities, a better job of combating the insensitivity, ignorance, and apathy in this area, and ultimately a better job of promoting a more diverse and unified family of God in our school, our churches, and our communities. The Bible repeatedly explains the kingdom of God as made up of a diverse group of

people from every tribe, language, people, and nation (Rev. 9, John 11). My prayer was that this would be a step toward recognizing and appreciating this beautiful picture.

After sending a letter out to all parents the week before the chapel to inform them of the chapel and the sensitive nature of the topic, sharing the names of the participants, and even making arrangements to video the chapel for the school family, my initial reaction was that the panel did great. I didn't agree with everything that was said, and I knew there would be some who were uncomfortable and even defensive with the conversation. This did indeed come out in a couple of the students during Q&A questions, but the initial response from many students, parents, teachers, and even administration was positive, and it led to innumerable substantive and meaningful discussions that day for myself and other teachers I talked to.

However, I soon realized that several students and parents were very upset with the chapel. They got the impression that the panel was trying to guilt and shame our white students and call them all racists and that there was some sort of political agenda behind it all. That was so completely NOT our desire. I understand that verbiage like "white privilege" and "systemic bias" can be loaded and that some families are going to disagree with the degree that these are perceived or actually present at our school and in our communities; however, the jump to sensing a desire to incur guilt and shame, claiming it was motivated by a political agenda, or that there were broad accusations of racism truly seem unfounded. I've re-watched and re-read what was said by the panel numerous times, and I just do not see the validity of these claims.

Knowing the hearts of the panelists, I can assure you that none of that was what they or I would EVER want to communicate.

In all of this, what I was most saddened by in terms of these reactions was the tone in which these different impressions and disagreements were communicated. I believe it is important to listen to each other, to have respectful dialogue, and to see if we can come closer to consensus through our shared bond in the Holy Spirit. Instead, I, the panel, and even one of our parents of color, were misrepresented and berated in both email interactions and parent meetings. Where there should have been love, grace, and a focus on our shared bond in Christ, and even honest confrontation lovingly expressed, there was vitriol, judgement, and condemnation. Matthew 18 and the dozens of “one another” verses that pervade the entire New Testament were blatantly ignored, as were numerous scriptural mandates regarding the Body of Christ.

As parents and as a school, we MUST model for our students respectful disagreement within the bounds of our shared love for Jesus. It would not be healthy to try to shut down the concerns or opinions of any parents, and we want all members of the FCA community, especially our minority voices, to have an equal seat at the table. But we must demonstrate what healthy dialogue, even in the midst of disagreement, looks like. I implore our community to resist turning this into a witch-hunt against the panel, Mr. Hasz, other teachers, or myself, who I can assure you, ALL have the best interest of FCA in mind. We invite anyone who thinks this to be untrue to simply sit down with any of us and I believe our hearts will be readily apparent.

Looking back, I clearly misjudged the positions and attitudes of some of our students and parents in regard to this issue, and I take responsibility for that. I never could have imagined the way that this chapel was perceived and, I believe, misunderstood. However, the nature of leadership is that you do what you believe is right while seeking counsel, prayer, and wisdom. I tried to do this, but now see that there has to have been a more effective way to enter into the subject of racism here at the high school. For my misjudgement here and for the hurt that has come as a result of the chapel, I am truly sorry. I pray forgiveness from any who have been hurt, and I truly would love to talk with you. If there is something that hurt or offended you, please come talk to me. I want to hear from you because ultimately, I rest in the promise that our God will work this together for good because we all love Him. I confidently state that I don't see any issues that can't be worked out by followers of Christ in good faith.

I do want to be clear that I do not apologize for starting dialogue about the issue of racism. I still believe this as an important conversation to be continued at FCA. If we stop it now, students and parents who walked away from chapel feeling that they were made to be ashamed of being white, that they are racists, and that they haven't worked hard for the things they have, will lose the opportunity to rise beyond that initial defensiveness and actually hear what their fellow brothers and sisters in Christ were actually (however imperfectly) articulating. There is no place for shame or condemnation in the life of a follower of Christ (Romans 8:1). Further, if we allow this to stifle the conversation, we could lose the opportunity to hear the voices and experiences of our minority brothers and sisters.

So regardless of where this takes me personally, my hope and prayer in all this is that what the enemy intended for evil, God will use for good to accomplish His purposes (Genesis 50:20). I pray that through all this, Faith will become a place that is more safe, respectful, and nurturing for minority students and families, a place where we honor the image of God in every person, even those who may look or think differently than us. A place where we strictly follow the Matthew 18 model when disagreements arise, and a place where the fruits of the Spirit are evident and practiced in all of our relationships.

So with that, I want to close this letter by inviting anyone who was hurt or offended by the chapel to come over to my home for dinner with Mercy and I to get a glimpse of who we really are and to hear our hearts. I believe this is an opportunity for unity and I am open to listen and talk through this with anyone. I hope that this will lead to an opportunity for teachers to be trained on how to handle issues of race in the classroom. I hope to see Faith actively recruit and pursue a more diverse staff at the high school who can help our school become more engaged with these issues. I hope to see this whole experience lead to the formation of a group of students, faculty, parents, community members, and even local clergy who want to move forward in engaging with this issue, including the development of solid, meaningful, transformative cross-cultural relationships centered on the love of Christ. I have seen these kinds of relationships change change my life, and I think it would only be positive for our school.

Above all, I call our Faith community to something better. By the power of the Holy Spirit in us, we can

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and must do better! Let us be willing to do the hard work of BEING the Church.

In Him,

Gregg Tucker

gregg.tucker@fca-schools.org

Excerpts from Deposition of Doug Newcomb

Tucker v. Faith Bible Chapel

No. 1:19-cv-01652, Dkt. 41-6

* * *

Q. Do the school and the church have their own sources of funding?

A. The school and the church, I mean, Faith Bible Chapel is one entity, it's one ministry entity. So whereas the church, you know, we take up offerings, donations at times, on Sundays; the school also takes in donations and also charges tuition, we charge tuition at the school. It's all one entity. It's all used for all pieces of the ministry, all the different parts.

* * *

Q. Is there a different person in charge of the church than is in charge of the school?

A. No.

* * *

You know—you know, Faith Bible Chapel has been around since 1965, so over time we've—we know a lot of people.

Q. Well, have you evaluated how similar or dissimilar you are from—from—from other churches, especially nationally organized churches?

A. Not really. We're not overly concerned with how they run their affairs. I mean, they can do what they want, and we follow what we believe God is telling us to do.

* * *

A. I mean, there are—every church is unique. I don't know if you've lived in the church world, every one is unique. There's—especially when you move into the nondenominational, independent, there's lots of us. And we're all different and we all have different views on different things. Some are similar. But at the end of the day, we're all a little bit different. Nothing wrong with that, it's okay. It's what they're doing with—they—felt God told them to do.

* * *

Q. Have you received advice from other churches with a similar business model that you have?

A. There are very few churches that have a business model that's close to ours, very few. And usually they're small.

Q. What would you say is unique about your business model?

A. That the school and the church are one, one entity, and we live together in one entity, and we actually love each other. Many churches that have schools are separate entities. That is not so here. We are wholeheartedly together. We are one ministry.

Q. Then why don't you require the teachers attend your church?

A. A number of couple reasons, but one of them is although we're large, we probably don't have enough teach—we can't hire enough people from inside our organization to staff everything. And to be honest, we want teachers that, you know, are very good academically, good teachers, you know, great teachers, and then that do align with our beliefs. There's numbers of people out there that align with our beliefs,

maybe they—but they choose to fellowship someplace smaller. You know, that's one thing we hear.

Q. Well, it also helps to attract a more diversified student body as well?

A. Sure. Sure. We would love for them all to attend our church, you know, but to make it a requirement, we haven't gone that far.

Q. Have you placed any limits on how large you want to grow as a school?

A. Absolutely not.

Q. Or as a church?

A. Nope. Bring them all.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-01652-RBJ-STV

GREGORY TUCKER,
Plaintiff,

v.

FAITH BIBLE CHAPEL INTERNATIONAL, a
Colorado non-profit corporation,
Defendant.

DECLARATION OF GREGORY TUCKER

I, Gregory Tucker, pursuant to the laws of the United States and under penalty of perjury, declare as follows:

1. I am competent to give testimony in this matter and each of the statements made herein is based upon my own personal knowledge.

2. I was a teacher at Faith Christian Academy ("FCA") from August 2000 to July 2006 and August 2010 to February 2018. I was also Director of Student Life from August 2014 to February 2018. In all of my years at FCA, I also coached volleyball.

3. I am aware that there is an entity somewhat related to FCA called Faith Church. My understanding is that the Church delivers religious sermons to the followers of the Church's religious

message. I have never attended a service at Faith Church.

4. My understanding is that Faith Church is led by pastors who are specially educated and ordained to supervise the Church's activities, spiritual and otherwise. Because I was an employee of FCA, rather than the Church, the pastors were not my supervisors. I rarely, if ever, interacted with Faith Church pastors. Any of my interactions with them were in passing.

5. My supervisors included the FCA superintendent and the Faith Christian High School ("FCHS") principal. By the end of my employment, Andrew Hasz ("Hasz") was the FCA superintendent and Michael Cook ("Cook") was the FCHS principal.

6. I was originally hired at FCA to teach biology, chemistry, and physics, and I did teach those classes throughout my tenure at the school. There was no theology, nor any distinct or unique Christian principle that I was required to teach in conjunction with the secular content of these subjects. I relied on the same textbooks used in public schools to teach these classes.

7. I also taught classes called "Leadership," "Worldviews," "Worldviews and Apologetics," "Worldviews and World Religions," and "Apologetics." Generally, the I taught classes surveyed various worldviews, religious and otherwise. In some of these classes, I taught that Christianity reflected a credible worldview. In so doing, however, I was required and expected to avoid the advancement of one Christian principle over another because there were many Christian perspectives, as well as non-Christian perspectives, represented in the school.

8. None of these classes were about the Bible specifically or involved teaching a specific theology. I did not have any specific training in the Bible and therefore was not qualified to teach any classes that involved instruction regarding the Bible or theology. Teachers who did teach classes regarding the Bible and theology typically had specific education or training in that field, like a seminary education or ordination.

9. Some of my students attended Faith Church and were members of the Church's congregation, but most of them were not. There were a wide variety of doctrinal and theological perspectives amongst both the students and teachers at the school. This included conservative evangelical, liberal evangelical, Lutheran, Catholic, Baptist, Presbyterian, and Mormon, among others. There were also students who held non-Christian worldviews like Buddhism, Hinduism, and atheism.

10. Similarly, most of my colleagues attended churches other than Faith Church. Unlike employees of Faith Church, as employees of FCA, we were not required to attend Faith Church. A number of teachers who affiliate with different Christian denominations and hold doctrinal and theological beliefs that differ significantly from those that I believe are promoted by Faith Church pastors.

11. I am aware that one teacher who taught a bible class at the school was Lutheran, and therefore subscribed to a different religious doctrine than that of Faith Church. Other teachers outwardly disagreed with the Faith Church religious doctrine.

12. Because FCA students and teachers come from a diversity of religious backgrounds, school administrators regularly reminded me and other employees of the need to accommodate diverse religious perspectives in our work.

13. While I was required to endorse a general set of Christian principles prior to the acceptance of employment with FCA, I was given no interpretive guidance or explanation in the form of a specific theology. Rather, I was encouraged to read the Bible and engage in private spiritual reflection.

14. Similarly, the only instruction I was given regarding communication of a religious message to students was to “integrate” a Christian worldview into my teaching. I was never provided any training, counseling, instruction, or literature as to what that worldview should be, other than Bible-oriented. I was not required to set aside classroom time specifically dedicated to a religious message, nor was I required to teach a class on any religious doctrine.

15. While employed with FCA, I was reminded often by school administrators that the school recognizes the interests of parents to guide their children into one or more variants of Christianity, if they chose. Thus, the school explicitly recognized the need to promote Christianity in such a way that would not offend diverse perspectives served by the school. I was, accordingly, told not to preach, but to encourage students to think through perceived versions of Christianity for themselves and to consult their parents regarding specific theological matters.

16. For example, if a student asked about free will versus predestination, the gifts of the Spirit, baptism,

or heaven and hell, I would encourage that student to reflect on those questions internally and seek guidance from his or her parents and/or church pastor.

