No. 20-1230

In the

United States Court of Appeals For the Tenth Circuit

FAITH BIBLE CHAPEL INTERNATIONAL,

Appellant,

v.

GREGORY TUCKER,

Appellee.

On Appeal from the United States District Court
for the District of Colorado
Judge R. Brooke Jackson
Civil Action No. 19-cv-1652-RBJ-STV

BRIEF OF RELIGIOUS LIBERTY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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STATEMENT OF IDENTITY AND INTEREST[1]

This brief focuses on hearing ministerial exception appeals as a collateral order. The *amici* are law professors whose scholarship, teaching, and practice focus on the Religion Clauses of the First Amendment. For decades, these professors have closely studied constitutional law and religious liberty and have published numerous books and scholarly articles on the topic and addressed it in litigation. The *amici* bring a deep understanding of the Supreme Court's First Amendment jurisprudence that may help the Court resolve the parties' claims. *Amici* share an interest in advancing the understanding of how courts should handle ministerial exception arguments as a matter of civil and appellate procedure.

[1]No party's counsel authored this brief in part or in whole. No party or party's counsel contributed money to fund preparing or submitting this brief. No person other than the *Amici Curiae* or their counsel contributed money that was intended to fund preparing or submitting the brief. The *Amici* have received consent from the Appellant to file this brief. *Amici* reached out to the Appellant for their consent but did not receive a response.

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The ministerial exception raises many challenging issues for courts, including who qualifies for the exception, which claims are subject to the

exception, and how fact-finding should occur. The *amici* have a range of views, including some disagreements, on these and other questions going to the merits of the ministerial exception. Crucially, however, all *amici* agree that the First Amendment supports early resolution of the ministerial exception as a threshold legal issue, subject to interlocutory appeal.

ARGUMENT

The panel majority below wrongly holds that the ministerial exception is not subject to interlocutory appeal as a collateral order. This error entangles the court in the internal governance of a religious organization. Because such entanglement violates the First Amendment and raises questions of substantial importance, *amici* respectfully request this Court grant rehearing en banc to consider the ministerial exception as a properly raised collateral order.

I. The ministerial exception should be resolved early in litigation and subject to interlocutory appeal as a collateral order.

In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), the unanimous Supreme Court located a robust ministerial exception in both Religion Clauses. While the Court concluded in a footnote that "the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar," *id.* at 195 n.4, that issue was not briefed and argued. Allowing litigation to continue when the lower court should have recognized the constitutional import of the ministerial exception will compound the injury via church-government entanglement the Supreme Court in *Hosanna-Tabor* found must not occur in litigation in full.

This Circuit has repeatedly recognized the constitutional protections underlying the ministerial exception. In *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002), this Court recognized that the defense "prevents adjudication" of certain cases because the First Amendment "protects the fundamental right of churches to decide for themselves matters of church government, faith, and doctrine." *Id.* at 654, 656. This Circuit subsequently applied the lessons of *Bryce* to a ministerial exception dispute in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243 (10th Cir. 2010) (employment decisions involving ministers must be "free from the interference of civil employment laws"). In this case the Court should give full meaning to the protections of the ministerial exception by recognizing this as an appropriately lodged interlocutory appeal.

The protection afforded by the ministerial exception arises from the broader and older principle that civil courts lack the competence to decide essentially religious issues. *See Watson v. Jones*, 80 U.S. 679, 729 (1872) (referring to the lack of competence of civil courts on matters of "ecclesiastical law and religious faith"). That the ministerial exception is an affirmative defense does not preclude the threshold determination,

when needed, including by interlocutory appeal when a trial court declines to apply the defense at the summary judgment phase.

As an affirmative defense, the ministerial exception is *sui generis*. The defense derives from a constitutional imperative grounded in the Religion Clauses of the First Amendment. As required by the First Amendment, the ministerial exception "imposes a disability on civil government with respect to specific religious questions." Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 Fordham L. Rev. 1847, 1867 (2018); *see also* Carl H. Esbeck, *After* Espinoza*, What's Left of the Establishment Clause?*, 21 Fed. Soc. Rev. 186, 202 (2020) ("[T]he defense operates like an immunity from suit as to certain discrete subject matters that go to a religious organization's control over the doctrine, polity, and personnel that execute its present vision or determine its future destiny.").

