No. 20-1230

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

v.

GREGORY TUCKER,
Plaintiff-Appellee.

On Appeal from the
United States District Court for the District of Colorado
No. 1:19-cv-01652-RBJ-STV
Honorable R. Brooke Jackson

AMICUS BRIEF IN SUPPORT OF DEFENDANT-APPELLANT FAITH BIBLE CHAPEL'S PETITION FOR REHEARING EN BANC, BY ASSOCIATION OF CHRISTIAN SCHOOLS INT'L, COLORADO CATHOLIC CONFERENCE, CHRISTIAN LEGAL SOCIETY, THE LUTHERAN CHURCH–MISSOURI SYNOD, THE CARDINAL NEWMAN SOCIETY, BENEDICTINE COLLEGE, AND MAUR HILL-MOUNT ACADEMY

Christian M. Poland
BRYAN CAVE LEIGHTON PAISNER LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601-3315
312-602-5085
christian.poland@bclplaw.com

Counsel for Amici

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each amicus party represents that it does not have any parent entity and does not issue stock.

Respectfully submitted,

/s/ Christian Poland

Christian Poland

BRYAN CAVE LEIGHTON PAISNER LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601-3315
(312) 602-5085
christian.poland@bclplaw.com

Counsel for Amici

Dated: June 28, 2022

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

IDENTITY AND INTERESTS OF AMICI CURIAE v

INTRODUCTION AND SUMMARY OF ARGUMENT vi

ARGUMENT 1

I. The Ministerial Exception Is a Threshold Issue That District Courts Must Adjudicate Separately from Merits Issues 1

A. The Ministerial Exception Is Rooted in Constitutional Principles That Limit the Authority of the Courts 1

B. The Ministerial Exception Is Akin to Qualified Immunity 2

C. The Burden of Litigation Alone Can Eviscerate the Key Purposes of the Ministerial Exemption and Be Unconstitutional 3

D. A Court Must Determine with Finality that the Ministerial Exception Does Not Apply Before It Permits Merits Discovery or a Merits Trial 5

II. Immediate Appellate Review Is Available Where, As Here, a District Court Decision Rejects a Ministerial Exception Defense 7

CONCLUSION 9

CERTIFICATE OF COMPLIANCE 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Page(s)

Cases

Demkovich v. St. Andrew the Apostle Parish,
3 F.4th 968 (7th Cir. 2021) (en banc) 3

Duquesne Univ. of the Holy Spirit v. NLRB,
947 F.3d 824 (D.C. Cir. 2020) 4

EEOC v. Catholic Univ. of Am.,
83 F.3d 455 (D.C. Cir. 1996) 5

Fratello v. Archdiocese of New York,
863 F.3d 190 (2d Cir. 2017) 7

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 2

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC,
565 U.S. 171 (2012) 1, 3, 6, 7

Lee v. Sixth Mount Zion Baptist Church,
903 F.3d 113 (3d Cir. 2018) 1

Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.,
885 F.3d 659 (10th Cir. 2018) 8

McCarthy v. Fuller,
714 F.3d 971 (7th Cir. 2013) 2, 3, 8, 9

Mitchell v. Forsyth,
472 U.S. 511 (1985) 8

NLRB v. Catholic Bishop,
440 U.S. 490 (1979) 6

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S. Ct. 2049 (2020) 1, 3

Pearson v. Callahan,
555 U.S. 223 (2009) 2

Rayburn v. Gen. Conference of Seventh-Day Adventists,
772 F.2d 1164 (4th Cir. 1985) 5

Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich,
426 U.S. 696 (1976) 6

Skrzypczak v. Roman Catholic Diocese,
611 F.3d 1238 (10th Cir. 2010) 2, 6

Sterlinski v. Catholic Bishop of Chicago,
934 F.3d 568 (7th Cir. 2019) 7

Sterlinski v. Catholic Bishop of Chicago, No. 16 C 00596,
2017 WL 1550186 (N.D. Ill. May 1, 2017) 7

Other Authorities

First Amendment .... passim

Fed. R. Civ. P. 8(c)(1) 2

IDENTITY AND INTERESTS OF AMICI CURIAE [1]

The amicus parties are the Association of Christian Schools International, the Colorado Catholic Conference, the Christian Legal Society, The Lutheran Church–Missouri Synod, The Cardinal Newman Society, Benedictine College, and Maur Hill-Mount Academy. (Detailed descriptions of each party are included in their motion for leave to file this brief.) They seek to represent the interests of religious educational institutions, and religious organizations generally, that may face claims similar to those brought against Appellant Faith Bible Chapel, to ensure that such institutions are protected from intrusive litigation that violates the constitutional protection ensured by the First Amendment's Religion Clauses. Through their own experiences, the amicus parties understand the importance of the proper application of the religious exemptions and the requirement that courts avoid improper entanglement in a religious organization's employment decisions.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D), amici state that permission to file this brief was sought by amici's motion for leave to file it, and all parties consent to its filing. Amici respond in the negative to the disclosures requested in FRAP 29(a)(4)(E).