17. Though I am aware that one of the categories for review of my job performance related to religion, I recall that its weight was minimal in the overall teacher evaluation scheme. I also recall that I always scored well in that category, but I have no understanding as to the reason because the metric was never explained to me.

18. The only clear expectation communicated to me and the other teachers at the school was to endorse Christianity in general terms, set a good moral example, and allow the Christian worldview to influence our teaching. Beyond that, we were encouraged to avoid delivering messages on church doctrine or theology.

19. In approximately August 2014, I was promoted, which meant that I assumed duties in addition to those I had as a teacher at FCA. After the promotion, I continued to be referred to informally as a teacher at FCA. My job title varied, though most often I was referred to as Director of Student Life.

20. The employment agreement that I signed when I accepted the promotion in August 2014, and extensions of that agreement that I signed thereafter, referred to the job that I took as "Chaplain." Other than in those documents, I was never referred to as Chaplain by any other staff member, any of the students, or any administrator at FCA.

21. In fact, when I was offered the promotion, then-Superintendent Brian Wall asked me whether I preferred the title "Director of Student Life," "Dean of

Student Life,” or “Chaplain.” I specifically chose the title, “Director of Student Life” because it had no religious connotation. During my tenure in that position, my email signature read “Director of Student Life” and I was issued business cards that referred to me by that title as well. I also received an updated job description with the title “Director of Student Life.”

22.To my knowledge, there exists no public reference to me as “Chaplain” at FCA. In fact, I believe it would have been disingenuous for FCA to refer to me as a chaplain because a chaplain refers to an ordained clergy member, which I am not.

23.My duties as Director of Student Life varied. I helped to organize service and student mentoring opportunities, provided support to parents who had questions regarding their children’s growth and achievement, conducted follow-up meetings with students who were working through discipline issues, and promoted the most positive student climate possible.

24.As Director of Student Life, I was not expected to counsel or discipline students who challenged one theological principle over another, or who expressed disagreement with the essential principles of faith expressed by Faith Church. In general, students were never counseled on what to believe, but rather on how to behave.

25.In the last year that I held that position, I assumed responsibility for organizing weekly “Chapel Meetings.” Prior to my assumption of that responsibility, these meetings were organized by Hasz. The reason that I was given the responsibility

in 2017 was because Hasz was promoted from FCHS Principal to FCA Superintendent.

26. Chapel Meetings were assemblies or symposiums where people who held a variety of religious perspectives (or sometimes non-religious perspectives) would speak on matters of interest to the school. These assemblies also consisted of announcements, awards ceremonies, homecoming rallies, student council election speeches, and other ordinary high school-related matters. Like classes at FCHS, these assemblies were designed so that students from a diversity of Christian backgrounds would be comfortable, and to facilitate parents' provision of guidance to their children on religious issues.

27. The FCA administration explicitly communicated that these symposiums were not regarded by FCA as church. Students were encouraged to attend their own church, whether that was Faith Church or a different place of worship.

28. I understand that FBCI contends that I was a "minister." I have never, before this lawsuit, heard anyone—including superintendents, principals, teachers, school administrative staff, students, or parents—refer to FCA teachers or the Director of Student Life as a minister. Nor have I ever seen any written publication in which FCA teachers or the Director of Student Life are referred to as "ministers."

29. In fact, at some point during my tenure as an employee of FCA, I learned that there is a tax deduction available for ministers to assist with housing costs. I asked then-Superintendent Brian Wall whether I qualified for the tax deduction and, if

so, if he would assist me in applying for it, and he expressly told me that I did not qualify because I was not a minister.

30. While FBCI describes itself as a collection of ministries in written documents I have seen because they were produced in this litigation, I am unaware of any instance in which the school has been held out to the public as a ministry of Faith Church, nor was it ever referred to that way internally.

31. In approximately January 2018, I was demoted from my position as Director of Student Life. I was also stripped of my responsibility for organizing weekly Chapel Meetings. Thus, at the time that FCA terminated my employment, my only job was that of teacher.

Dated this 21st day of February, 2020.

Gregory Tucker

31. In approximately January 2018, I was demoted from my position as Director of Student Life. I was also stripped of my responsibility for organizing weekly Chapel Meetings. Thus, at the time that FCA terminated my employment, my only job was that of teacher.

Dated this 21st day of February, 2020.

/s/ Gregory Tucker

Gregory Tucker

Tucker's Performance Review*Tucker v. Faith Bible Chapel*

No. 1:19-cv-01652, Dkt. 25-3

**FAITH CHRISTIAN ACADEMY
SUMMATIVE REVIEW**Teacher Name Gregg Tucker School Year 2016-17Date 5-18-17

1) The staff member effectively manages the classroom, personally resolving the majority of their discipline incidents. (1)___

4 ③ 2 1 NA TE

2) The staff member successfully uses a variety of teaching techniques, which engage students through each of the visual, auditory, and kinesthetic learning modalities. (2)___

4 ③ 2 1 NA TE

3) The staff member effectively uses assessment to guide instruction, and test questions correspond to the unit objectives and can be objectively graded. (2)___

4 ③ 2 1 NA TE

4) The staff member is organized for daily classroom instruction, and punctually posts HW, lesson plan data, and pertinent student resources online. (2)___

4 3 ② 1 NA TE

Several weeks
entered late

5) The staff member punctually submits and posts weekly grades. (2)___

4 3 ② 1 NA TE

Grades in, more or less, every other week and total number a little low

6) Attendance is accurately and punctually submitted. (1)___

4 ③ 2 1 NA TE

7) The staff member regularly attends FCA morning devotions and faculty meetings. (1)___

④ 3 2 1 NA TE

8) The staff member consistently illuminates Biblical principals related to course material in a manner which leads students to evaluate their personal worldview and/or challenges them to respond via worship, service, etc. (2)___

④ 3 2 1 NA TE

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9) The staff member successfully completes curriculum map updates and annual ESOs. (1)____

④ 3 2 1 NA TE

10) The staff member consistently and punctually completes all assigned AM, PM, and lunch supervision responsibilities. (1)____

4 ③ 2 1 NA TE

11) The staff responds to parent concerns graciously and in a timely manner, initiating parent contacts. (1)____

④ 3 2 1 NA TE

12) When conflicts/disagreements arise with administrators, teachers, parents or students ,the staff member works to initiate positive resolution, following Matt. 18. (1)____

④ 3 2 1 NA TE

13) The staff member is positive, speaking edifying words to and about students, parents, co-workers and all FCA/FBC staff members. (1)____

④ 3 2 1 NA TE

14) The staff member demonstrated improvement in their selected professional instructional target areas this year. (1)____

Spring eval not yet completed

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④ 3 2 1 NA TE

15) The staff member creates and works toward the accomplishment of spiritual goals during the year. (1)___

④ 3 2 1 NA TE

16) The staff member effectively fulfills all extracurricular supervisory responsibilities:

_____ (1)

④ 3 2 1 NA TE

17) The staff member demonstrates interest in students by attending extracurricular events such as concerts, plays, and athletic events. (1)___

④ 3 2 1 NA TE

18) The staff member consistently completes peer walk through observations. (1)___

4 3 ② 1 NA TE

19) The teacher survey HS students acknowledges that they were challenges and that class time was used wisely. (1)___

④ 3 2 1 NA TE

20) In the teacher survey HS students acknowledged that their teacher cared for them, was approachable, and had good rapport with the class. (1)____

4 ③ 2 1 NA TE

Combined item weight x evaluation score for items 1-20 = Summative **percentage score** 82%

Additional comments:

Gregg, you continue to have an impact in the lives of students in so many ways. From the classroom, to activities, to chapel, to coaching, etc. Thank you for pouring into them! Along the way, some details do seem to step through the cracks at times, so that is a good focus point moving forward. I am looking forward to you getting back into a science classroom next year! Have a great time with the seniors next week and a blessed summer.

/s/
Administrator Signature

5-18-17
Date

Gregg Tucker
Teacher Signature

5/18/17
Date

Chaplain/Director of Student Life

Job Description

Tucker v. Faith Bible Chapel

No. 1:19-cv-01652, Dkt. 41-11

FAITH CHRISTIAN ACADEMY

FCHS DIRECTOR OF STUDENT LIFE

JOB DESCRIPTION

Job Title: FCA High School Director of Student Life

Reports To: FCHS Principal

Works In Concert With: HS Guidance Counselors, Dean of Students, Teachers & The FCA Enrollment Director

Days/Hours Scheduled: Works an average of 20-25 hours per week

Summary:

The Chaplain will be responsible for the physical, relational and spiritual wellbeing of FCHS students. The Chaplain will also work with the Principal to plan chapels, retreats, outreach projects and student mentoring opportunities that are designed to provide opportunities for student spiritual growth. The Chaplain is also responsible for new student assimilation.

Responsibilities include, but are not limited to:

- Plans chapels, retreats, student outreach projects, and student mentoring projects
- Identifies and connects students with spiritual life issues to others who can support and provide assistance to them.
- Intentionally plans activities that enhance student spiritual growth.

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- Provides support to parents with questions regarding their student's spiritual growth.
- Conducts follow-up meetings with students who are working through honor code issues.
- Serves as a liaison between students, teachers and parents.
- Maintains awareness of the spiritual pulse at FCHS and make recommendations to the Principal and Superintendent that would address key student issues and promote the most positive spiritual growth climate possible.
- Works with the Bible department to review and enhance the 9-12th grade Bible curriculum.
- Works with the Enrollment Director to facilitate HS shadow student days.
- Meets with Shadow students and may conduct new family interviews.
- Heads up annual welcome team and orientation day activities for new students.
- Coordinates annual surveys related to student connectivity and spiritual growth/Biblical worldview.

Success of this position:

Measuring progress:

Qualifications:

Must have a passionate relationship with Jesus Christ and a desire to see students grow in their ability and desire to build a daily trust relationship with Christ. Must be able to build positive relationships with students and simultaneously oversee and deliver appropriate disciplinary consequences when necessary. Must be organized, an effective communicator, teacher and leader of students individually and as a group.

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Tucker's Class Introduction

Tucker v. Faith Bible Chapel

No. 1:19-cv-01652, Dkt. 46-2

Worldviews and Apologetics

Mr. Gregg Tucker

Christian Leadership

Mr. Gregg Tucker

Director of Student Life / Chaplain (*Periods 1-4*)

- Focused on the physical, relational, and spiritual wellbeing of FCHS students.
- Plan chapels, retreats, outreach projects and student mentoring opportunities that are designed to provide opportunities for student spiritual growth.
- New student assimilation.

Classes I teach this year (*Periods 5-7*)

- Sophomore/Senior Bible
 - Leadership
- Junior Bible
 - Worldviews and Apologetics

Biography:

- Graduated from Pepperdine University
 - B.S. in Sports Medicine
 - Minor in Religious Studies
- CDE Professional License
 - Science
 - Physical Education

** Fluent in Spanish

**Excerpts from Deposition of Gregory Tucker
and Exhibits**

Tucker v. Faith Bible Chapel

No. 1:19-cv-01652, Dkt. 56-2

* * *

EXAMINATION

[BY MR. HATCH:]

* * *

Q. Okay. Now, I assume that you consider yourself to be a Christian?

A. Yes.

Q. And how long have you been a Christian?

A. I would probably say since 1992. But, yeah, it's been a journey. I don't know that I could pinpoint, this was the moment, but, yeah, it was—I'd say around 1992.

* * *

Q. Would—would it be accurate to say that you were feeling a spiritual calling to teach?

A. How would you define “spiritual calling”?

Q. I don't know. Just you felt like there was some role that you could fulfill and further some sort of spiritual influence on kids or help to teach kids in a spiritual setting?

A. Yeah.

MR. FRIESEN: Object as to form.

A. Yeah, I'd say I was—I was attracted—I think I said this before—attracted to the fact that at a private institution like that, like Regis or Faith, there was a

freedom to integrate and discuss spiritual, religious principles, whereas that's not as likely in a public school institution.

* * *

[BY MR. HATCH:]

Q. So I'm looking at the—farther down on the letter where you explain that at the time you worked for Regis Jesuit High School, but that you'd like a teaching job at Faith because it was closer to your home and more in line with your Christian philosophy of education; do you see that?