Courts should treat the resolution of the ministerial exception in light of the constitutional basis of the rule. In other words, "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…" Mark E. Chopko & Marissa Parker, *Still A Threshold Question:*

Refining the Ministerial Exception Post-Hosanna-Tabor, 10 First Amend. L. Rev. 233, 292 (2012). In this way, the robust constitutional backing for the ministerial exception distinguishes it from how courts treat other affirmative defenses.

II. The court erred in holding that the Court does not have jurisdiction to consider the ministerial exception on interlocutory appeal.

The Supreme Court recognized in *Hosanna-Tabor* that the ministerial exception serves as a complete bar to suit rather than merely a defense to liability. *Hosanna-Tabor*, 565 U.S. at 196. Even before *Hosanna-Tabor*, this Circuit has interpreted the ministerial exception to "prevent[] adjudication of Title VII cases brought by ministers against churches." *Bryce*, 286 F.3d at 656; s*ee also Skrzypczak*, 611 F.3d at 1246 (holding that the ministerial exception serves as a bar to suit). While the panel majority below conceded that "[i]f the employee is a minister, suit over the employment discrimination claims ends[,]" it disregarded this command by holding that the exception should not be determined at the outset of the litigation. *See Tucker v. Faith Bible Chapel Int'l*, 2022 WL 2035804, at *14 (10th Cir. June 7, 2022).

For the following reasons, *Amici* urge this Court to reverse the panel's decision and consider this appeal as a properly raised collateral order.

A. The ministerial exception should be resolved early in litigation because it is a question of law that serves a value of higher order.

In holding that the ministerial exception is not a proper issue for interlocutory appeal, the panel majority placed undue emphasis on the factual inquiries that underly the question of whether a person is a minister for purposes of the ministerial exception. *See Tucker*, 2022 WL 2035804, at *5. While there are admittedly some initial factual determinations that must be made, *see Tucker*, 2022 WL 2035804, at *28 (dissenting opinion), the ultimate question of "whether the exception attaches at all is a pure question of law." *Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829, 833 (6th Cir. 2015).

The panel majority glosses over the important role of the ministerial exception in preventing judicial interference into the internal affairs of religious organizations. By deciding that in its judgment requiring Faith Bible Chapel to litigate this case will not amount to "excessive" entanglement into a religious organization's internal governance, the court is implicitly acknowledging that its decision *does* to some extent entangle the court with religion. *See Tucker*, 2022 WL 2035804, at *18. But the court's focus on "excessive entanglement misses the very reason underlying the ministerial exception. The exception exists because "the

Establishment Clause limits the power of the government not only to issue and enforce a binding judgment [against religious organizations] on [ministerial employment] matters but also merely to entertain such questions." Smith & Tuttle, *supra*, at 1881. Thus, the court's focus on the level of entanglement between the courts and religion is inapposite; the very purpose of the ministerial exception is to prevent entanglement in the sense of civil interference in internal matters of church governance.

B. The ministerial exception warrants interlocutory appeal for substantially the same reasons as qualified immunity, which has been subject to interlocutory appeal for decades.

The Supreme Court has long held that denials of summary judgment based on qualified immunity are immediately appealable under the collateral-order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) ("[Q]ualified immunity questions should be resolved at the earliest possible stage of a litigation[.]"). Many of the jurisprudential reasons for hearing qualified immunity appeals prior to final judgment also apply to the ministerial exception.

Qualified immunity shields government officials from suit based on good faith performance of their duties, so long as those acts do not "violate

clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If a trial court denies qualified immunity at the summary judgment phase the officer must go through the burdensome discovery on the merits and trial process before a final, appealable judgment could enter. Interlocutory appeal allows the "immunity from suit" to protect officers from the harms of continuing through litigation to final judgment when immunity should have been granted. *Mitchell*, 472 U.S. at 526.

The doctrines are similar in their prudential goals and reasons for needing resolution as a threshold matter. First, 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. Consider, if a trial court denies summary judgment based on the ministerial exception, and that decision was erroneous, the "absence of an avenue for immediate appeal will require the court not only to permit discovery about, but to resolve, quintessentially religious questions." Smith & Tuttle, *supra*, at 1881. But the Establishment Clause prohibits courts from ruling on the validity, meaning, or importance of a religious question or dispute. *See Widmar v.*

Vincent, 454 U.S. 263, 271–72 n.11 (1981) (discussing entanglement of government and religion).

