No. 22-741

IN THE

Supreme Court of the United States

FAITH BIBLE CHAPEL INTERNATIONAL, PETITIONER,
v.
GREGORY TUCKER, RESPONDENT.

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

BRIEF OF *AMICI CURIAE* ETHICS AND PUBLIC POLICY CENTER AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* ETHICS AND PUBLIC POLICY CENTER AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE IN SUPPORT OF PETITIONER

Amici curiae, Ethics and Public Policy Center and The Islam and Religious Freedom Action Team of the Religious Freedom Institute, respectfully submit that this Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.[1]

INTEREST OF THE *AMICI CURIAE*

Amicus curiae Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. A strong commitment to a robust understanding of religious liberty pervades EPPC's work. EPPC's HHS Accountability Project regularly submits regulatory comments and amicus briefs on religious liberty issues, and is led by two lawyers, Rachel Morrison and Eric Kniffin, with extensive religious liberty experience. EPPC Distinguished Senior Fellows George Weigel and Ed Whelan have written about the theological and constitutional aspects of religious liberty. EPPC's president, Ryan T.

[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief.

Anderson, has published several books and law review articles on religious liberty disputes. EPPC's Faith Angle Forum aims to strengthen reporting and commentary on how religious believers, religious convictions, and religiously grounded moral arguments affect American politics and public life.

Amicus curiae The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom of Muslims. To this end, the IRF engages in research, education, and advocacy on core issues including freedom from coercion in religion and equal citizenship for people of diverse faiths. The IRF explores and supports religious freedom by translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and by partnering with the Institute's other teams in advocacy.

EPPC's and IRF's interest in this case arises from the centrality of the ministerial exception to the First Amendment's parallel guarantees of the free exercise and non-establishment of religion. A religious group's choices as to who will lead its religious exercises like prayer and communal worship, and who will convey the tenets of religious faith, are at the very heart of religious exercise. Government interference in such decisions—including by allowing the judicial process to proceed beyond the point necessary to determine if the ministerial exception applies—undermines the protections afforded by the First Amendment and the

consequent limitations on the judicial branch of government. As this Court and other courts have cautioned, such judicial intrusions into religious organizations' internal affairs may chill religious exercise and distort religious communities' process of self-definition.

SUMMARY OF ARGUMENT

Until the Tenth Circuit's decision below and then the Second Circuit's decision in *Belya* v. *Kapral*¸ 45 F.4th 621 (2d Cir. 2022), courts were coalescing around a common approach to certain procedural issues related to the ministerial exception. First, as the cases cited by *amici* below confirm, *infra* n.2, "every federal or state appellate court to address the issue ha[d] characterized ministerial status as a question of law." *Tucker* v. *Faith Bible Chapel Int'l,* 53 F.4th 620, 628 (10th Cir. 2022) (Bacharach, J dissenting from the denial of en banc consideration). Second, courts agreed that—discovery—to the extent it is needed—should be bifurcated to focus on the ministerial exception first. See *infra* n.3 (collecting cases); see, *e.g.*, *Demkovich* v. *St. Andrew the Apostle Parish, Calumet City*, 3 F.4th 968, 983 (7th Cir. 2021) (en banc) (noting that the ministerial exception makes a threshold inquiry necessary and that this discovery is materially different from discovery to determine how that minister was treated); *Rweyemamu* v. *Cote*, 520 F.3d 198, 207 (2d Cir. 2008) (noting that a case in which the ministerial exception is implicated may only proceed where there is a limited inquiry and the court can prevent a wide-ranging intrusion into sensitive religious matters); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (explaining that discovery was

limited to focus on the nature of an associateship in pastoral care); *Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951, 957 (9th Cir. 2004) (noting the "restricted inquiry" of the affirmative defense of the ministerial exception).