A. Yeah.

Q. And so help me understand what you mean by more in line with your Christian philosophy of education?

A. Yeah. I would say I—I was not a Catholic, that wasn't my denomination at all. And so I would say some of the beliefs and practices of the Jesuit institution were different than my, again, experience with Protestantism, that branch of Christianity. So that's why, Faith, I would say, would have been in my branch of Christianity.

Q. So you consider yourself to be a Protestant?

A. Yes.

Q. And Faith is a Protestant school, correct?

A. Yes, I think it would be considered that.

* * *

Q. In the second paragraph of Exhibit 22 you write, "Further, as a Christian, my philosophy of education is shaped by the Bible, which I believe to be the inerrant, infallible Word of God"; do you see that?

A. Yes.

Q. And that was accurate at the time, I assume?

A. Yes.

Q. And is it accurate still today?

A. Yes, I would say it's accurate; although, I would say what I believe about the Bible's inerrancy, infallibility, has probably evolved over the years.

Q. And so if you were writing this letter or this exhibit today, would you not use those words to accurately describe how you feel about the Bible?

A. It would actually probably depend on the institution that I was applying to, what I would emphasize, as far as my philosophy of education.

Q. But would you say that the Bible is the inherent, infallible Word of God?

A. Would I say that in an application, or in a—

Q. Today, do you believe that to be true?

A. Yes, I do.

Q. You said that your feelings had evolved over the years. In what way have they evolved?

A. Yeah, I would say my view of what inerrancy is and what infallibility is, I would say I had a pretty superficial understanding of it. I would say that has evolved over time.

Q. Below that, you write, "In addition, I feel the most important part of a student's education should be the enlivening and growth of his"—

A. Enlivening.

Q. I'm sorry, "enlivening and growth of his/her Christian character"; do you see that?

A. Yes.

Q. What did you mean by that?

A. Character is an extremely important part of education.

Q. Do you still agree with that position?

A. Yeah, most definitely.

Q. You go on to say, "Without this, all knowledge is somewhat useless and lacks a foundation for application"; do you see that?

A. Yes.

Q. And you believe that to be true?

A. I do.

Q. "Therefore, our main goal in educating students should be to help them become more like Jesus Christ"; do you see that?

A. I do.

Q. And do agree that to be true?

A. Yes.

Q. In particular, do you agree that a teacher's main goal should be to educate students and help them to become more like Jesus?

A. Yes.

Q. At the bottom of the page you say, "I also feel the teacher should be a role model and should seek to demonstrate the Christian character in every area of his/her life. A teacher should genuinely love their

students and seek to continually grow in his/her ability to teach Christ as the center of their education”; do you see that?

A. Yes.

Q. Do you still agree with that statement?

A. Yes.

Q. Do you agree in particular that a teacher at FCA should demonstrate Christian character in every area of his or her life?

A. Yes, I believe that’s a good thing.

Q. And the teacher should teach Christ as the center of education; do you believe that to be true?

A. Yes.

Q. On the second page of Exhibit 22, you give your Christian testimony; do you see that?

A. I do.

Q. And again, this is something FCA asked for?

A. Yes.

* * *

Q. But I’m sure you heard the school say in other context that it believes the Bible to be divinely inspired, to be infallible, to be inerrant, and to be the authoritative Word of God; you’ve heard that many times at Faith, I’m sure.

A. Yeah, I’m—those—those terms have come up, sure.

Q. And have you ever questioned that or asked the— the School or Church to unpack it, using your words, and explain—

A. I would say amongst teachers, doctrines, theology, and even with students were discussed often, yeah. And I would even say had conversations with administrators as well about different doctrines at different points.

So yeah, I don't recall any specific conversations about that first bullet point. But, yeah, I'd say discussing doctrine and theology occurred.

* * *

Q. When you were teaching or acting as a Chaplain at the School, did students—did you ever encourage somebody to become saved?

MR. FRIESEN: Object as to form.

A. Hmmm. I don't recall ever using the term "saved" or "unsaved."

[BY MR. HATCH:]

Q. How about leading somebody to salvation, would that be a phrase that you would recognize?

A. I definitely recognize that phrase, yeah.

Q. What do you think that phrase means in—in the school that you taught in, Faith?

A. I don't know exactly.

Q. So if somebody came up to you and said, say a student came up to you and said, Mr. Tucker, I would like you to help me become saved. What do I need to do to be saved, and what would you say? What would your answer be?

A. Had a student come up and asked that question, how would I have responded? Is that the question?

Q. Yes.

A. Yeah. Yeah. I think I would have encouraged them to kind of look—look at the Bible, look at what kind of the Bible calls us to. I think that's what I would encourage them to do.

* * *

Q. It says, in the middle of the page, "FBCI Leadership Requirements"; do you see that?

A. Uh-huh.

Q. And you'll see where it says, "While working at Faith Bible Chapel International, you will be visible and viewed as a member of leadership. We require that each staff member commit to certain lifestyle expectations, be in a position to effectively minister to others, and be maturing as a believer"; do you see that?

A. Yes.

Q. And is that—you've initialed below that, I'm assuming you've—you agreed to that, correct?

A. Yes.

Q. I'm looking at the second page, towards the top, Bates page 132 of Exhibit 17, you wrote by hand the different subjects that you were prepared to teach; do you see that?

A. Yes.

Q. And one of those subjects was Bible, correct?

A. Yes.

Q. So at the time you applied for a position, you applied to be a Bible teacher in 2010, correct?

A. I don't know what I specifically applied for, but yeah, I do recall when being explained the classes that

were in the Bible department, there were certain classes that I felt prepared to teach. There were some in the Bible department I did not feel comfortable to teach.

* * *

Q. Is Bible also a subject, not just—

A. No, we don't have an individual class called Bible class. We have classes within, or they had classes within the Bible department.

Q. So you were just saying that you had an interest or you were applying to be a teacher and teach one of those Bible classes, not all of them?

A. Yeah, I assume I had seen a list of classes, like the departments and the course offerings. And there were classes within the Bible department which I must have felt like I was prepared to teach; same with science, same with PE, and same with Spanish.

Q. Going down on page 132 of Exhibit 17. You'll see where you have given your employment history.

A. Yes.

Q. And you handwrote all that out, correct?

A. Yes.

Q. And the first employer that you referenced is Lookout Mountain Community Church; do you see that?

A. Yes.

* * *

Q. I don't remember you telling me moments ago when I asked you for your employment background, you saying you worked at a Church?

A. Yeah, so I taught at Faith prior to this. I had two tenures there. I taught at Faith from 2000 to 2006, and then 2010 to 2018. So there was an interim there between 2006 and 2010, when I left Faith Christian High School and that's when I worked with Lookout Mountain Community Church. And when you listing my employment, that was prior to my first tenure in 2000.

Q. Gotcha. Okay. At Lookout Mountain Community Church, you worked there from July of 2006, to the time you applied, which was May 2010, correct?

A. Yeah. As you can see, Faith Christian Academy is actually listed as a former employer. I worked for them and left to go with Lookout Mountain Community Church.

Q. And your job title at the Church was Missionary, correct?

A. I don't recall if—if they gave a particular job title. I think I often referred to myself as missionary, especially in the context of where we were. So, yeah, that would have been applicable title.

Q. I'm just reading what you wrote. You described your job title to be "Missionary" when you filled out this application, correct?

A. Yes.

* * *

Q. You'll see where it says "Mission Statement," towards the top.

A. Uh-huh.

Q. Please read that and let me know when you're finished.

A. (Deponent perused document.) Okay.

Q. Would you agree with me that this mission statement accurately reflects the—the mission of Faith and its School during your tenure?

A. Yes. By tenure, you mean—because I recall at some point the mission statement being updated or changed, so I’m not sure what point this specific one was, but, yes, I do recall that being the mission statement in 2017-’18.

Q. Okay. And then below that, you’ll see where “Core Values” are listed.

A. Yes.

Q. You’ll see the second bullet point, where it says, “All subjects will be taught from a Biblical perspective; do you see that?”

A. Yes.

Q. It goes on to say, “emphasizing that all truth is God’s truth, and that Jesus Christ is the ultimate source of wisdom”; do you see that?

A. Yes.

Q. And you understood that that was a core value for core purpose for teaching students at the School, correct?

A. Yes. I understood that as a core value.

Q. And on the next page, which would be page 317 of Exhibit 6, do you see the “Statement of Faith”?

A. Yes.

Q. Please read it and let me know when you’re finished.

A. Okay. (Deponent perused document.) Okay.

Q. All right. Going back to page 317, Exhibit 6, "Statement of Faith," it starts out by saying, "The following beliefs (convictions) are firmly upheld by all staff members of Faith Christian Academy"; do you see that?

A. Yes.

Q. And so you understood that it was your responsibility as a staff member at Faith Christian Academy, to follow these convictions that are listed as the "Statement of Faith," correct?

A. That wording you gave is a little weird, "to follow them." I don't know that all of them are commands to follow, but they're statements of belief. So the beliefs are to be upheld, not commands to follow.

Q. Well, I'm just reading the sentence. It says that they're convictions and they're to be firmly upheld. You understood that they were convictions and that they needed to be firmly upheld while you're teaching at the School, correct?

A. Yes.

* * *

Q. Okay. Now, in approximately 2014, you were made the Chaplain at the School, correct?

A. No. My title was Director of Student Life.

Q. All right. Let's look at Exhibit 7 in your book. Do you recognize Exhibit 7?

A. Yes, I do.

Q. And what is it?

A. It is the employment contract for Faith Christian Academy.

Q. And if you flip to the third page of Exhibit 7, is that your signature?

A. Yes, it is.

Q. And it's dated March 20, 2017.

A. That's correct.

Q. Going back to the first page of Exhibit 7, I asked you to identify and you left out a word. Do you see where it says "Faith Christian Academy Full-Time Chaplain"?

A. Yes.

Q. And if you look down into the first Roman numeral, "General," the first sentence reads, "The Superintendent of Faith Christian Academy or his designee discussed with Employee the—the necessity that the hand of the Lord be upon Employee and that he/she exhibits the gift necessary to perform in the position of Chaplain"; do you see that?

A. Yes.

Q. And "Chaplain" is in bold letters, correct?

A. Yes.

Q. The next sentence, "Employee has expressed his/her belief that" she—"he/she has this gift and that God has called him/her to minister this gift at FCA"; do you see that?

A. Yes.

Q. And this is the contract you signed?

A. Yes.

Q. Going down to Roman numeral V in Exhibit 7, first sentence, "Employee shall well and faithfully serve FCA in the position assigned"; do you see that?

A. Yes.

Q. I'm handing you what has been marked as Deposition Exhibit 15.

(Deposition Exhibit 15 was marked.)

[BY MR. HATCH:]

Q. Do you recognize Exhibit 15?

A. I do.

Q. What is it?

A. This was an intro PowerPoint presentation that I would give in class, that I gave in class in 2017.

Q. Okay. So this is a PowerPoint presentation that you prepared?

A. Yes, it is.

Q. And the first page of Exhibit 15 says that it's for Worldviews and Apologetics class; is that correct?

A. Yeah. Actually this was for both, you can see the second page, it says, "Christian Leadership." So this was a PowerPoint presentation, because it was introductory, I would use it for multiple classes, because it wasn't specific to any content.

* * *

Q. And what was the content of that classroom? What was the curriculum for the class? What did it call for?

A. Again, the curriculum evolved over time, as did the classes and their names. So this specific year, I would probably put it, it would have been 2015, I believe, is

when this class was called “Worldviews and Apologetics.”

So I didn’t teach, again, the classes, the content, the names evolved over time. But this particular class, “Worldviews and Apologetics,” was a survey of all the major world views. And within those world views, the world religions that were within them. And then we would cover kind of the reasons that these different religions had for believing what they believed. And that included, again, all the world’s major religions.

Q. But this was one of the Bible courses that you taught?

A. This class was in the Bible department, yes.

* * *

Q. On the second page of Exhibit 15, describes “Christian Leadership”—or says “Christian Leadership.”

A. Yes.

Q. So when you got to this point in your PowerPoint presentation, what was the message you were communicating to your students?

