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 Courts of Appeals for the Tenth Circuit

BRIEF OF OKLAHOMA AND 20 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici States are home to thousands of religious organizations and millions of religious believers. *See, e.g.*, *About*, Oklahoma Baptists, https://www.oklahomabaptists.org/about/ (nearly 1,800 Southern Baptist churches exist in Oklahoma); *Facts and Statistics*, The Church of Jesus Christ of Latter-Day Saints, https://newsroom.churchofjesuschrist.org/facts-and-statistics/state/utah (over 5,000 LDS congregations are located in Utah); *About*, Texas Catholic Conf. of Bishops, https://txcatholic.org/about/ (over 1,000 Catholic parishes serve 8.5 million Catholics in Texas); Ihsan Bagby, *Report 1 of the US Mosque Survey 2020: Basic Characteristics of the American Mosque*, Inst. for Soc. Policy & Understanding (June 2, 2020), https://www.ispu.org/report-1-mosque-survey-2020/224 (nearly 100 mosques can be found in Virginia); *State Membership Report*, The Ass'n of Religion Data Archives (2020), https://thearda.com/us-religion/census/congregational-membership?y=2020&y2=0&t=1&c=12 (nearly 100 synagogues are located in Georgia).

These States have a compelling interest in protecting the constitutional rights of their citizens to select religious leaders as they see fit. The States also have a weighty interest in protecting their own court systems, agencies, and departments from entanglement in the internal affairs of religious groups. In holding that (a) the ministerial exception merely protects against

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[1] *Amici* submit this brief pursuant to Sup. Ct. R. 37.2. *Amici* provided the respective counsels of record timely notice of the State of Oklahoma's intent to file the brief.

liability, (b) is "quintessentially" a jury question, and (c) is unappealable on an interlocutory basis, the Tenth Circuit opinion below threatens these profound interests, directly and indirectly.

Directly, the panel opinion is now the controlling law for *Amici* States within the Tenth Circuit, like Oklahoma, as well as the numerous religious adherents and organizations within those States. Those religious believers are now operating within a system that exposes their leadership decisions to invasive discovery, depositions, and jury trials—an undeniably chilling proposition. Moreover, States within the Tenth Circuit are on the hook for overseeing those processes, and without relief will soon find themselves improperly enmeshed and entangled with religious questions, doctrine, and dogma.

Indirectly, the Tenth Circuit opinion has already sparked, or at least laid the groundwork for, an unfortunate new trend. In the short time since the panel opinion was released, that is, at least two other appellate courts have expressly embraced aspects of its mistaken analysis. *See Belya v. Kapral*, 45 F.4th 621, 632-34 (2d Cir. 2022) (repeatedly citing the Tenth Circuit's decision below to support its holding that a church autonomy question is not reviewable on an interlocutory basis); *Doe v. Roman Catholic Bishop of Springfield*, 190 N.E.3d 1035, 1044 (Mass. 2022) (quoting the panel below for the proposition that the ministerial exception "does not immunize religious employers from the burdens of litigation itself"). Thus, the present decision not only creates circuit splits, as Petitioner has detailed, but it is threatening the constitutional boundaries of *every* State and the constitutional rights of their citizens.

SUMMARY OF THE ARGUMENT

A core aspect of religious freedom protected by the First Amendment is a prohibition on governmental intrusion into a religious organization's selection or rejection of ministerial leadership. The government must tread extremely lightly in this area, as religious adherents have the right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (citation omitted). Critical here, this Court has emphasized that the First Amendment's "ministerial exception bars . . . a *suit*" by a minister "challenging her church's decision to fire her." *Id.* at 196 (emphasis added).

The petition for certiorari details—as dissenting Judges Bacharach, Eid, and Tymkovich did below—how the Tenth Circuit has now split with other courts in several ways that will cause severe and sustained entanglement between religious institutions and government, as well as infringement on the religious liberty rights of countless individuals and organizations. In the Tenth Circuit, juries will now be tasked with analyzing significant religious questions, courts will be forced to mediate discovery disputes probing religious doctrine and religious intent, and religious adherents and organizations will have no immediate recourse against a wayward trial court decision that threatens to invade some of the most critical aspects of religious practice—the choice of leadership. The panel's decision was a radical departure from existing case law at the time and this Court's precedent.

Again, the Tenth Circuit panel indicated that ministerial status is a question of fact for the jury, that the ministerial exception is a mere liability defense, and that such questions are not immediately appealable. These views are wrong.