The Second and Tenth Circuit's decisions represent a departure from what had been a consensus. The Tenth Circuit held that the ministerial exception is not a legal issue and therefore not appropriate for review under the collateral-order doctrine. *Tucker* v. *Faith Bible Chapel Int'l*, 36 F.4th 1021, 1029–1030, 1048 (10th Cir. 2022). And the Second Circuit showed where the Tenth Circuit's reasoning leads, because the district court in *Belya* refused to bifurcate discovery and the Second Circuit left that order untouched. See 45 F.4th at 628.

Both decisions are fundamentally at odds with this Court's analyses in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC* and *Our Lady of Guadalupe School* v. *Morrissey-Berru*, which demonstrate that the ministerial exception's function is to protect personal and organizational religious liberty, *and also* to protect government institutions from becoming entangled with religious disputes that the First Amendment recognizes they are incapable of resolving. See 565 U.S. 171, 189 (2012); 140 S. Ct. 2049, 2060 (2020). This structural function is consistent with the three main cases the Court discussed in *Hosanna-Tabor*. In each of those cases, the Court concluded that the state was categorically forbidden from revisiting religious decisions made by religious organizations.

Because the ministerial exception protects the judiciary from entangling itself in religious affairs

which it is incompetent to resolve, and not just the religious entity's right to choose its ministers free from the chilling effect of judicial regulation, the ministerial exception is analogous to official immunity. With regard to both complete and qualified immunity, the defendant is harmed by the very act of being sued. Here, *both* the judiciary and the religious entity are harmed by the lawsuit itself when a religious entity is dragged into the secular courts for exercising its right to select its ministers. See Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1867 (2018) (observing that the doctrine "imposes a disability on civil government with respect to specific religious questions").

The purposes of the ministerial exception answer the procedural questions at issue in *Tucker* and *Belya*. Because the very maintenance of litigation where the ministerial exception applies harms the structural and personal interests that the doctrine protects, the exception should be treated as a legal issue that can be resolved early in the case. Courts should address the doctrine expeditiously (as they do when resolving immunity questions) and limit discovery to whether the plaintiff is or was a ministerial employee. And if a court determines that the ministerial exception does not apply, the party asserting the exception should be allowed to immediately appeal under the collateral-order doctrine.

This case offers this Court an opportunity to clarify further the protections afforded by the ministerial exception and to give practical guidance on how those protections affect the procedure for applying the doctrine.

ARGUMENT

I. The ministerial exception protects the courts from exercising governmental authority to review religious determinations.

In *Hosanna-Tabor*, the Court determined that "it is impermissible for the government to contradict a church's determination of who can act as its ministers." 565 U.S. at 185. One reason for this conclusion is that according the state such power violates the Establishment Clause. *Id.* at 188–189.

This Court began its analysis of whether a ministerial exception exists by tracing the history of legal protections for religion in America. *Id.* at 182–187. The Court focused on three cases dating back nearly 150 years, all involving property disputes, and all of which recognized that the government is categorically prohibited from contradicting ecclesiastical decisions. *Id.* at 185–187.

In *Watson* v. *Jones*, 80 U.S. 679 (1871), this Court declined to interfere with a denomination's determination as to which faction of a church rightly controlled the church's property. There the Court stated:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers

> within the general association, is unquestioned. . . . It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. [*Id.* at 728–729.]

Accordingly, the Court adopted the common-law rule that courts could not review or overturn decisions by religious bodies on "questions of discipline, or of faith, or ecclesiastical rule, custom, or law." *Id.* at 727.

Some 80 years later, this Court declared that the decision in *Watson* "radiate[d] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). In *Kedroff*, the Court first recognized that the freedom to select clergy is protected under the First Amendment. See *Hosanna-Tabor*, 565 U.S. at 186; *Kedroff*, 344 U.S. at 116. Ecclesiastical questions, the Court declared, are "forbidden" to the "power of the state." *Kedroff*, 344 U.S. at 119.

This Court returned to the harm caused by the interjection of the courts into ecclesiastical or religious questions in *Serbian Eastern Orthodox Diocese for United States of America & Canada* v. *Milivojevich*, 426 U.S. 696 (1976). In *Milivojevich*, the Court determined that courts cannot "delve into the

various church constitutional provisions" because to do so would repeat the lower court's error of involving itself in "internal church government, an issue at the core of ecclesiastical affairs." *Id.* at 721.