A. Again, to be really specific in this point, I would not have explained “Christian Leadership,” but when we got to, in the class, of course the first—usually the second day after I would give it, I would give an introduction of myself on the first day. The next day was when I would start unpacking, all right, here’s what the class is, we would go through the syllabus.

* * *

A. So, yeah, with Christian Leadership we covered kind of specific leadership principles and covered it from a Christian perspective.

Q. Okay. Flipping to the next page, which is the third page of Exhibit 15.

A. Yes.

Q. Top line says “Director of Student Life/Chaplain”; do you see that?

A. Yes.

Q. And so you were holding yourself out to the students as being the Director of Student Life and also Chaplain, correct?

A. Yes.

Q. And it explains below that, that you’re focusing on the physical, relational, and spiritual wellbeing of FCH students; do you see that?

A. Yes.

Q. And that—that was indeed what you were doing, correct?

A. Yeah, that was an aspect of one of my roles.

Q. And the next bullet point or arrow is, “Plan chapels, retreats, outreach projects and student mentoring opportunities that are designed to provide opportunities for student spiritual growth”; do you see that?

A. Yes.

Q. And that’s indeed what you did in this class?

A. In this class, no. Again, this is referring to—I was giving an introduction of myself, so it says Periods 1

through 4, I was telling students what my role was at the School.

Q. Okay. I got you.

A. Yeah, I would say this is one of my roles, and then here is the other role there.

* * *

Q. Did each chapel start with prayer?

A. It didn't necessarily start with prayer, but prayer was usually an element of the—the chapel services.

Q. And would you sometimes lead the prayer?

A. Yes, at times I would pray.

Q. Was there music at each chapel?

A. No, not at every one.

Q. But the music that was at the chapel, was it all religious music?

A. Most of the time, but not always.

* * *

Q. Was worship a part of each chapel?

A. Not every one.

Q. But most?

A. Yes, I'd say most, 50 to 75 percent. They didn't do on breakout group days, which were a quarter of them and I would say the remaining three-quarters it was the majority of that, so somewhere between 50 and 75 percent.

Q. And how would you define "worship"?

A. Yeah, I would—I would say in this sense it was singing praise songs to God.

* * *

BY MR. HATCH: I don't have any other questions.

MR. FRIESEN: Okay. We had a clarification, Greg, would you care to offer it.

A. Yeah, yeah. I think it was one of the last couple questions prior to breaking for lunch, I may have misunderstood or misheard, I think you may have asked if at the time of termination, you may have called it separation, but it may be semantics, but was I—was this contract still in effect? And I think I was interpreting that as was this the last contract that I signed? That would be a yes. Was this contract still in effect at my termination? The answer would be no for that, that I was demoted and didn't have any Chaplain duties at the time of termination.

[BY MR. HATCH:]

Q. You were Chaplain at the time the Race to Faith chapel occurred in January of 2018, correct?

A. At the time of the Race to Faith chapel, January of 2018, yeah, I would have been teacher, Director of Student Life, coach, and then have the role of Chapel Coordinator, which they referred to as Chaplain.

Q. And so you're saying between the date of that chapel, which was in January, and February 26th of 2018, at some point during that period you're saying you were demoted and no longer Chaplain?

A. Yes, in the week or two following the Race in Faith chapel, I had the chapel planning duties taken away. I was demoted from—again, what we called the

Chaplain role. It was the person who organized the majority of the chapels there. So I would no longer have that responsibility and then by the end, even the—again, the majority of the Director of Student Life roles, what we classified as, those were also not part of my duties by then. Those were taken away in the interim after the Race in Faith chapel.

* * *

Tucker Deposition Exhibit 16: Tucker's Emails

From: Gregg Tucker

Sent: Friday, November 10, 2017 10:10AM

To: Michael Cook . . .

* * *

Subject: 3rd Chapel Breakout Group—Mon 11/13

Good Afternoon Chapel Breakout Group Facilitators:

It's that time again. Our next Chapel Breakout group is this coming Monday, November 13th. We're skipping to the third video in this series called *Alive To God*. The following is a short description:

In this session we talk about the activities that awaken us, and how each of us progresses toward Christlikeness. We can boil all of what D.A. is talking about in this session to the idea of running toward a goal. If you play basketball, the goal is the basket. If you play football, the goal is the end zone. Those of you who compete in academics, the goal is the medal or ribbon. In sanctification the goal is Christlikeness. The more we strive to be like Christ, the more we become like Him. Christ is the goal.

If you'd like to watch the full video ahead of time (it's about 20 minutes long), here's how you can do that:

- Go to <https://www.rightnowmedia.org/Content/Series/149304#3>
- To login, use the e-mail: [REDACTED]
- Choose "Christ Presbyterian Church"
- Click on the "Session #3" Alive to God"

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I have attached the Agenda [17-18 Breakout Agenda 03-Alive to God.docx] which has a rundown of the schedule with some questions and commentary from the discussion guide. As always, use this however you'd like. I'd suggest reading through it before and choosing the questions that you think will resonate with your group. I've also attached an updated group list in case anyone needs it.

And finally, if you can, remind the person(s) in your group who are responsible for snacks and/or drinks this week.

If you have any questions or concerns, let me know.

See you Monday.

Gregg Tucker
Director of Student Life
Faith Christian HS
P: 303.424.7310 x9.5203
E: gregg.tucker@[REDACTED]

From: Gregg Tucker <Gregg.Tucker@[REDACTED]>

Sent: Tuesday, January 31, 2017 9:39AM

To: Laura Caldwell . . .

* * *

Subject: RE: Chapel: Thanksgiving mission trip reports

Just a reminder that this Monday, February 6th we will be sharing about our mission trips over Thanksgiving break. Here's a brief overview of what I'm thinking for the schedule:

9:01-9:05 Announcements

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9:01-9:25 Worship

9:25-9:30 Mr. Tucker will give a brief introduction

9:30-9:40 Dominican Republic

- We are planning on doing a video recap of the trip that has pictures, videos, and clips of the students talking about it

9:40-9:50 Romania

- Not sure what they are doing. Laura, let me know when you have a chance.

9:50-10:00 Costa Rica

- I believe they are doing a video with pictures and having some students talk about the trip

10:00-10:05 Brief recognition of [REDACTED] who lived with missionaries in Germany first semester. Brief recognition of [REDACTED] and [REDACTED] who will likely be spending a semester in the Dominican Republic in the Fall of next year. Brief announcement for the Urban Immersion trip to downtown Denver in April.

Let me know if you have any questions.

-Gregg

From: Gregg Tucker

Sent: Friday, January 06, 2017 9:23AM

To: Laura Caldwell . . .

* * *

Subject: Chapel: Thanksgiving mission trip reports

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I just wanted to send out a heads up that the high school chapel on Monday, 2/6/17 will be devoted to sharing about our mission trips over Thanksgiving break. I have also asked [REDACTED] to briefly (like 2-3 minutes) share about her time in Germany last semester. She's going to let me know if she's up for that.

Anyway, my thought was that we just each take about 10 minutes to share of our experiences, but I thought it would be good to coordinate a little so it doesn't get too repetitive. I don't know that having every student who participated share, as has often been done in the past, is the most effective and engaging way to do it unless they have something concise and thoughtful scripted out ahead of time. I'm going to try and make a video for our trip that weaves in pictures, music, and video of them sharing about their experiences. We are going to focus on the following:

- Things we learned (historically, culturally, about ourselves, etc.)
- Ways we fellowshiped, encouraged, and served the communities we were in (mainly the people we met and relationships we developed)
- Ways we gave {material and monetary donations, etc)
- How we shared and modeled Christ

I'm fine if you want to focus on these things as well, or you can go in whatever direction you feel led. let me know if you have any questions.

Thanks,

Gregg Tucker
Director of Student Life
Faith Christian HS

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P: 303.424.7310 x9.5203

E: gregg.tucker@[REDACTED]

From: Gregg Tucker <Gregg.Tucker@[REDACTED]>

Sent: Friday, October 2, 2015 8:32AM

To: Jonathan Lowry . . .

* * *

Subject: 1st Chapel Breakout Groups – Mon 10/5

Good morning Chapel Breakout Group facilitators!

First of all, I want to thank all of you for your help with these Breakout Groups, especially our “outside”

facilitators, Gina Seamans, Kimi Wenger, Brian Wall, and Luke Gregory. This is our 4th year doing these groups and the feedback has been very positive from both students and facilitators. Our desire has always been that this be an opportunity for students to connect on a little more intimate and interactive level. It is also a nice change of pace from the typical chapel.

Using the feedback we got last year from facilitators and students, we made a few tweaks to the group selection process this year. Many students and faculty preferred we go back to having representation from each class within the groups so upperclassmen could interact more, and perhaps even mentor, the underclassmen (and Lord knows we want to avoid the all freshmen groups 😊). But everyone still wanted the opportunity to have at least a few friends in their group. So we basically had students form “pods” of 3-4 within their own class and then I had students from the Spiritual Life Committee in Student Council

assemble groups of 12-16 with a “pod” from each class (with 4 exceptions since we didn’t have enough senior “pods” to go around). We also made every effort to make it so each group had at least a “pod” or two that could help carry the discussion. I am hoping these changes will continue to improve the dynamics of the groups, though obviously there is no perfect way of assembling them. I have attached a master list of all of the groups.

Finally, this year we will be doing a video series called “Gods At War” by Kyle Idleman (Teaching Pastor at Southeast Christian Church in Louisville, KY and bestselling author of “Not A Fan”). It is a six-part series (about 20 minutes each video) that seeks to help believers recognize that there are false gods at war within each of us, they battle for the place of glory and control in our lives, and they are what keeps us from truly following Jesus since our hearts are pursuing something or someone else. While these pursuits may not be the “graven images” of old, they are in fact modern day idols. Behind the sin we’re struggling with, the discouragement we’re dealing with, the lack of purpose we’re living with, is a false god that is winning the war for our hearts. The videos integrate testimonies of those who have struggled in each area to illustrate a clear path away from our 21st century idolatry and back to the heart of God.

So the first meeting is this coming **Monday, October 5th**. It is just an introductory video and session. I’ve attached the agenda with suggested format and discussion questions. Like past years, use the agenda as a guideline, but feel free to add, subtract, or go in whatever direction you feel like the Holy Spirit is leading. Also like past years, it would be great if you,

the facilitator, brought snacks for this first week, and then have a sign-up sheet for the remaining weeks (I've attached that also). You can't go wrong with donuts, but feel free to do whatever you'd like for that.

If you have any questions or concerns, please don't hesitate to let me know.

In Him,

Gregg Tucker
Director of Student Life
Faith Christian HS
P: 303.424.7310 x9.5203
E: gregg.tucker@[REDACTED]

From: Gregg Tucker <Gregg.Tucker@[REDACTED]>

Sent: Friday, October 10, 2014 8:21AM

To: Ron Bedore . . .

* * *

Subject: Small Group Lunch

Small Group Faculty Leaders,

Sorry for the delay in helping get the Small Groups underway. I've been busier than I thought "learning the ropes" of this new position. But I'm pretty sure I've spoken with all of you who were selected by students to be leaders of their Small Groups, and you've probably already met with them once (perhaps with a few additional students) with the first Chapel Breakout Group. So first of all, thank you for being willing to invest in the lives of our students in this way. The value and reward that comes from the Small Group settings is invaluable and so important for our

students to experience—and also very rewarding for us as leaders.

Next, I've attached the "Leader Guidebook" that Michael Cook had prepared for past years, with a few changes. It contains a lot of good information about leading a small group. I encourage you to read through it when you have a chance. I've also attached the rosters for all of the Small Groups. If there are any mistakes, please let me know.

Anyway, I think we are ready to begin meeting. In fact, I know a few groups are already underway. To do this, the first step is to contact the students in your group and plan a first meeting. This will give you an opportunity to plan and discuss the day, time, and location in which you'll begin meeting on a weekly or bi-weekly basis. Because everyone has different schedules it will be up to you to nail down a time your group will meet, however the Access/Lunch time slot on Thursday is the preferred time frame to meet. Please feel free throughout this experience to be flexible and think outside of the box if need be. Since not all of the students will be in the same lunch/access as each other and/or yours, they will be excused to make it to your Small Group. But once you've figured out a day, time, and frequency, let me know so I can put it on the calendar.