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutionally derived "ministerial exception," recognized by the Supreme Court in *Our Lady of Guadalupe* and *Hosanna-Tabor* limits judicial authority and is a form of immunity enjoyed by religious entities regarding employment disputes involving key religious employees. When the ministerial exception is invoked, courts must narrow discovery to what is necessary to adjudicate the exception through a dispositive motion before permitting merits discovery (and certainly before trial). If a district court strays outside these constitutional boundaries, interlocutory appeal is available because the ministerial exception's immunity is irreparably eviscerated and effectively unreviewable upon final judgment.

This Court's 2-1 panel decision, 2022 WL 2035804 (10th Cir. June 7, 2002) ("*Tucker*") commits several errors. It treats the ministerial exception as any other affirmative defense. It rejects the immunity-like nature of the exception, which justifies interlocutory review. It says the applicability of the exception is a fact question for the jury, instead of a key constitutional issue for court resolution. It ignores the unconstitutional burdens and intrusion of litigating religious issues, which numerous other circuits have readily recognized. It refuses to acknowledge that the ministerial exception is a "structural" limitation on court powers. It declines to exercise collateral-order-doctrine jurisdiction, even though the *Cohen* factors are satisfied, and other circuits have done so in similar cases. And it leaves constitutional

religious defenses to be reviewed only after final judgment, when irreparable harm to religious bodies will have necessarily occurred.

If the *Tucker* decision remains in place, religious entities in the Tenth Circuit will be deprived of the First Amendment rights enjoyed in nearly every other circuit. Thousands of religious schools and organizations will face severe and unprecedented risks to their ministry and their religious autonomy. The amicus parties therefore ask that Faith Bible Chapel's Petition for Rehearing En Banc (the "Petition") be granted.

ARGUMENT

I. The Ministerial Exception Is a Threshold Issue That District Courts Must Adjudicate Separately from Merits Issues

A. The Ministerial Exception Is Rooted in Constitutional Principles That Limit the Authority of the Courts

The ministerial exception, unanimously recognized by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012), and applied again in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), is grounded in both the Free Exercise and Establishment Clauses of the U.S. Constitution's First Amendment. *See* 565 U.S. at 188. The Free Exercise Clause ensures that each religious group maintains control over "the selection of those who will personify its beliefs" and "protects a religious group's right to shape its own faith and mission through its appointments." *Id.* The Establishment Clause "prohibits government involvement in such ecclesiastical decisions." *Id.* These protections impose structural limitations on the courts and the adjudicatory process.

Courts consistently hold that the ministerial exception limits the judiciary's power to consider matters touching on religious expression, including the selection, discipline, and termination of leaders or message-bearers employed by a religious organization. *See* Petition at 8-14 (citing numerous cases). This is because the Religion Clauses set "structural" limits on what courts may properly adjudicate. *Lee v. Sixth*

Mount Zion Baptist Church, 903 F.3d 113 (3d Cir. 2018). Thus, the nature of the ministerial exception defense shows that it must be courts' priority focus at each step of any necessary litigation.

B. The Ministerial Exception Is Akin to Qualified Immunity

The ministerial exception is no ordinary affirmative defense. Typically, affirmative defenses have no constitutional basis. *See* Fed. R. Civ. P. 8(c)(1). By contrast, the ministerial exception's First Amendment foundation has led several courts, including this Court, to analogize the exception to a qualified immunity. *See, e.g.*, *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1242 (10th Cir. 2010); Petition at 9-12 (citing cases). Qualified immunity ensures that the fear and burden of litigation cannot be used to upset the balance of important rights. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). For example, it shields public officials from the social costs of litigation including legal expenses, diversion from public duties, and "the danger that fear of being sued will dampen the ardor of all but the most resolute [public officials]." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (cleaned up). When qualified immunity applies, courts process the protected party's defenses with enhanced priority. *See id.* at 818. For similar reasons, courts treat the ministerial exception and other religious-autonomy doctrines as a form of immunity. In *McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013), the district court had ruled that a jury would decide whether the defendant was a member of a religious order, which, if answered in the affirmative, would be "rejecting the

contrary ruling of the religious body … authorized … to decide such matters." *Id*. at 976. The Seventh Circuit granted interlocutory review and reversed: "The conditions for collateral order review are satisfied ..., the district judge's ruling … being closely akin to a denial of official immunity. A secular court may not take sides on issues of religious doctrine." *Id*. at 975 (citing *Hosanna–Tabor*).