First, ministerial status is not a factual question that requires a jury to slog through religious beliefs, doctrine, and structure. It is a legal question: does an employee of a religious organization perform a religious role protected by the First Amendment? The mere prospect of jury examination of ministerial status would impair the First Amendment rights of religious adherents and their institutions, and it would cause significant entanglement problems for *Amici*'s court systems and enforcement agencies. Virtually any employee can mimic what Respondent did below, excising or downplaying (well after-the-fact) the undisputed religious words from his title and job duties to obfuscate the central question: whether a religious school's "Chaplain" is a minister as a matter of law.

Second, the ministerial exception is not some run-of-the-mill defense to liability. It is a structural cornerstone and core First Amendment *right* to be free from the government's regulations in matters of religious faith, doctrine, and governance. As courts broadly recognize, that right is infringed as much by judicial rooting through religious beliefs as by an ultimate imposition of liability. In short, *Amici*'s citizens should be free to choose religious ministers without fear of government meddling, and *Amici* States shouldn't be required to meddle. Because the Tenth Circuit's opinion muddies First Amendment waters on jurisprudential questions of exceptional importance and threatens the constitutional rights of countless religious

adherents and organizations, a grant of certiorari and eventual reversal are necessary.

ARGUMENT

I. THE TENTH CIRCUIT'S REFORMULATION OF THE MINISTERIAL EXCEPTION AS "QUINTESSENTIALLY" A QUESTION FOR A JURY WAS NOVEL, WRONG, AND WILL LEAD TO EXCESSIVE ENTANGLEMENT.

"The values enshrined in the First Amendment plainly rank high 'in the scale of our national values.'" *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). Relevant here, through the Free Exercise and Establishment Clauses, the First Amendment forbids "judicial entanglement in religious issues." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020). This entanglement principle protects "the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Id.* at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186). As the Tenth Circuit once observed, years before the errant decision below, "second-guessing" of "religious beliefs and practices" is supposed to be verboten because governments have "neither competence nor legitimacy" in those areas. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261, 1265-66 (10th Cir. 2008).

One key aspect of religious autonomy protected by the First Amendment is an institution's "selection and supervision" of religious ministers. *Our Lady*, 140 S. Ct. at 2055. This protection is part of religious groups' "independence in matters of faith and doctrine

and in closely linked matters of internal government." *Id.* at 2061. When an employee brings a discrimination suit that could infringe on a faith-based institution's religious autonomy, courts must resolve whether that employee is a religious minister within the First Amendment's scope. Because of predominant questions of faith and doctrine, this Court has made it perfectly clear: resolution of that question must be "sensitive" and pay due deference to "[a] religious institution's explanation of the role of such employees in the life of the religion." *Id.* at 2066, 2069. Courts, that is, "must take care to avoid resolving underlying controversies over religious doctrine" and "practice." *Id.* at 2063 n.10 (cleaned up). This Court has *repeatedly* warned against "[d]eciding such questions" in a way that "would risk judicial entanglement in religious issues." *Id.* at 2069.

Thus, in both *Hosanna-Tabor* and *Our Lady*, this Court did not remand the respective cases for a jury's analysis, despite the disputes in both situations being about this ultimate question of ministerial status.

In *Hosanna-Tabor*, this Court indicated that the Sixth Circuit should have affirmed the district court's grant of summary judgment on the ministerial exception, 565 U.S. at 181, 190, 196, even though the district court itself had at one point "highlight[ed] the existence of a factual dispute between the parties" relating to that plaintiff's ministerial status. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church*, No. 07-14124, 2008 WL 5111861, at *1 (E.D. Mich. Dec. 3, 2008). Concurring, Justice Alito (joined by Justice Kagan) wrote separately to point out that allowing "a civil court—and perhaps a jury" "to engage in the pretext inquiry that respondent and the Solicitor General

urge us to sanction would *dangerously undermine* the religious autonomy that lower court case law has now protected for nearly four decades." *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring) (emphasis added). The "mere adjudication" of religious "questions would pose *grave problems* for religious autonomy," they stressed, as it "would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission." *Id.* at 205-06 (Alito, J., concurring) (emphasis added).

Likewise, in *Our Lady*, this Court indicated that the Ninth Circuit should have affirmed several district courts' grants of summary judgment to defendants, 140 S. Ct. at 2058-60, 2066, 2069, even though one district court in question had found that a factor in the analysis weighed against "the ministerial exception applying." *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, No. 2:16-cv-09353-SVW-AFM, 2017 WL 6527336, at *2 (C.D. Cal. Sept. 27, 2017). And sure enough, on remand the Ninth Circuit promptly affirmed the lower courts' grants of summary judgment to the religious organizations being sued. *See Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 817 F. App'x 497, 498 (9th Cir. 2020), *and Biel v. St. James Sch.*, 971 F.3d 1005 (9th Cir. 2020).