Next, in hopes of growing corporately as a school and a body of Christ, we've prepared a list of books that Small Groups could use as material for discussion, though these are not mandatory. You can find the list of options at the end of the "Leader Guidebook" (beginning on page 22). Feel free to review them with your group and choose one if it sticks out to you, or feel free to go in another direction that fits your group.

Students would need to purchase any book on their own, but we will reimburse them for the amount the books costs. Those receipts can be submitted to me.

I think that's it for now. If you have any questions, let me know. Otherwise, I will leave you with this, a great foundation to remember from **Hebrews 10:24-25**:

“And let us consider how we may spur one another on toward love and good deeds, not giving up meeting together, as some are in the habit of doing, but encouraging one another - and all the more as you see the Day approaching.”

Thank you for your service, your sacrifice, and your willingness to help these students grow in an incredibly significant way!

Gregg Tucker

Director of Student Life

Faith Christian HS

P: 303.424.7310 x9.5203

E: gregg.tucker@[REDACTED]

From: Gregg Tucker

Sent: Thursday, September 25, 2014 9:33AM

To: Charissa McCaslin . . .

* * *

Subject: Student Spiritual Goals information

Bible teachers,

I wanted to let you know we have changed the Student Spiritual Goals from a hard copy to a paperless Web Form on Ren Web. However, in order to give them

“incentive” to actually do it, we would like you to make the completion of it a homework grade. So if you can let your students know ASAP (at the latest by tomorrow, Friday) that they can access it by logging into Ren Web, and underneath the “School Information” on their main page, at the very bottom, is the “Web Forms” link. If they click that, the only Web Form will be “FCHS Student Spiritual Goals”. The directions are pretty clear from there. They will set TWO goals for the year and explain why they chose that goal. There are tabs to update how they are doing in January and how they did in May. They obviously don’t need to fill that out now. You can let them know that it will be checked for completion, but otherwise it will not be “graded”, rather, it is for their own self-reflection. I always like to let them know that we, as teachers, do this also, and that it’s just a good opportunity to think about where we’re at and tangible steps we can take to improve our relationship with God. Really not a bad idea to do this with all areas and relationships in our lives. But I think it does help to encourage them to take it seriously.

Anyway, tell them they have until next Friday, October 3rd to complete this. At that point I will give you teachers a list of those that did NOT complete it and they should receive a ZERO for a homework grade and I will follow up with those students. Let me know if you have any questions.

Thanks,

Gregg Tucker
Director of Student Life
Faith Christian HS
P: 303.424.7310 x9.5203
E: gregg.tucker@[REDACTED]

From: Gregg Tucker

Sent: Wednesday, August 9, 2017 12:23 PM

To: Janet Hannah

Subject: RE: Hi!

Janet,

Sorry for the delay in getting back to you. Things have been crazy since we returned from our extended road trip this summer. Let's definitely connect when you return at the end of August. Things should have settled down by then.

Thanks,

Gregg

---Original Message---

From: Janet Hannah

[mailto:janhannah@[REDACTED]]

Sent: Saturday, August 5, 2017 11:37 AM

To: Gregg Tucker <Gregg.Tucker@[REDACTED]>

Subject: RE: Hi!

Hi, Gregg! I just texted you, but am not sure I have your correct number. I'd love to connect with you about chapel ideas and discipleship for the students this year. I'm heading out to California this week for a memorial service and then taking [REDACTED] to college. I'll contact you after I return at the end of August. God bless you as you start the school year! 😊

Janet Hannah

From: Gregg Tucker

Sent: Thursday, August 10, 2017 10:24 AM

To: Michael Cook

Subject: RE: Chapel

Yes. Or we could chat sooner if that's better, as I've already begun filling out the schedule, especially for 1st semester. But I would especially love to talk about just the general format. Let me know.

-Gregg

From: Michael Cook

Sent: Thursday, August 10, 2017 9:58 AM

To: Gregg Tucker <Gregg.Tucker@[REDACTED]>

Subject: RE: Chapel

Gregg,

Would you be free next Tuesday afternoon to chat about a few chapel ideas? let me know what may work for you—thanks!

Gooooo Eagles!!

- Michael

Michael Cook, M.A., Principal
Faith Christian High School
Arvada, CO, 303.424.7310 x.5100

“Inspiring and equipping students with an excellent education, as they use their unique gifts to passionately represent Christ.”

From: Gregg Tucker

Sent: Thursday, August 10, 2017 11:49 AM

To: Jenae Bundick

Subject: RE: Vision for Community and Students

Jenae,

Sorry for the delay in getting back to you. It's been a busy couple weeks of preparation. I LOVE that you have a heart to see the kids put their faith into action more practically, see the needs of the community, etc. Let's find a time to chat about what that could look like, not only at the elementary level, but throughout. Are you ever over here at the high school?

-Gregg (formerly Mr. Tucker 😊)

From: Jenae Bundick

Sent: Thursday, August 3, 2017 6:03 PM

To: Gregg Tucker <Gregg.Tucker@[REDACTED]>

Subject: Vision for Community and Students

Hello Mr. Tucker,

This is Jenae Hall Bundick, and I am teaching second grade this year at FCA! I am emailing you because I have a wild idea for our students, and I would love to talk to you more about it to see if we can come up with a beautiful plan: I feel that our students could be encouraged to put faith into action more practically, and I don't see why that can't start at an early elementary level. I want to nurture our students to have eyes that see the needs of our community, and

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promote a heart that wants to reach these people with the love of Jesus to give them hope for something better. If you are interested in talking with me more about this, please let me know.

Blessings,
Jenae Bundick

From: Gregg Tucker
Sent: Monday, August 14, 2017 11:48 PM
To: Michael Cook
Subject: DRAFT – E-mail to faculty regarding Chapel Michael,

I was going to send the following e-mail to the high school faculty regarding Chapel and Breakout Groups this year. Let me know if you have any input or suggestions. Also, I think we were going to sit and talk a little more about this tomorrow, so I will wait to send it until after that. I just wanted to give you a heads up.
- Gregg

Teachers,

I wanted to send out some quick info on Chapel and Breakout Groups for this coming year. As you may have heard, the Chapel programming was handed over to me this year (Andrew has done it since he became Principal). I am excited at the opportunity to help facilitate this important aspect of life here at Faith. And while I don't have any major overhauls

planned, I do hope to introduce some tweaks to format and scheduling in response to feedback we have received through the years and that I hope will improve student engagement. Here's a few of those tweaks:

- 1) We are going to spice up the stage a little with a couple floor lamps and maybe some hanging lights.
- 2) Announcements will be at the beginning. Last year we switched to the PowerPoint announcements that cycled at the beginning, but students complained that they rarely had a chance to read them and were, therefore, more uninformed. We also hope to integrate some multimedia into the announcements (Faith News, funny videos, etc).
- 3) Many students suggested integrating a brief time of student/teacher recognition (Student of the Week, Faculty Spotlight) and/or a game or trivia that could hook students in and help promote school unity. We're still thinking about what that might look like.
- 4) Most weeks, either before or during worship, different students will give a small, quick devotional, likely related to our theme of "running for the prize".
- 5) Monthly we will usually do one of the following:
 - a. Breakout Groups (more on that later)
 - b. Alumni focus- an alumni speaker talking about their college and post-college journey and how their faith has informed it
 - c. Student led- Student Council, and especially our Student Chaplains [REDACTED] will organize and facilitate the chapel with my help

- d. Other-Teacher, Youth Pastor, community member, or something else

As you can see, in response to student feedback, we are de-emphasizing pastors and youth pastors (students consistently expressed being a little burned out of that “type” of speaker and message), and emphasizing testimonies and stories. The last few years their highest ranked chapels were either student-led or others that related to testimonies or stories.

6) We will communicate to speakers that 25 minutes is a pretty ideal cap for speaking time and that we would like to set aside 5-10 minutes after that for a time of Q&A. We will continue to examine what that might look like, but (again) it was a common suggestion of students in order to increase engagement.

Further, I am totally open to new ideas or suggestions that you all may have. Please let me know what you like, don’t like, or think could improve our chapel experience.

And finally, a bit about Chapel Breakout Groups- First of all, the goal of Breakout Groups is to give students an opportunity to have Biblically grounded, honest, open, and broad conversations about spiritual topics in a smaller, safer environment than the typical chapel. Ideally it is an opportunity for students to be seen, heard, and known on a more personal level, as well as an opportunity for different genders and different grades to come together and interact (hopefully with the upperclassmen leading and modeling healthy interactions). And while there is no perfect way to organize these groups (we’ve switched methods about every year), we feel like we were pretty close to a sweet

spot last year and had our strongest feedback regarding Breakout Groups. So we are planning on organizing the groups similarly, which was basically allowing the students to select a group (we called them “pods”) of 2-4 students from their class (friends they are close to and already connected with).

From those pods, Student Council, using their “inside” knowledge of student dynamics, put one pod from each class into a group of 10-15 students (no more than 12 is ideal, but dependent on number of leaders), trying to get at least one solid junior or senior pod and one solid freshmen or sophomore pod in each group. Inevitably this still leaves a handful of difficult groups (difficult to get them to discuss), a handful of dream groups, and the majority on a spectrum in between. But for the most part students preferred this over other ways we’ve organized the groups.

Again, if you have any ideas or suggestions on how this might be able to be done better, please let me know. We are totally open to how this could improve.

I’m looking forward to this year and how God will work in the midst of much change.

In Him,

Gregg

**Tucker Deposition Exhibit 17: Tucker's
Application to Faith Christian Academy**

**Expression of Interest/
Application for Employment
Faith Bible Chapel International**

**Faith Cristian Academy, Sonshine Center,
Impacto de Fe, Intern**

Expression of Interest Section

Date: 5/5/10 Cell Phone: **[REDACTED]**

Full Legal Name: Gregory James Tucker

Day Telephone: **[REDACTED]**

Address: **[REDACTED]**

Position(s) of Interest: Teacher

☐ FBCI

☒ FCA

☐ Sonshine
Center

☐ Impacto de Fe

☐ Intern

Have you worked for Faith Bible
Chapel International in the past?

☒ yes ☐ no

If yes, what position did
you hold? Teacher

Are you younger than 18?

☐ yes ☒ no

If hired, can you provide proof
of your age?

☒ yes ☐ no

Have you used illegal drugs in
the last two years?

☐ yes ☒ no

Have you been convicted of or
pled guilty to a felony?

☐ yes ☒ no

*(Neither a plea not a conviction
will necessarily disqualify you
for employment, but all decisions*

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are reserved to FBCI in its sole discretion).

Do you have a legal right to work in the United States? ☒ yes ☐ no

Employment is contingent upon satisfactory proof of legal ability to work in the United States. All applicants who receive job offers must complete Form 1-9 and provide identification to verify they may work in the U.S.)

Have you worked using other names? ☐ yes ☒ no

If yes, list all other names you have used: _____

FBCI Leadership Requirements

While working at Faith Bible Chapel International, you will be visible and viewed as a member of leadership. We require that each staff member commit to certain lifestyle expectations, be in a position to effectively minister to others, and be maturing as a believer. At a minimum this means you:

- Attend a biblically based church on a regular basis.
- Understand the importance of and have committed to tithing.
- Commit willingly to refrain from the following activities including but not limited to: abusing prescription drugs, alcohol, tobacco, gambling, or use of illegal drugs, distributing alcohol, tobacco or illegal drugs, engaging in, promoting or

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condoning pornography, or homosexuality of any type, breaking any criminal laws or contributing to the delinquency of minors.

- Committed to sexual purity.

GT By initialing here, I agree to follow the leadership requirements as outlined above.

If you satisfy ALL of the above requirements, you may proceed to the following pages.

If you do not satisfy ALL of the above, we welcome you to re-apply when you do meet all of our requirements.

Application for Employment Faith Bible Chapel International

Complete entire application PLUS individual sections at the end of this packet specific to the position you are seeking at Faith Christian Academy, Sonshine Center, Impacto de Fe, or Intern

Full Legal Name: Gregory James Tucker

Day Telephone: **[REDACTED]**

Position(s) Applying for: Teacher

Indicate which division of Faith Bible Chapel International you are applying to:

<input type="checkbox"/> FBCI	<input checked="" type="checkbox"/> FCA	<input type="checkbox"/> Sonshine
<input type="checkbox"/> Impacto de Fe	<input type="checkbox"/> Intern	Center

If applying for teacher, which grades and subjects are you prepared to teach? High School: Bible, Science, PE, Spanish

Employment Experience

Starting with your present job, list your last three employers. (Must complete, even if attaching your resume).