In short, in the three cases that animated this Court's recognition of the ministerial exception in *Hosanna-Tabor*, the Court emphasized that the state, and courts in particular, are categorically forbidden from resolving religious disputes.

The Court's adoption of the ministerial exception applied this categorical prohibition to religious organizations' decisions about who will serve as the organizations' ministers. In *Hosanna-Tabor*, this Court recognized that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so" similarly enmeshes the state in the affairs of religious bodies in the same fashion as deciding doctrinal disputes. 565 U.S. at 188–189. Doing so "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs," thereby interfering with "a religious group's right to shape its own faith and mission through its appointments." *Id.* at 188. This in turn "violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 189. Because the Establishment Clause "prohibits government involvement in ecclesiastical matters," *id.*, it is "impermissible for the government to contradict a church's determination of who can act as its ministers," *id.* at 185.

In *Our Lady of Guadalupe School* v. *Morrissey-Berru*, this Court reaffirmed the structural nature of the ministerial exception and explained that "[s]tate

interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." 140 S. Ct. at 2060. Accordingly, "courts are *bound* to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* (emphasis added).

Thus, the ministerial exception protects religious liberties and the courts' structural interest in avoiding the establishment of religion. The federal courts of appeals have recognized the structural protection afforded by the ministerial exception and so have declined to allow parties to waive the doctrine and thereby drag courts into religious controversies by choice or neglect. *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015). Accord *Lee* v. *Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *Tomic* v. *Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated on other grounds*, *Hosanna-Tabor*, 565 U.S. 171.

II. Because of the protections afforded by the ministerial exception, it should be treated as a legal issue, and its application should be determined before courts reach the merits.

When the Court adopted the ministerial exception, it addressed only one procedural aspect of the doctrine. Before *Hosanna-Tabor*, courts were split on whether the ministerial exception was jurisdictional or an affirmative defense. This Court determined that the ministerial exception is an affirmative defense and not a jurisdictional bar. 565 U.S. at 195 n.4.

Before the Tenth Circuit's decision here and the Second Circuit's decision in *Belya*, courts were uniformly coalescing around a common approach towards some of the other procedural issues related to the ministerial exception. Generally, courts were treating the ultimate application of the exception as a legal issue well suited for early resolution and were bifurcating discovery to focus on that issue.

The rationale for the ministerial exception confirms that this approach is correct. The protection of personal religious liberty encompassed by the ministerial exception includes the recognition that it is not only the decisions made by the court that "impinge" on religious liberty but the "very process of inquiry" leading to those decisions that impinges on that liberty. *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). Indeed, "it is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.) (cleaned up).

The structural interest in avoiding the establishment of religion also commends limiting the scope of courts' involvement in cases before determining if the ministerial exception applies. Indeed, the ministerial exception is unlike most other affirmative defenses. Courts have no interest of their own in whether a party's claims are barred by unclean hands or whether the statute of limitations has expired. But because of the structural limitation imposed by the ministerial exception on the exercise of judicial authority, courts *do* have an interest in ensuring that the exception is applied even where the parties fail to raise the doctrine or where someone claims that they have waived it affirmatively. See, *e.g.*, *Lee*, 903 F.3d at 117–118, 123 (upholding application of the ministerial exception where trial court raised the issue *sua sponte*); *Grussgott* v. *Milwaukee Jewish Day School, Inc.*, 882 F.3d 655, 658 (7th Cir. 2018) (stating that "a religious institution does not waive the ministerial exception by representing itself to be an equal-opportunity employer"), *cert. denied*, 139 S. Ct. 456 (2018).

Accordingly, and as explained in more detail below, in cases where the exception may apply, (1) it should be characterized as a legal question, (2) discovery should be bifurcated to focus on that issue, (3) any trial should be similarly bifurcated, and (4) interlocutory appeals should be available under the collateral order doctrine.