This Court did not remand for jury resolution in *Hosanna-Tabor* and *Our Lady* for the simple reason that ministerial status is, at its core, a legal question. *See* App.134a (Bacharach, J., dissenting) ("Until now, every federal or state appellate court to address the issue has characterized ministerial status as a question

of law."). It is no different, in other words, from whether an institution qualifies as religious for First Amendment purposes or other church autonomy questions—each of which, the Tenth Circuit once indicated, is "a question of law to be resolved at the earliest possible stage of litigation." *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 654 (10th Cir. 2002) (citation omitted). Thus, courts have universally resolved the question of ministerial status themselves. *See Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1244 (10th Cir. 2010) (upholding grant of summary judgment to defendant, despite three affidavits purporting to show a factual dispute); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015) ("whether the exception attaches at all is a pure question of law"); *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) ("The status of employees as ministers . . . remains a legal conclusion for this court.").

Moreover, courts have always resolved ministerial status at summary judgment, if not earlier. *E.g., Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. 2022); *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568 (7th Cir. 2019); *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416 (2d Cir. 2018); *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113 (3d Cir. 2018); *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018); *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017); *Yin v. Columbia Int'l Univ.*, 335 F. Supp. 3d 803 (D.S.C. 2018) (all resolving on summary judgment); *see also, e.g.*, *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968 (7th Cir. 2021) (en banc); *Conlon*, 777 F.3d at 832; *Cannata v. Catholic Diocese of Austin*, 700 F.3d

169 (5th Cir. 2012); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (en banc); *Werft v. Desert Sw. Annual Conf. of United Methodist Church*, 377 F.3d 1099 (9th Cir. 2004); *Simon v. Saint Dominic Acad.*, No. 19-cv-21271, 2021 WL 6137512 (D.N.J. Dec. 29, 2021) (all resolving on motions to dismiss).

The panel below blazed its own trail, however, skipping past the numerous cases cited above. The panel held, in a published opinion, and on the basis of a practically non-existent factual dispute, that whether Respondent was a minister "is *quintessentially* a factual determination for the jury." App.26a n.8 (emphasis added). According to the panel, a jury will "*often*" "have to resolve the factual disputes and decide whether an employee qualifies as a 'minister . . . [,]'" App.19a n.4 (emphasis added), even though such a jury resolution cannot be found referenced in any pre-*Faith Bible* court decision of which *Amici* are aware. And the panel found no constitutional problem with its unprecedented yet somehow "quintessential" rule: "If a jury's resolution of those facts indicates that the employee is not a minister, then the Establishment Clause is not implicated." App.52a.

The panel was wrong. Despite its expansive rhetoric (*i.e.*, "quintessentially" and "often"), it pointed to no case where a jury had actually been tasked with determining an individual's status as a minister. Instead, remarkably, it cited *Our Lady* and *Hosanna-Tabor*, claiming that a jury decision "cannot be avoided" because the Supreme Court "emphasized" in those cases "the fact-intensive nature of the question." App.49a. As discussed above, this reading of *Our Lady* and *Hosanna-Tabor* is wildly mistaken. Those cases

upheld three different district courts' *grants* of summary judgment in ministerial exception cases, they emphasized that an entire "[law]suit [is] barred by the 'ministerial exception,'" *Our Lady*, 140 S. Ct. at 2062 (quoting *Hosanna-Tabor*, 565 U.S. at 190), and concurring justices cautioned about the "grave problems for religious autonomy" that juries could create by probing ministerial decisions, *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring).

Judge Ebel's statement supporting the denial of *en banc* review did nothing to correct the panel's obvious misreading of this Court's precedent, either. Instead, he doubled down, claiming that "[o]ur panel decision is consistent with the Supreme Court's recognition [in *Hosanna-Tabor* and *Our Lady*] of the fact-intensive nature of the inquiry into whether a religious employee should be deemed a minister[,]" App.122a (Ebel, J.), while ignoring the critical text and context of those decisions counseling against jury involvement. Nor did Judge Ebel produce or point to any case where a court punted ministerial status to a jury; indeed, he did not mention the word "jury" once.

Judge Ebel did add a citation to the Second Circuit's subsequent ruling in *Belya*, 45 F.4th 621. App.123a-124a. But even that questionable decision[2] seemingly acknowledged that "the religious question of whether a party was a nun" *was* "collaterally appealable," *id.* (citing *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013)). Determining whether a woman is a nun and whether a chaplain is a minister

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[2] *See Belya v. Kapral*, 59 F.4th 570, 573 (2d Cir. 2023) (Cabranes, J., dissenting from the order denying rehearing *en banc*) ("[T]he matter can and should be reviewed by the Supreme Court.").

are hardly distinct questions. *Belya* does not support juries deciding whether an individual is a minister.