Employer <i>Lookout Mountain Community Church</i>	Date Employed	
Telephone [REDACTED]	From	To
Address [REDACTED]	<i>7/06</i>	<i>Present</i>
Job Title <i>Missionary</i>	Hourly Rate/Salary	
Supervisor [REDACTED]	From	To
Reason for Leaving <i>Finished project</i>	[REDACTED]	
Work Performed <i>Collaborated w/ local church and community leaders to plan and establish a sustainable community technology center. Managed all aspects of project while training local leaders to integrate into leadership positions. Taught advanced ESL classes.</i>		

Employer <i>Faith Christian Academy</i>	Date Employed	
Telephone	From	To
Address	<i>8/00</i>	<i>6/06</i>

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Job Title <i>Science Department Chair / Teacher</i>	Hourly Rate/Salary	
Supervisor	From	To
Reason for Leaving	[REDACTED]	
Work Performed		

Employer <i>Regis Jesuit High School</i>	Date Employed	
Telephone [REDACTED]	From	To
Address [REDACTED]	<i>8/99</i>	<i>6/00</i>
Job Title <i>Teacher</i>	Hourly Rate/Salary	
Supervisor [REDACTED]	From	To
Reason for Leaving <i>Moved</i>	[REDACTED]	
Work Performed <i>Taught Biology, Chemistry, and Physics.</i>		

Personal References

List those familiar with your capabilities, including the supervisors previously noted under “Employment Experience.”

(Do not list relatives)

Name: *Brian Wall*

Relationship: *Principal Superintendent*

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Address: _____ Telephone: _____ Fax: _____

Name: Andrew Hasz

Relationship: Principal

Address: _____ Telephone: _____ Fax: _____

Name: [REDACTED]

Relationship: Pastor

Address: [REDACTED] Telephone: [REDACTED]

~~Fax~~ Email: [REDACTED]

Education

	High School	College/ University	Graduate/ Professional	Other
School Name and City	<i>Bear River</i>	<i>Pepperdine University</i>		
Years Completed	9 <u>10</u> 11 12 GED	1 2 3 <u>4</u>	1 2 3 4	1 2 3 4 5
Diploma/ Degree	<i>Diploma</i>	<i>B.S. Sports Medicine</i>		
Course of Study	<i>College Prep</i>	<i>Sports Medicine</i>		
Please describe any specialized	<i>ASB President, Boys State Rep.</i>	Accepted and attended overseas program		

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train- ing, ap- pren- tice- ships, skills, honors, and ex- tra-cur- ricular activi- ties				
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Driving History

Do you have a valid Colorado Drivers License? ☒yes ☐no

Do you have a clean driving record (no moving violations)? ☒yes ☐no

Do you know of any reason you are not qualified to drive our vehicles? ☐yes ☒no

Has your Driver's License in any state ever been surrendered, denied, suspended, revoked, restricted or placed on probation? ☐yes ☒no

If yes, please explain here: _____

I authorize the FBCI to obtain a copy of my motor vehicle record for the past 7 years ☒yes ☐no

Driver's License State: CO

Driver's License Number: ____

Exp Date: ____

<p>Faith Bible Chapel International Statement of Faith</p>
--

We believe . . .

- the Bible to be the divinely inspired, infallible, inerrant, and authoritative Word of God.
- there is one God, eternally existent in three persons: God the Father, God the Son, and God the Holy Spirit.
- in the virgin birth of the Lord Jesus Christ, His deity, His sinless humanity, the eternal all-sufficiency of His atoning death, His bodily resurrection, His ascension to the Father's right hand, and His personal, future return to this earth in power and glory.
- each human must receive the gift of eternal life through Jesus Christ in order to live forever in Heaven and God.
- in the ministry of the Holy Spirit who convicts, regenerates, baptizes, indwells, enlightens, and empowers believers for godly living and imparts spiritual gifts for the edification of the body of Christ.
- God did not reject Israel, His people, for God's calling is irrevocable. Therefore, for the sake of God, we offer friendship and support to the people and nation of Israel.
- the church is the spiritual body of which Christ is the head, both functionally and eternally. We observe the ordinances of Christian baptism by immersion for believers and the Lord's Supper.
- in the resurrection of the human body and the

eternal existence of all people in heaven or hell. Without mental or other reservation, I hereby subscribe to the above statements. (Please sign below if you completely agree.)

Signature: Gregg Tucker **Date:** 5/5/10

<p align="center">Applicant's Christian Testimony and Perspective</p>
--

Faith Bible Chapel International is a non-profit Christian organization whose purpose is to reach out our city for Christ. Because of the unique nature of our ministry, we are concerned that our employees be committed to this Christian perspective. All of our employees are involved in times of prayer for the specific needs of those we serve. They also actively participate in departmental and companywide devotional times. Please take a moment to answer the following questions that will help us evaluate our compatibility. Thank you for sharing your thoughts with us.

Please provide a statement of Christian testimony and experience. (You may attach another sheet or use this page back if necessary).

Do you have a personal relationship with Jesus Christ?	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> no
Do you use tobacco of any type?	<input type="checkbox"/> yes	<input checked="" type="checkbox"/> no
Do you use alcohol?	<input type="checkbox"/> yes	<input checked="" type="checkbox"/> no
Do you agree that the Bible condemns homosexual acts, premarital sex, and extramarital sex?	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> no
Do you participate in, promote, or	<input type="checkbox"/> yes	<input checked="" type="checkbox"/> no

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condone any of the above activities?

Do you participate in pornography or gambling? ☐yes ☒no

Do you currently attend church? ☒yes ☐no

Name of your church? Lookout Mountain Community Church

Name of your pastor? [REDACTED]

In what ways are you involved in your church and/or other Christian organizations? Missionary to Dominican Republic

Permission for Background Check
--

Due to the presence of a K-12 school and daycare facility on the grounds of Faith Bibel Chapel International, we request that applications voluntarily provide their date of birth and social security number with the understanding that Colorado Bureau of Investigation background check will be performed. Providing the following information will constitute your authorization to conduct a background search.

Date of Birth: [REDACTED]

Social Security Number: [REDACTED]

*****Date of Birth and Social Security number
MUST be provided to process application***
Application will not be processed without this
information**

ALL Applicants Complete Office Computer and Special Skills Section

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List word processing systems, accounting and spreadsheet programs you have used: MS Word, Excel, Powerpoint, Interact, Quickbooks, Integrate

Other computer skills: Digital Video Production

Office equipment you have used: Copier, printer, scan-tron

Additional office skills not listed above: _____

Summarize special skills and qualifications acquired from employment, military service or other experience: _____

<p>Please complete the following sections that apply to the position(s) you are seeking</p>
--

Applicants for Teacher or Teacher Aide at Faith Christian Academy Complete Following Section

Teacher Certification: ☒ yes ☐ no ☐ in process of obtaining at (Name of Institution) CO Department of Education

Type of certificate: Secondary Science State: CO

Student teaching: (subject and place) N/A

Critique teacher: (new teachers) N/A

Address: _____ Telephone: _____

Attach The Following to This Completed Application on a Separate Sheet of Paper

- A copy of your teaching certificate. Please request official transcripts be send to FCA from any college or university attended.
- A list of all Bible college classes you have taken (*include name of course, place taken, and dates attended*).
- A list of any special training and coursework

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you have had in Christian philosophy of education. (*include name of course, place taken, and dates attended*)

- List briefly your experience with children other than teaching (if any).
- Discuss how you would create a positive learning climate in your classroom.
- List any other experience of skills that you believe are pertinent to a position at FCA.
- Briefly describe what you believe makes a highly effective teacher.
- Share your contributions you hope and expect to make to the students and staff at FCA.
- In 250 words or less share a concise version of what you believe to be the most significant differences between the philosophy of Christian education and the philosophy of secular education.
- Three letters of reference.

Tucker Deposition Exhibit 22: Tucker's Philosophy of Education and Christian Testimony

PHILOSOPHY OF EDUCATION

When thinking about my philosophy of education, I can't help but think of my own experience in high school and reflect on what I feel impacted me in a positive way. Living in and attending a public high school in a fairly small, rural town allowed teachers to become much more involved in 'the lives of their students. I was also elected Student Body President which gave me the opportunity to work closely with many of the teachers as well as the administration of the school. These experiences have helped form what my priorities and goals are as a teacher. It allowed me to see first-hand what a crucial role teacher's can play in shaping children's lives and preparing them for adulthood. Above all, it was those teachers who truly loved what they did and had a desire to see students grow and mature not only in their intellect, but in their understanding of life, that made a difference in my life as well as the lives of those around me. I love the idea of connecting with students in a way that helps impart a love of learning, a respect for others, and a sense of self-worth. I am inspired to see how teachers can, through their knowledge, creativity, energy, and enthusiasm, inspire their students to go on to achieve. The goal of teachers should be to open up interesting problems and to provide tools for solving them. Good teachers should expose their students to enough situations that the students will become curious enough to take learning into their own hands. And while getting a good grade will hopefully be important, actually solving a problem and learning something

should be the primary motivation. I also believe it is important for teachers to make themselves available to listen to the ideas of students. It seems like students rarely have the opportunity to try out their thoughts and beliefs because often the teacher doesn't have the required time, patience or ability to reserve judgment. But I believe it is through taking time to listen to students that teachers are able to better understand their needs.

Further, as a Christian, my philosophy of education is shaped by the Bible, which I believe to be the inerrant, infallible Word of God. I believe that all truth is God's truth and that God has revealed His truth in the Bible. I also believe that the Bible conveys truth in every area of life, including all academic disciplines.

In addition, I feel the most important part of a student's education should be the enlivening and growth of his/her Christian character. Without this, all knowledge is somewhat useless and lacks a foundation for application. Therefore, our main goal in educating students should be to help them become more like Jesus Christ. Education that does not do this is not only incomplete, but also unsuccessful in providing our world with what it needs most: men and women who are powerful in spirit and strong in character.

Further, I believe that a student should be motivated to pursue excellence in his/her education. A teacher should promote a love for learning as well as a desire to excel in his/her studies. However, in that God gives different gifts and even the same gifts in different measure to children, each child should be given individual attention based on spirituality, maturity, and intellectual capacity to handle the subject matter at hand.

I also feel the teacher should be a role model and should seek to demonstrate the Christian character in every area of his/her life. A teacher should genuinely love their students and seek to continually grow in his/her ability to teach Christ as the center of their education. The teacher should also demonstrate mastery of the subject material which he/she is teaching. While curriculum is important, the primary instrument for educating the student should be the teacher.

And finally, I believe that prayer is vitally important to any philosophy of education in order to promote a dependence on God and in maintaining the spiritual unity of believers within a school.

CHRISTIAN TESTIMONY

I did not grow up in a Christian home. My parents were wonderful, loving and compassionate people, however, due to their experience in church, decided not to introduce us to its influence.

As a teenager going through the beginning of high school, I began to ask those questions that everyone must sooner or later face in life, and I wanted answers. Questions like, "Who am I?" "Why am I here?" "Where am I going?" etc. Thomas Aquinas once wrote: "There is within every soul a thirst for happiness and meaning." That sums up what I wanted. At the time, however, my happiness was like so many other people's. It depended on my own circumstances. If things were going great for me, I was great. But when things would go bad, I was bad.

It was around this time that my sister, who had become a Christian at college, would come home and visit every once in awhile. It was also at this time that I

became friends with a few guys at school who happened to be Christians. It was in them (my sister and these friends), that I noticed something different. They seemed to know why they believed what they believed. They seemed to be riding above the circumstances of their lives, while most appeared to be tossed around. They had a happiness that was not dependent on circumstances. They possessed an inner, constant source of joy that was so obvious to me. After many discussions with them, I decided to give church another try. I say another because I had been once before. Honestly, I thought it was the most pointless and boring thing I had ever done. Further, I felt all the people I knew who went to church were just boring people who didn't have fun. Which carried into my impression of God as strictly a disciplinarian. Someone looking over my shoulder just waiting for me to do something wrong, and I wanted nothing to do with that. But I gave it another try.