C. The Burden of Litigation Alone Can Eviscerate the Key Purposes of the Ministerial Exemption and Be Unconstitutional

The burden of litigating the issues raised by the ministerial exception can itself be an unconstitutional imposition of governmental authority over a religious entity. In a concurring opinion in *Hosanna-Tabor*, which was later adopted by the majority in *Our Lady*, *see* 140 S. Ct. at 2064, Justices Alito and Kagan explained that subjecting to judicial review a religious body's determination of the requirements for its leaders amounts to an unconstitutional inquiry:

> Hosanna–Tabor believes that the religious function that respondent performed made it essential that she abide by the doctrine of internal dispute resolution ... and the civil courts are in no position to second-guess that assessment[;] … a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees.

565 U.S. at 206; *see also Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968 (7th Cir. 2021) (en banc) (expressing grave concern over "the prejudicial effects of incremental litigation" on a religious entity, which is in part why courts must "stay out of employment disputes involving

those holding certain important positions with churches and other religious institutions" [quoting *Our Lady*, 140 S. Ct. at 2060]); *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 835 (D.C. Cir. 2020) (rejecting the NLRB's assertion of jurisdiction over a Catholic university because even the process of determining the university's religious nature and faculty members' roles in the university's religious mission would "impinge on rights guaranteed by the Religion Clauses.")

Protecting religious groups' immunity from the burdens of unconstitutional litigation is essential. The amicus parties strongly disagree with *Tucker*'s statement that "[t]here is no … evidence that alternatives to an interlocutory collateral-order appeal now would be onerous to Faith Christian or, indeed, to most churches in America." 2022 WL 2035804 at *11 n.12. Speaking for thousands of schools and churches in the Tenth Circuit (and across the country), the amicus parties can state unequivocally that permitting appellate review of religious defenses only after trial is not merely onerous, but likely financially devastating to many schools and parishes. Without the protection of religious-autonomy immunity, and interlocutory appeal to correct erroneous district court rejection of such defenses, many religious entities would be faced with the unfair dilemma of either not exercising their religious beliefs or closing their doors. Religious schools often operate on limited budgets, in which tuition charges provide only a portion of the revenue needed to run the school, with the balance provided by donors. To tell a religious school that it is constitutionally entitled to fire a teacher-minister based on non-compliance with the school's religious standards, but that it will cost the school several-

hundred-thousand dollars in legal fees if the court finds any issues of fact for trial, is to leave the school with an impossible choice: retain religiously antagonistic personnel to avoid the cost of litigation, or preserve religious identity but risk bankrupting the school with legal fees. But it is not just legal fees that create an unconscionable dilemma; the intrusion on their religious affairs will inevitably deter religious groups from taking religious actions that are otherwise fully protected by the Free Exercise clause. *See EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (noting that being "deposed, interrogated, and haled into court" would "inevitably affect" how a religious school defines its teacher criteria); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (if religious organizations face the possibility of "the full panoply of legal process" whenever they discharge a minister, they will inevitably "make [those choices] with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments").

D. A Court Must Determine with Finality that the Ministerial Exception Does Not Apply Before It Permits Merits Discovery or a Merits Trial

Tucker rejected the idea that the ministerial exception protects against anything but liability, leaving religious autonomy claims to face jury decisions just like run-of-the-mill employment discrimination cases. This approach is counter to Supreme Court principles, has been rejected by numerous federal circuits, flies in the face of standard

605409490.5

ministerial-exception practices, and would create immense harm to religious groups.

The Supreme Court's decisions strongly suggest that once the ministerial exception has been invoked, discovery and trial do not proceed as usual. In their *Hosanna-Tabor* concurrence, Justices Alito and Kagan wrote, "the mere adjudication of" factual questions about church teaching can "pose grave problems for religious autonomy." 565 U.S. at 205-06. In rejecting the NLRB's assertion of jurisdiction over certain Catholic secondary schools, the Court noted that the "very process of inquiry" can violate the First Amendment. *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). Other rulings suggest the same. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 718 (1976) (a court's "detailed review of the evidence" regarding internal church procedures is "impermissible" under the Religion Clauses).