Second, both doctrines aim to protect an institution quite apart from the immediate context of the disputed liability between the parties. With the ministerial exception, the courts protect the separation of church and state, rightly understood. By its very nature the ministerial exception imposes a disability on courts deciding religious questions, that is, church-state separation leaves the question in dispute solely for resolution by the church.

C. The ministerial exception satisfies the three elements of the collateral order doctrine.

The collateral order doctrine is properly invoked when the question on appeal conclusively determines an issue, the issue is separate from the merits, and the issue would be effectively unreviewable after a final judgment is entered. *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 664 (10th Cir. 2018). The panel majority erroneously concluded that the first and third elements of the collateral order doctrine are not satisfied.

1. The ministerial exception conclusively determines the issue.

The panel majority erroneously assumed that the collateral order here would not definitively determine Faith Bible Chapel's immunity from suit because there are underlying factual determinations for the jury. In this sense, the majority is arguing that the ministerial exception can only be applied *after* a trial, even though the majority acknowledges that "[i]f [an] employee is a minister, suit over the employment discrimination claims ends." *Tucker*, 2022 WL 2035804, at *14. However, the ministerial exception is appropriate for an interlocutory appeal because if the exception applies, the lawsuit is terminated. *See Bryce*, 289 F.3d at 656; *Skrzypczak*, 611 F.3d at 1246.

In other words, if the ministerial exception applies to bar Mr. Tucker's Title VII claim against Faith Bible Chapel, then the exception conclusively determines this case. Because the exception has the potential to conclusively dispose of the claim without further proceedings, it should be resolved as a threshold matter.

2. The decision on the ministerial exception would be effectively unreviewable after final judgment.

The panel majority erroneously posits that the ministerial exception is reviewable after final judgment because an appellate court can apply the exception as a bar to liability after the fact. *Tucker*, 2022 WL 2035804, at *11–12. Citing scholarship from Professor Tuttle, the majority argues that the ministerial exception is nothing more than a defense to liability and does not immunize a religious organization from suit. *See id.* at *12 n.13. However, the court misstates Professor Tuttle's analysis. While it may be true that the ministerial exception can be applied after final judgment to insulate religious institutions from ultimate liability, delaying appeal over the exception's application exposes religious organizations to unconstitutional interference by civil process into their internal governance. True, appellate court can reverse a judgment erroneously exposing a religious organization to suit. But applying the collateral order doctrine to the ministerial exception "would better guard against Establishment Clause violations by trial courts than

would the standard requirement of a final judgment before appeal." Smith & Tuttle, *supra*, at 1881.

For example, consider how courts are compelled to decide religious questions if a case proceeds beyond the initial stages of litigation. A terminated minister could have a written contract requiring, among other things, fidelity to church doctrine. If that minister sued for breach of contract, the church would raise the ministerial exception as a defense. If a trial court rejected the defense and proceeded to decide whether the minister was faithful to church doctrine, the court would become entangled in religious doctrine. *See Thomas v. Review Bd. Of Ind. Emp. Sec. Div.*, 450 U.S. 707, 716 (1981) (noting that "it it is not within the judicial function and judicial competence to inquire" into the interpretation of religious doctrine). This is just the sort of governmental interference with church doctrine that the ministerial exception is intended to prevent.

III. Collateral order appeal is appropriate in this case.

Amici contend this Court sitting en banc should consider this appeal as a properly raised collateral order. Such threshold determination of the legal question properly respects the constitutional rights and immunities

underlying the ministerial exception. While *amici* do not take a position on the merits of whether the ministerial exception applies, *amici* agree that this Court should decide the question as raised in this appeal.

CONCLUSION

The judgment of the panel should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) because it is proportionately spaced, has a typeface of 14-point Century font, and contains 2561 words, excluding parts of the brief that are exempted by Fed. R. App. P. 32(f).

I also certify that pursuant to this Court's guidelines on the use of the CM/ECF system:

a) all required privacy redactions have been made pursuant to 10th Cir. R. 25.5 and Fed. R. App. P. 25(a)(5);

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/s/ Michael Francisco
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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2022, the foregoing was electronically filed with the Clerk for the United States Court of Appeals for the Tenth Circuit using the CM/ECF system. CM/ECF will serve all counsel of record.

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