This is when I met Todd, the youth pastor. He was a tall, good looking guy who had just moved from Southern California where he had been an actor and beach volleyball player. He was one of the first down-to-earth, normal, "cool" Christians I had ever met. But more than that, he was the most genuine and inspiring person I had ever met. I could go on forever on what took place over the next few months. I continued to go to church and everything began to make sense. I discovered the answers to those difficult questions, and they made sense. Above all, I learned that Christianity is not a religion, which I had always thought. Religion is humans trying to work their way to God through good works. Christianity, I learned, is God coming to men and women through Jesus Christ, offering them a relationship with Himself. So the summer after my

junior year in high school, after spending a weekend at a church camp, I grabbed one of my sisters books called "Power of Love", took it into my parent's pitch dark closet with a flashlight, and prayed a prayer to accept Jesus Christ into my heart and became a Christian. Now many religious people talk about seeing a bolt of lightening or coming to God after a near-death experience. But after I prayed, nothing happened. I felt nervous as if I didn't really know what I had gotten myself into. But it was only a matter of time before I realized that what I had gotten myself into was a relationship that would change me for eternity. My life was changed.

Through high school, I attended a Christian camp each summer called Hume Lake. This camp helped nurture and foster my spiritual growth as well as serving as a place where I could re-dedicate my life to Jesus Christ which I believe should occur on a regular basis in our walk with God.

In college, I was further challenged intellectually to examine the claims that Jesus Christ is God's Son; that taking on human flesh, He lived among real men and women and died on the cross for the sins of mankind; that He was buried and He arose three days later and could change a person's life in the twentieth century. Eventually, my mind came to the conclusion that Jesus Christ must have been who He claimed to be. This gave me the solid foundation for my faith.

Beyond this, I have been blessed with a wonderful wife, as well as friends who have also helped me mature in my walk with God. For this, I am always thankful.

Tucker Deposition Exhibit 23: Tucker's Application Cover Letter to Faith Christian Academy

Gregg Tucker

March 13, 2000

[REDACTED]

ATTN: Brian
Faith Christian Academy
4890 Carr Street
Arvada, CO 80002

Dear Brian,

I am writing with great interest in your school and the education and ministry it provides to high school students from all over the Denver area. I was referred to your school both through the church I attend, specifically Keith Bushaw, Youth Pastor at Lookout Mountain Community Church, as well as through my mentor teacher at Regis Jesuit High School where I currently teach Science and coach basketball.

In brief, I graduate from Pepperdine University in southern California in December of 1996, where I earned a Bachelor of Science in Sports Medicine with a minor in Religious Studies. Throughout college, I was involved with Campus Ministry, Campus Crusade for Christ, Malibu Presbyterian college group leadership and worship team, as well as Young Life International. I was also part of the Sports Medicine Department's student teaching program where I served as a teacher's assistant for the anatomy and physiology classes. Following graduation, I moved out to Philadelphia where I was hired with Bally Total Fitness, a nationwide, Fortune 500, health club company where I worked for two years as an assistant manager. A year-

and-a-half ago I was married and soon after, relocated to the Denver area where I continued to work in management for another year at a Bally Total Fitness club. I was fortunate to gain much experience in the sales and business aspect of the company. This is described briefly in my resume. After moving out here from Philadelphia, however, I had felt heavily on my heart the need for me to change directions in my life and pursue teaching high school. I had always had a passion to work with youth and have done so in a variety of different settings, however, it was not until last year that I decided to pursue a career in teaching. Soon after, I was hired to teach Science at Regis Jesuit High School, which I have done for the past year. However, while I have deeply enjoyed my time at Regis, my wife and I have decided it would be much more convenient and fulfilling to move to a school such as Faith which is close to us in terms of location as well as more in line with my Christian philosophy of education.

Considering my extensive work in ministry, my experience teaching, along with my education, I feel that I have the necessary skills and experience to give to a prestigious high school such as Faith. Above all, I am a dedicated Christian who is deeply interested in having a positive impact on the lives of students.

As requested, I am enclosing the application, a resume outlining my education, honors, experience, skills, and other activities, as well as the application questions. I look forward to being able to discuss with you my qualifications and your needs in more detail.

In His Service,

Gregg Tucker
Gregg Tucker

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:19-cv-01652-STV

GREGORY TUCKER,

Plaintiff,

v.

FAITH BIBLE CHAPEL INTERNATIONAL, a
Colorado non-profit corporation,

Defendant.

ANSWER TO FIRST AMENDED COMPLAINT

Defendant Faith Bible Chapel International (alternatively to herein as “FCA” or “FCHS”), hereby Answers the Plaintiff’s First Amended Complaint and Jury Demand (the “Amended Complaint”).¹

ANSWER

1. INTRODUCTION

1. Deny.
2. Deny.
3. Deny.

¹ The numbered paragraphs in the Answer portion of this pleading refer to the corresponding numbered paragraph of the Amended Complaint. Unless otherwise indicated, an unqualified denial to the corresponding paragraph of the Amended Complaint shall be considered a denial of all allegations set forth in the paragraph.

4. Deny.

* * *

16. Defendant admits that its ministries are located in Arvada, Colorado but denies all allegations suggesting that it engages in “business affairs” as that term is ambiguous.

* * *

64. Defendant admits that a Chapel was dedicated to discussing race and faith with FCHS student body and teachers, but Defendant states that the idea was first suggested by Wall and Hasz in 2016. Defendant is without sufficient knowledge or information to form a belief about the truth of the remaining allegations and therefore Defendant denies the same.

65. Admit.

66. Admit.

67. Defendant admits that on January 9, 2018, Plaintiff emailed all FCHS parents to explain that the Race and Faith Chapel would be held on January 12, 2018, and that the Race and Faith Chapel was livestreamed through FCHS’s internal video streaming service. Defendant is without sufficient knowledge or information to form a belief about the truth of the remaining allegations and therefore Defendant denies the same.

68. Defendant is without sufficient knowledge or information to form a belief about the truth of the allegations and therefore Defendant denies the same. Defendant states that after due inquiry Cook and Hasz cannot recall whether they sent a text message to Tucker as alleged in the Paragraph although they

do recall that they were supportive of what Tucker had intended to achieve with the Race and Faith Chapel.

69. Defendant admits that the Race and Faith Chapel occurred on January 12, 2018. With regard to all other allegations of Paragraph 69, Defendant is without sufficient knowledge or information to form a belief about the truth of the allegations and therefore Defendant denies the same.

70. With respect to the allegations in Paragraph 70, Defendant states that the referenced transcript of the Race and Faith Chapel speaks for itself and denies any allegations inconsistent with the same.

71. Admit.

72. Defendant states that Hasz and Cook were generally supportive of the purpose and content of the Race and Faith Chapel that Tucker programmed and hosted. However, there were several assertions and applications of Scripture presented at the Race and Faith Chapel that Defendant did not believe were correct and Tucker refused to acknowledge these inaccuracies and misapplications of Scripture. To the extent the allegations of Paragraph 72 of the First Amended Complaint are inconsistent with the foregoing, Defendant denies the allegations of the Paragraph.

* * *

80. With respect to the allegations in Paragraph 80, Defendant states that the referenced email speaks for itself and denies any allegations inconsistent with the same. Defendant is without sufficient knowledge or information to form a belief about the truth of the

remaining allegations and therefore Defendant denies the same.

* * *

92. Defendant admits that there was a January 19, 2018 meeting between Hasz, Cook, and Plaintiff. Defendant denies the remaining allegations in Paragraph 92.

* * *

100. Defendant admits to the existence of a January 26, 2018 meeting wherein Plaintiff expressed frustration to Hasz and Cook over the responsibility of planning chapel had been taken away from him. Plaintiff denies the remaining allegations contained in Paragraph 100.

101. Defendant admits that on January 28, 2018, Plaintiff sent an email to Cook and Hasz. The referenced letter speaks for itself and Defendant denies any allegations inconsistent with the same.

102. Admit.

103. Deny.

104. Admit.

105. Defendant admits that Cook spoke with Plaintiff from time to time during different points of Plaintiff's tenure. Defendant is without sufficient knowledge or information to form a belief about the truth of the remaining allegations and therefore Defendant denies the same.

106. Defendant admits that Plaintiff sent a letter to a handful of parents on February 6, 2018. The referenced letter speaks for itself and Defendant denies any allegations inconsistent with the same.

107. Defendant admits that Hasz and Cook received copies of a letter. Defendant denies the remaining allegations contained in Paragraph 107.

108. Deny.

109. Defendant admits to the existence of a February 6, 2018 meeting, which Plaintiff recorded and produced in his F.R.C.P. 26 initial disclosures, and the contents of which speak for themselves and Defendant denies any allegations inconsistent with the same.

110. Defendant admits to the existence of an email exchange between Plaintiff and Andrew Hasz, the emails speak for themselves and Defendant denies any allegations inconsistent with the same.

111. Defendant admits that FCHS held parent-teacher conferences on February 15, 2018, and to the existence of a meeting between Andrew Hasz and Plaintiff, which Plaintiff recorded and produced in his F.R.C.P. 26 initial disclosures, and the contents of which speak for themselves and Defendant denies any allegations inconsistent with the same.

112. Defendant is without sufficient knowledge or information to form a belief about the truth of the allegations and therefore Defendant denies the same.

113. Defendant admits that Tucker sent an email on February 17, 2018. Defendant denies the remaining allegations contained in Paragraph 113.

114. Defendant denies that Andrew Hasz had any sons attending FCHS during 2018. Defendant is without sufficient knowledge or information to form a belief about the truth of the remaining allegations and therefore Defendant denies the same.

115. Defendant is without sufficient knowledge or information to form a belief about the truth of the allegations and therefore Defendant denies the same.

116. Defendant admits that Plaintiff's employment ended on February 26, 2018. Defendant denies the remaining allegations contained in Paragraph 116.

117. Deny.

118. Defendant admits that Hasz asked Plaintiff to sign a joint statement. Defendant denies the remaining allegations contained in Paragraph 118.

119. Defendant admits that Plaintiff did not agree to sign the joint statement. Defendant denies the remaining allegations contained in Paragraph 119.

120. Defendant admits that Hasz sent an email to the parents of FCHS students following Plaintiff's separation. The email speaks for itself and Defendant denies any allegations inconsistent with the same.

121. Defendant admits that Hasz sent an email to the parents of FCHS students following Plaintiff's separation. The email speaks for itself and Defendant denies any allegations inconsistent with the same.

122. Deny.

123. Defendant admits that a faculty member offered to resign and that Hasz and Cook stated that such action was unnecessary. Defendant is without sufficient knowledge or information to form a belief about the truth of the remaining allegations and therefore Defendant denies the same.

124. Deny.

125. Admit.

FIRST CLAIM FOR RELIEF

- 126. No response is needed to Paragraph 126.
- 127. Deny.
- 128. Deny.
- 129. Deny.
- 130. Deny.
- 131. Deny.
- 132. Deny.
- 133. Deny.
- 134. Deny.

* * *

AFFIRMATIVE DEFENSES

* * *

2. Plaintiff's Amended Complaint is barred by the Religion Clauses of the United States Constitution's First Amendment, and specifically the "ministerial exception" developed thereunder to employment termination claims, which operates to bar any claim, the resolution of which would limit a religious institution's right to employ or not employee individuals in ministerial roles.

3. Plaintiff's Amended Complaint is barred by the Religion Clauses of the United States Constitution's First Amendment, and specifically the protections afforded for religious autonomy, which operates to bar any claim, the resolution of which requires judicial entanglement in the decision to terminate an employee based on internal ecclesiastical disputes, discussions, or disciplinary actions.

4. Plaintiff's Amended Complaint is barred by the Religion Clauses of the United States Constitution's First Amendment, and specifically the protections afforded for religious content developed thereunder to employment termination claims, which operates to bar any claim, the Case resolution of which requires judicial entanglement in a religiously based decision to terminate an employee.