The federal courts of appeal, including this Court, have reinforced the principle that focused discovery is not only proper but necessary to honor the protection provided by the religious autonomy doctrines. *See, e.g.*, *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238, 1245 (10th Cir. 2010) ("The types of investigations a court would be required to conduct in deciding Title VII claims brought by a minister could only produce by their coercive effect the very opposite of that separation of church and State contemplated by the First Amendment." [cleaned up]); *Sterlinski v. Catholic Bishop*, 934 F.3d 568, 570 (7th Cir. 2019) ("Only by subjecting religious doctrine to discovery and, if necessary, jury trial, could the judiciary reject a church's characterization of its own theology

and internal organization. Yet it is precisely to avoid such judicial entanglement in, and second-guessing of, religious matters that the Justices established the rule of *Hosanna-Tabor*."); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 198 (2d Cir. 2017) (after the district court could not determine whether the ministerial exception applied on the archdiocese's motion to dismiss, it "appropriately ordered discovery limited to" the applicability of the exception).

District courts typically honor these principles by bifurcating discovery and then entertaining motions for summary judgment on the ministerial exception and other constitutional doctrines. *See, e.g.* *Sterlinski v. Catholic Bishop of Chicago*, No. 16C00596, 2017 WL 1550186, at *5 (N.D. Ill. May 1, 2017) (noting that it is standard practice to "limit discovery to the applicability of the ministerial exception"). The ministerial exception exists to avoid judicial entanglement in the internal affairs of religious institutions, and bifurcating discovery serves that end.

In holding that that the ministerial exception only protects against liability, provides no form of immunity from standing trial, and is like every other affirmative defense, *Tucker* conflicts with all of the above authorities.

II. Immediate Appellate Review Is Available Where, As Here, a District Court Decision Rejects a Ministerial Exception Defense

When a district court declines to apply the ministerial exception, review under the collateral-order doctrine is available and warranted.

The collateral-order doctrine allows for appeal of judicial decisions that (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment. *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659 (10th Cir. 2018). *Tucker* agreed that the second element was "clearly satisfied," 2022 WL 2035804 at *10, but the other two are as well. The district court's refusal to grant summary judgment on the ministerial exception conclusively determined that Faith Bible had no ministerial exception "immunity" and was subject to merits trial. *See Mitchell v. Forsyth*, 472 U.S. 511, 537 (1985) (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"). And, of course, the question of whether Faith Bible has a right not to stand trial is unreviewable after it has already been tried.

Other federal circuits have held that collateral-order-doctrine jurisdiction is available to review rejected claims of religious autonomy. For example, the Seventh Circuit in *McCarthy* allowed such an appeal to review an Establishment Clause defense arising from a district court decision that certain religious disputes should go to trial. The court explained that even a jury verdict on the judgments of a religious order were impermissible:

> Then there would be a final judgment of a secular court resolving a religious issue. Such a judgment could cause confusion, consternation, and dismay in religious circles. The commingling of religious and secular justice would violate not only the injunction in Matthew 22:21 to "render unto

> Caesar the things which are Caesar's, and unto God the things that are God's," but also the First Amendment, which forbids the government to make religious judgments. The harm of such a governmental intrusion into religious affairs would be irreparable, just as in the other types of case in which the collateral order doctrine allows interlocutory appeals.

714 F.3d at 976.

Thus, contrary to *Tucker*'s holding, Faith Bible's appeal warranted collateral-order review.

CONCLUSION

Tucker is contrary to well-settled law. It also places severe burdens on religious groups and permits unconstitutional interference with their religious autonomy. The amicus parties therefore ask that Faith Bible Chapel's Petition for Rehearing En Banc be granted, and that *Tucker* be vacated pending review by the full Court.

June 28, 2022

Respectfully submitted,

/s/ Christian Poland

Christian Poland

BRYAN CAVE LEIGHTON PAISNER LLP
161 N. Clark St., Suite 4300
Chicago, IL 60601-3315
(312) 602-5085
christian.poland@bclplaw.com

Counsel for Amici

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,594 words, according to a count performed by Microsoft Word.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

Dated: June 28, 2022

/s/ Christian Poland
Christian Poland

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2022, the foregoing amicus brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Christian Poland
Christian Poland