A. Whether the ministerial exception applies is a legal question.

Before the Tenth Circuit's decision below, "every federal or state appellate court to address the issue ha[d] characterized ministerial status as a question of

law." *Tucker,* 53 F.4th at 628 (Bacharach, J dissenting from the denial of en banc consideration).[2] Even this

[2] See, *e.g.*, *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999) ("The status of employees as minister . . . remains a legal conclusion for this court."); *Conlon*, 777 F.3d at 833 (stating that "whether the [ministerial] exception attaches at all is a pure question of law"); *Fratello* v. *Roman Catholic Archdiocese of New York*, 175 F. Supp. 3d 152, 162 (S.D.N.Y. 2016) ("Whether the [ministerial] exception attaches is a pure question of law which this Court must determine for itself." (cleaned up)); *Grussgott*, 260 F. Supp. 3d at 1054 n.1 ("With due respect to [expert witness opining on whether plaintiff was a minister], application of precedent to a given factual scenario is a question of law, and the Court is the only expert permitted to address such questions."); *Ciurleo* v. *St. Regis Parish*, 214 F. Supp.3d 647, 650 (E.D. Mich. 2016) ("[W]hether the exception attaches at all is a pure question of law which this court must determine for itself."); *Guinan* v. *Roman Catholic Archdiocese of Indianapolis*, 42 F. Supp. 2d 849, 852 (S.D. Ind. 1998) ("The applicability of the ministerial exception is a question of law for the court."); *Miller* v. *Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174, 1181 (E.D. Wis. 2001) ("The applicability of the ministerial exception is a question of law for the court."); *Smith* v. *Raleigh Dist. of North Carolina Conference of United Methodist Church*, 63 F. Supp. 2d 694, 706 (E.D.N.C. 1999) ("The applicability of the ministerial exception is a question of law for the court."); *Alicea-Hernandez* v. *Archdiocese of Chicago*, No. 01 C 8374, 2002 WL 598517, at *4 (N.D. Ill. Apr. 18, 2002) ("[A]pplicability of the ministerial exception is a question of law for the court."); *Cannata* v. *Catholic Diocese of Austin*, No. A-10-CA-375 LY, 2011 WL 4352771, at *6 (W.D. Tex. Sept. 16, 2011), report and recommendation adopted, No. A-10-CV-375-LY, 2011 WL 7074303 (W.D. Tex. Oct. 21, 2011), aff'd, 700 F.3d 169 (5th Cir. 2012) ("Whether an employee of a religious institution is a 'minister' is a question of law for the court."); *Preece* v. *Covenant Presbyterian Church*, No. 8:13CV188, 2015 WL 1826231, at *3 (D. Neb. Apr. 22, 2015) ("The court must make a determination of the functions of a church employee. However, whether the

Court in *Hosanna-Tabor* and *Our Lady* approached the issue as a legal question. See Pet. at 24. And for good reason: treating the exception as a jury question would further enmesh the courts in the affairs of the church and inflict the very harm the exception is designed to protect. See *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) ("In this case, the EEOC's two-year investigation of [the] claim, together with the extensive pre-trial inquiries and the trial itself, constituted an impermissible entanglement with judgments that fell within the exclusive province of the Department of Canon Law as a pontifical institution."); *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 609 (Ky. 2014) ("Certainly, it is important 'that these questions be framed as legal questions and resolved expeditiously at the beginning of litigation to minimize the possibility of constitutional injury' and provide the litigants with a clear understanding of the litigation's track." (quoting Mark E. Chopko, Marissa Parker,

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exception attaches at all is a pure question of law which this court must determine for itself." (cleaned up)); *Kirby* v. *Lexington Theol. Seminary*, 426 S.W.3d 597, 608–609 (Ky. 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. Ct. App. 2010) (characterizing the applicability of the ministerial exception as a "question of law"); *Turner* v. *Church of Jesus Christ of Latter-Day Saint*s, 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."); *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).