* * *

11. Plaintiff's claims fail because Plaintiff's discharge was justified. Plaintiff's religious message that he shared and promoted at the Race and Faith Chapel was flawed and not consistent with the religious message that Defendant sought to share with its students, parents and community. Further, Plaintiff was insubordinate. Plaintiff also sought to address his grievances with his supervisors and with Defendant in a manner inconsistent with the Defendant's grievance process set forth in its Teacher Handbook. In addition, Plaintiff's religious message that he shared and promoted at the Race and Faith Chapel, as well as his defense of his religious message to Defendant and FCA's students and parents thereafter was inconsistent with the religious message that Defendant believed should have been shared. Moreover, when Defendant confronted Plaintiff with specific Bible verses that were shared at the Race and Faith Chapel, but which Defendant believed were espoused out of context and inconsistent with Defendant's interpretation of the Bible, Plaintiff refused to acknowledge the validity of Defendant's concerns and interpretation of the Bible.

* * *

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Case No. 20-1230**

GREGORY TUCKER,

Plaintiff-Appellee,

v.

FAITH BIBLE CHAPEL INTERNATIONAL,
a Colorado non-profit corporation,

Defendant-Appellant.

On appeal from the United States District Court
for the District of Colorado
The Honorable R. Brooke Jackson,
Civil Action No. 1:19-cv-01652-RBJ-STV

**PLAINTIFF-APPELLEE GREGORY TUCKER'S
JURISDICTIONAL MEMORANDUM**

* * *

PROCEDURAL BACKGROUND

The motion for which FBCI seeks appellate review was first filed in the district court as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Because the motion was supported by three attached exhibits, the district court elected to convert FBCI's motion to a motion for summary judgment and allowed the parties to conduct discovery pertinent to the issues raised in the motion. (Supp. App. 10, Doc 32). The district court ultimately denied FBCI's

motion on that basis that whether Tucker was a “minister” within the meaning of the “ministerial exception” was genuinely disputed on the evidence. (App. 97, Doc. 52). Two days before filing its Notice of Appeal, FBCI filed a motion to reconsider pursuant to Federal Rule of Civil Procedure 59(e). In its reply in support of its motion to reconsider, FBCI cited as new authority the Supreme Court decision in *Our Lady of Guadalupe School v. Morrissey Berru*, No. 19-1267 (U.S. July 8, 2020). (Supp. App. 20, Doc. 66). That decision postdated Tucker’s response to FBCI’s motion to reconsider (Supp. App. 12, Doc. 64) and Tucker has been granted leave to file a surreply to the pending motion to reconsider. (Supp. App. 26, Doc. 68)

FACTUAL BACKGROUND

This case concerns Tucker’s opposition to an environment of racial hostility directed against him (as father to an adopted black child), and toward other students of color, by a faction of racially bigoted students attending FBCI’s school. When he was hired at FBCI’s school, Tucker held the dual role of Dean of Students and as a teacher of secular subjects. His duties as Dean of Students were to organize religiously oriented discussion groups that FBCI referred to as “Chapels,” to counsel students on matter of school discipline, and to provide spiritual guidance and counseling. As a result of his opposition to racial hostility and harassment, Tucker was demoted from the position of Dean of Students and stripped of all those attendant responsibilities but remained in his position as a teacher of secular subjects. His opposition to racial harassment continued after his demotion, and his employment as teacher was then terminated.

Tucker then sued FBCI for the termination of his employment.

In denying FBCI's converted motion for summary judgment, the district court allowed Tucker's submission of competent evidence, a portion of which was included in the district court's order denying FBCI's motion for summary judgment:

Gregory Tucker was a teacher at Faith Christian Academy from August 2000 to July 2006 and from August 2010 to February 2018. Declaration of Gregory Tucker, ECF No. 41-7 at ¶2. He also was Director of Student Life beginning in August 2014. In approximately January 2018 he was demoted from the position of Director of Student Life and was stripped of the responsibility of organizing weekly chapel meetings. *Id.* at ¶31. When his employment was terminated by Faith Christian Academy in February 2018 his only position was that of teacher. (App. 102-103, Doc. 52, pp 6-7).

Mr. Tucker understood that there was an entity "somewhat related" to the Faith Christian Academy called Faith Church that was led by ordained pastors, but the pastors were not his supervisors, and he rarely, if ever, interacted with them. (App. p. 103, Doc. 52 p. 7).

Mr. Tucker was hired to teach biology, physics and chemistry, and he did so throughout his tenure at Faith Christian Academy. He relied on the same textbooks that were used in public schools. There was no theology, nor was there any "distinct or unique Christian principle that [he] was required to teach in conjunction with the secular content of these subjects. (App. p. 103, Doc. 52 p.7).

He also taught classes in “Leadership” and “Worldviews and World Religions,” but although he taught that Christianity represented a credible worldview, he was required “to avoid the advancement of one Christian perspective over another because there were many Christian perspectives, as well as non-Christian perspectives, represented in the school. (App. p. 103, Doc. 52 p. 7).

He “did not have any specific training in the Bible and therefore was not qualified to teach any classes that involved instruction regarding the Bible or theology. Teachers who did teach classes regarding the Bible and theology typically had specific training or education in that field, like a seminary education or ordination.” (App. p. 103, Doc 52 p. 7).

Most of his students were not members of the Faith Church. Doctrinal and theological perspectives among students and teachers varied and included conservative evangelical, liberal evangelical, Lutheran, Catholic, Baptist, Presbyterian, and Mormon; and there were students who had non-Christian views including Buddhism, Hinduism, and atheism. Most teachers attended churches other than Faith Church and were affiliated with different Christian denominations that often-held theological beliefs quite different from those promoted by Faith Church. (App. p. 103-104, Doc. 52 p. 7-8).

He was instructed to integrate a Christian worldview in his teachings but was not provided any training, instruction or literature as to what that worldview should be, other than Bible-oriented. He was never required to teach a class in religious doctrine or to set aside time in his classes specifically dedicated to a religious message. He was told not to

preach but to encourage students to think through their own perceived versions of Christianity and to consult their parents about specific theological matters. He was expected to “endorse Christianity in general terms, set a good moral example, and allow a Christian worldview to influence [his] teaching,” but he was “encouraged to avoid delivering messages on church doctrine or theology. (App. p. 103-104, Doc. 52 p. 8).

Given the clarification of the meaning of “minister” in the recent Supreme Court decision in *Our Lady of Guadalupe School v. Morrissey Berru*, it is important that while Tucker met the qualification set out by FBCI that he be a Christian, he was reminded that he was not otherwise qualified or required to teach or promote a version of Christianity attached to FBCI or any other denomination. Due to the fact that FBCI marketed its services as a school to a wide array of religious perspectives, some of which were not Christian, he was explicitly told as teacher not to promote the theology of FBCI, or any other Christian denomination. Such instruction was to be relegated to the students’ parents, and to their own private reflection. The district court’s ruling was thus in line with the general principle that while a religious school may refer to their teachers as “ministers,” and that such reference is relevant, it is not determinative. That finding must be made by an independent trier of fact.

ARGUMENT

- A. The Final Judgment rule is important to the orderly and efficient resolution of disputes and is subject to very narrow exception.**

An appellant bears the burden of establishing appellate jurisdiction. *See Estate of Ceballos v. Husk*, 919 F.3d 1204, 1223 (10th Cir. 2019). Appellate jurisdiction generally is limited to “final decisions of the district courts.” 28 U.S.C. § 1291; *see Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 586, 205 L. Ed. 2d 419 (2020) (stating a decision is final under § 1291 if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment”

* * *

While FBCI argues that its right against judicial interference in its ecclesiastical affairs is categorical, in that it functions as a jurisdictional restriction on the power of the courts to interfere with the affairs (or autonomy) of religious organizations, that conceptualization has been rejected by the Supreme Court. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n. 4 (2012) (concluding that the ministerial exception operates as an affirmative defense not as a jurisdictional bar).

The ministerial defense bears some resemblance to governmental immunity because it emphasizes a need that religious organizations have in protecting their autonomy in the management of their religious messaging without governmental interference. But this deference does not extend to the point where the church bestowal of ministerial title is sufficient to establish the defense. *See Hosanna-Tabor*, 565 U.S. at 193; *see also id.* at 203 (Alito, J., concurring); *Our Lady of Guadalupe Sch.*, slip op. at 17. Quite the opposite, in both *Hosanna-Tabor* and *Our Lady of Guadalupe School*, the Supreme Court conducted an independent factual inquiry concerning whether the terminated

employees were in fact functioning as ministers. In both cases, despite the urging of Justice Thomas that the courts give conclusive deference to a church's own designation and definition of what a minister is, the majority declined to accept that view. *See Hosanna-Tabor*, 565 U.S. at 197; *see also Our Lady of Guadalupe Sch.*, slip op. at 22.

* * *

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Case No. 20-1230**

GREGORY TUCKER,

Plaintiff-Appellee,

v.

FAITH BIBLE CHAPEL INTERNATIONAL,

Defendant-Appellant.

On appeal from the United States District Court
for the District of Colorado
The Honorable R. Brooke Jackson,
Civil Action No. 19-cv-01652-RBJ-STV

**PLAINTIFF-APPELLEE'S RESPONSE IN
OPPOSITION TO DEFENDANT-APPELLANT
FED. R. APP. P 8 MOTION TO STAY
PROCEEDING BELOW PENDING APPEAL**

* * *

ARGUMENT

**A. FCBI misstates Tucker's employment
status at the time of his termination.**

The Order from which this appeal is brought included factual findings that seriously deflate the kind of urgency FBCI attaches to it. FBCI places enormous emphasis on what it contends are vital religious func-

tions attendant to Tucker’s role as Dean of Students.³ The undisputed character of this role was the organization of monthly symposium (known as “Chapels”) on matters of spiritual importance to a very diverse religious community, and the counseling of students on disciplinary issues in a manner that was sensitive to the religious interests of students representing many different religious perspectives. (App. 104-105).

Whether this role qualified him as a “minister” would be an interesting academic exercise but would have no relevance to a ministerial exception claimed for his termination. Tucker was demoted from that role—as a result of opposition he voiced to racial harassment running rampant at FBCI—and was left to his role as a teacher. (App. 102). This role, as a teacher of secular classes, did not include any instruction or promotion of the religious doctrines of FBCI. While being asked to “integrate” his religious perspectives into his teaching, he was also told to avoid teaching any kind of doctrinal position because such teaching would intrude upon the parental role of religious indoctrination, in a school that markets itself to diverse religious backgrounds. (App. 103-104).

* * *

³ Tucker rejected the title “Chaplain” as applicable to that role.

November 18, 2020

VIA CM/ECF

Christopher M. Wolpert, Clerk of Court
United States Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 8257

Re: *Tucker v. Faith Bible Chapel Int'l*, No. 20-1230 (10th Cir.)

**Notice to Motion Panel that Appellee Has
Failed to Respond to the Pending Motion
to Modify**

Dear Mr. Wolpert,

On October 29, 2020, immediately after this Court granted Appellee Gregory Tucker 60 additional days to file his merits response brief, Appellant Faith Bible Chapel timely moved to modify that order to also grant a stay of the proceedings below. The fourteen-day window for Tucker to respond to Faith Bible's motion has passed without a response. See 10th Cir. R. 27.3(A)(4).

Tucker accordingly failed to rebut Faith Bible's showing that continuing to merits discovery and trial before resolving Faith Bible's church autonomy defenses would cause irreparable harm. Mot. to Modify at 1-2. He has likewise failed to show that a stay would cause him or the public any harm. Tucker's "failure to respond to [Faith Bible's] motion[] has its consequences," *Tolbert v. KPHN Radio*, 194 F.3d 1321,

at *2 (10th Cir. 1999) (unpublished table decision), including that the Court may “assume” Faith Bible’s “analysis is correct” for the limited purpose of granting the motion to modify. *Eaton v. Pacheco*, 931 F.3d 1009, 1031 (10th Cir. 2019).

Moreover, it is now clear that action by the Court is required quickly: Tucker has set merits-related depositions of Faith Bible’s senior leadership for December 8, 9, and 10, and served merits-related discovery requests. Faith Bible must now work over the Thanksgiving holiday to prepare witnesses and respond to discovery requests seeking production of, among other things, its internal religious deliberations, the investigation and resolution of internal religious disputes, and “all” internal and parental communications about the “Chapel Meeting” that Tucker led, including “any” “reactions” to the religious content of the chapel service. If a stay is not entered, an important part of this appeal will be irretrievably lost. *See* Mot. to Modify at 2-3.

Sincerely,

Word count: 281

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* * *