Still A Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 292–293 (2012)). Moreover, the ultimate decision of whether the exception applies involves application of judicial precedent to the facts of the case, "and the Court is the only expert permitted to address such questions." *Grussgott*, 882 F.3d at 657.

The Tenth Circuit's contrary holding not only conflicts with these cases, it rests on faulty reasoning. The Tenth Circuit held that application of the ministerial exception is not a legal issue because an individual's status as a "minister" is a "fact-intensive inquiry." *Tucker,* 36 F.4th at 1029–1030. But that conclusion does not follow from that premise. The nature of the inquiry and the nature of the ultimate conclusion are different things: "[T]he inquiry is fact-dependent and considers the employee's title, qualifications, and responsibilities[,] [b]ut the ultimate question of ministerial status entails a matter of law." *Id.* at 1057 (Bacharach, J., dissenting).

Official immunity offers a useful analogy. The factual nature of the inquiry in qualified immunity cases has not stopped courts from treating the application of the doctrine as a legal issue. As the Tenth Circuit itself noted, "[t]here 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." *Id.* at 1035 n.8. The dissent aptly illustrates that this is exactly what the district court should have done here. See *id.* at 1059–66. The disputed facts in this case were not material. See *id.* Even when they were construed in Tucker's favor,

Tucker was still a minister under this Court's jurisprudence. See *id.* at 1066.

For these reasons, the Court should take this opportunity to clarify that application of the ministerial exception is a legal question well suited for early resolution.

B. If discovery is needed to decide if the ministerial exception applies, discovery should be limited to that issue.

If the application of the ministerial exception is not resolved by a motion to dismiss, courts should limit discovery to topics relevant to whether the ministerial exception applies. See Fed. R. Civ. P. 16(b)(3)(B)(ii), 26(b)(1). The reasons for this are twofold.

First, allowing broad discovery in an employment case involving a ministerial employee will result in inquiries into the minister's fitness for the position, the basis for the termination, and whether that basis was pretextual. These are precisely the inquiries that *Hosanna-Tabor* held that the government cannot make. 565 U.S. at 188–189.

Second, the "process of inquiry" harms the rights protected by the Religion Clauses, *Catholic Bishop of Chicago*, 440 U.S. at 502, and discovery is a principal means by which that harm is inflicted. See Mark E. Chopko, Marissa Parker, *Still A Threshold Question: Refining the Ministerial Exception Post*-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 293–294 (2012). Subjecting a religious organization to discovery about its choice of its ministers can result in the organization's leaders being deposed on matters of doctrine and religious orthodoxy, as well as the

organization's fidelity to its beliefs in practice. Discovery may also result in the adversarial inquiry into the spiritual beliefs and failings of religious persons. Such inquiry may chill a religious organization's articulation and practice of its faith if it knows that it might face discovery. See *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 343–344 (1987) (Brennan, J., concurring) ("While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation."); *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.").

This problem is compounded by the possibility of contentious motion practice where such information is likely to be made part of the public record. *Bernstein* v. *Bernstein Litowitz Berger & Grossmann LLP,* 814 F.3d 132, 140–141 (2d Cir. 2016) (recognizing presumption of public access to documents filed in a civil proceeding); *Center for Auto Safety* v. *Chrysler Grp., LLC*, 809 F.3d 1092, 1096–1098 (9th Cir. 2016) (recognizing strong presumption of public access to documents filed in a civil proceeding, and requiring a

party to demonstrate a compelling reason for documents to be kept under seal).

This Court should provide guidance that, where discovery is necessary to determine whether the ministerial exception is applicable, district courts should limit the discovery to that issue. Courts should not allow discovery that may be moot if the ministerial exception applies. Such discovery carries with it the very harms the ministerial exception is intended to prevent.

Indeed, this was the approach the lower courts uniformly took before *Belya*. See *Fitzgerald* v. *Roncalli High Sch., Inc.*, No. 1:19-cv-04291RLYTAB, 2021 WL 4539199, at *1 (S.D. Ind. Sept. 30, 2021) ("courts regularly bifurcate discovery in ministerial cases"); see also *Presbyterian Church (U.S.A.)* v. *Edwards*, 566 S.W.3d 175, 179 (Ky. 2018) (allowing merits discovery before resolving a church's ministerial exception defense "would result in a substantial miscarriage of justice" since the defense "includes protection against the cost of trial and the burdens of broad-reaching discovery" (cleaned up)).[3] But see *Belya*, 45 F.4th at

[3] Accord, *e.g.*, *Sterlinski* v. *Catholic Bishop of Chicago*, No. 16 C 00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017) ("[D]iscovery must move forward, but only on a limited basis. Before launching into potentially intrusive merits discovery about the firing—the very type of intrusion that the ministerial exception seeks to avoid—it is sensible to limit discovery to the applicability of the ministerial exception."); *Herzog* v. *St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 671 (N.D. Ill. 2012) ("The Court allowed limited discovery to determine whether the ministerial exception applies."); *Collette* v. *Archdiocese of Chicago*, 200 F. Supp. 3d 730, 735 (N.D. Ill. 2016) ("To help focus the discovery to be taken in this phase, the Court notes that the

628 (observing district court denied motion to bifurcate discovery).

It is also the approach this Court has directed trial courts to employ in the official immunity context. For example, in *Anderson* v. *Creighton*, 483 U.S. 635, 646 n.6 (1987), this Court noted where discovery is necessary to resolve whether qualified immunity applies, "any such discovery should be tailored specifically to the question of . . . qualified immunity." Accordingly, the lower courts will allow limited discovery to determine if qualified immunity wholly bars a suit. See, *e.g.*, *Backe* v. *LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012) (discussing the "careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense."); *Solomon* v. *Petray*, 795 F.3d 777, 791 (8th Cir. 2015) ("Limited discovery is sometimes appropriate to resolve the qualified immunity question."

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scope of the issue subject to discovery is narrow."); *Lishu Yin* v. *Columbia Int'l Univ.*, No. 3:15-CV-03656-JMC, 2017 WL 4296428, at *6 (D.S.C. Sept. 28, 2017) ("[T]his matter is referred . . . for the purpose of developing a scheduling order allowing the parties to conduct limited discovery to determine whether the ministerial exception applied to Plaintiff while employed with Defendant."); *Stabler* v. *Congregation Emanu-El of the City of New York*, No. 16 CIV. 9601 (RWS), 2017 WL 3268201, at *7 (S.D.N.Y. July 28, 2017) ("The parties will meet and confer with respect to discovery and motion schedule limited to the ministerial exception defense."); *Fassl* v. *Our Lady of Perpetual Help Roman Catholic Church*, No. CIV.A. 05-CV-0404, 2005 WL 2455253, at *1 (E.D. Pa. Oct. 5, 2005) ("During oral argument, the Court also issued an order, on the record, permitting the parties to conduct very limited discovery . . . ."); *Fratello*, 175 F. Supp. 3d at 161 (observing the Court "directed the parties to engage in limited discovery on the issue").

(cleaned up)); *Robertson* v. *Lucas*, 753 F.3d 606, 623 (6th Cir. 2014) ("Discovery is disfavored in this context, but 'limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity.'" (quoting *Crawford–El* v. *Britton*, 523 U.S. 574, 593 n.14 (1998))). Given the structural protections served by the ministerial exception, the same approach should be taken here.

C. If trial is necessary, courts should bifurcate trial on the ministerial exception from trial on the merits.

The use of Rule 56 as the vehicle for determining the applicability of the ministerial exception freights the risk that a genuine issue of material fact may exist that precludes summary judgment on the ministerial exception. Although *amici* are unaware of any cases where this circumstance has arisen, presumably such factual disputes would be resolved at trial. Under a proper standard for the ministerial exception, such occasions will be quite rare. The same reasons that warrant limited discovery on the ministerial exception's application also counsel in favor of a district court exercising its discretion to order a separate trial limited to those disputed facts. Fed. R. Civ. P. 42(b) (allowing courts to order a separate trial of a separate issue to avoid prejudice and expedite resolution).

D. Orders denying the application of the ministerial exception should be immediately appealable under the collateral-order doctrine.

Where a district court concludes that the ministerial exception does not apply, such decisions should be immediately appealable on an interlocutory basis under the collateral-order doctrine. This Court has made clear that the litigation process itself may excessively entangle government, including the courts, in religion. There is no unringing the bell after the courts have become excessively entangled in a religious controversy because they erred in declining to apply the ministerial exception and dismiss the case.

Appellate jurisdiction typically arises either from a district court's final judgment, 28 U.S.C. § 1291, or the district court's certification of an issue for interlocutory appeal, 28 U.S.C. § 1292(b). A "narrow and selective" class of orders, however, are appealable because they meet the requirements of the collateral-order doctrine. *Will* v. *Hallock*, 546 U.S. 345, 350 (2006). Appellate jurisdiction is proper over "collateral" rulings that are sufficiently final and distinct from the merits to be appealable before a final judgment. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The collateral-order doctrine thus contains three elements: (1) the order conclusively determines the disputed question, (2) the order resolves an important issue completely separate from the merits of the action, and (3) will be effectively unreviewable on appeal from the final judgment. *Johnson* v. *Jones*, 515 U.S. 304, 310 (1995). The Court has found the last

element to mean "that failure to review immediately may well cause significant harm." *Id.* at 311.

The ministerial exception meets all three of these elements. First, a district court's order conclusively determines the religious body's immunity from suit. Second, the ministerial exception is a First Amendment issue which is completely separate from the merits of any employment law claim. Third, awaiting an appeal from the final judgment will make the order effectively unreviewable. By that point, the religious body will have already been subject to a burdensome discovery, trial, and post-judgment motions and the judiciary, and thus the government, will have already impermissibly entangled itself in ecclesiastical issues.

Here again, qualified immunity provides a useful analog. See *McCarthy* v. *Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). "[P]retrial orders denying qualified immunity generally fall within the collateral order doctrine." *Plumhoff* v. *Rickard*, 572 U.S. 765, 772 (2014). This is because orders denying qualified immunity "conclusively determine whether the defendant is entitled to immunity from suit; th[e] ... issue is both important and completely separate from the merits of the action, and th[e] question could not be effectively reviewed on appeal from a final judgment[.]" *Id.* Qualified immunity is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth,* 472 U.S. 511, 526 (1985)*;* see also *Plumhoff,* 572 U.S. at 772 (noting that if an order denying qualified immunity cannot be reviewed, "the immunity from standing trial will have been irretrievably lost.").

The same is true of the ministerial exception. The harm caused to the defendant by the wrongful denial of the ministerial exception is the same harm incurred by the defendant in the qualified immunity context. The defendant loses the First Amendment protection against suit, and the protection from a judicial determination on the religious issue of who should be an organization's ministerial employee. While a post-judgment appeal can undo any ultimate judgment, it cannot restore the protections of the ministerial exception as guaranteed by the Religion Clauses. The plaintiff and the court will have already trolled through the religious organization's beliefs and practices. That toothpaste cannot be put back in the tube.

In *Mitchell,* 472 U.S. at 526, this Court determined that a similar partial restoration of qualified immunity was unacceptable. And in the context of the ministerial exception, the harm is much worse. First, the defendant loses constitutional, not merely common-law, rights. Second, because the ministerial exception protects against the government's intrusion into quintessential religious questions—who a religious organization's ministers are—the constitutional harm occurs because of the judicial proceedings. As noted by the Petition, this is precisely the rationale offered by the courts that have allowed interlocutory appeal of this issue. See Pet. at 26–27.

Accordingly, an order declining to apply the ministerial exception should be immediately appealable under the collateral-order doctrine like decisions denying qualified immunity.

CONCLUSION

For the reasons given above, the Court should grant the petition for certiorari and clarify the procedural issues surrounding application of the ministerial exception.

Respectfully submitted,

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