Judge Ebel also cited a concurrence to this Court's denial of a writ of certiorari in *Gordon College v. DeWeese-Boyd*, 142 S. Ct. 952 (2022). App.123a. "Of course, '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case . . . .'" *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)). Regardless, the accompanying statement from Justice Alito says nothing about a jury deciding the ministerial question (which is hardly surprising, given his and Justice Kagan's concurrence in *Hosanna-Tabor* referencing the danger of involving juries in religious questions). Moreover, rather than punt the issue, in *Gordon College* the lower state courts held as a matter of law that the exception did *not* apply to the particular facts of that case. *See Gordon Coll.*, 142 S. Ct. at 954 (Alito, J.) ("The Supreme Judicial Court . . . concluded that DeWeese-Boyd was not a 'minister' . . . ."). And, as Petitioner points out, Justice Alito didn't even assert that an interlocutory appeal was inappropriate. Instead, he simply noted that it was a "threshold . . . issue" that complicated that particular case. *Id.* at 955. This is hardly a substantial basis for turning a ministerial question over to a jury for the first time.[3]

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[3] Judge Ebel also overreads Justice Alito's mere reference to "understanding" the brief in opposition's concession in that case as a full-fledged endorsement of the position that a ministerial exception question "can be effectively reviewed following the entry of final judgment." App.123a.

To repeat, requiring a jury to make such "judgment[s] about church doctrine" itself "would pose grave problems" under the First Amendment. *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring). The ministerial exception would no longer be resolved quickly and delicately to avoid interference with church autonomy. No religious institution could quickly escape legal claims from disgruntled former leaders. Just look at the present case, which involves virtually no dispute about the key facts, but rather concerns an employee's effort to downplay facts showing his role as a religious leader.[4] *See* App.83a (Bacharach, J., dissenting) ("Under Mr. Tucker's version and other undisputed facts, he qualified as a minister in his role as Director of Student Life/Chaplain.").

Under the malleable standard deployed by the panel below, however, nearly every ministerial exception case would have to await jury resolution, potentially dragging a religious institution and its members through years of discovery, depositions, and other litigation facets before the institution's "right to shape its own faith and mission through its appointments" is affirmed. *Hosanna-Tabor*, 565 U.S. at 188. "The harm of such a governmental intrusion into religious affairs would be irreparable . . . ." *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013).

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[4] By focusing on leadership status here, *Amici* States do not mean to imply that the ministerial exception *only* applies to religious leaders, narrowly defined. *See, e.g.*, *Our Lady*, 140 S. Ct. at 2063 (indicating that the exception includes, *inter alia*, anyone "who leads a religious organization, conducts worship services or important religious ceremonies or rituals, *or* serves as a messenger or teacher of its faith" (emphasis added) (citation omitted)).

One of those harms, of course, is financial. If allowed to stand, the Tenth Circuit's opinion will "require[] religious bodies to spend years and fortunes litigating who are ministers and who aren't." App. 133a (Bacharach, J., dissenting). In response, the Tenth Circuit cavalierly dismissed this as merely "the cost of living and doing business in a civilized and highly regulated society." App.32a n.11. This grossly misconstrues the purpose of most religious organizations—which is *not* just to "do business"—and ignores the vast difference between litigation costs to obtain an early dismissal and those needed to take an entire case through a jury trial and beyond. *See United States v. City of Miami*, 614 F.2d 1322, 1334 (5th Cir. 1980) ("The expense to all sides of a full blown trial can be enormous."), *on reh'g*, 664 F.2d 435 (5th Cir. 1981).

Another critical harm interwoven with financial considerations is the "danger of chilling religious activity." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring). The mere "prospect[] of litigation," as Justices Brennan and Marshall observed in *Amos*, may even force religious communities to alter their "self-definition." *Id.*; *see also* App.61a (Bacharach, J., dissenting) (predicting that, under the panel's view, "a religious body might hesitate to fire a minister even in the face of doctrinal disagreements"). That is to say, entanglement with the government in this way is innately coercive, in a manner that restricts speech and religious freedom. And these harms would not be limited in scope, given how many millions of religious believers and thousands of religious organizations there are in *Amici* States and elsewhere. Employment lawsuits are hardly uncommon, after all.

Rather, they make up a hefty portion of court dockets across the country. *See, e.g.*, *Zakrzewska v. New Sch.*, 574 F.3d 24, 28 (2d Cir. 2009) ("[E]mployment discrimination cases are a substantial portion of the caseload for the District Courts of this Circuit.").

In addition to these harms, state courts and enforcement agencies would suffer the entanglement of all that a jury trial on a religious question would bring, from discovery to depositions to jury selection to "civil factfinder[s] sitting in ultimate judgment of what" role an identified leader "really" plays in the religious institution. *Hosanna-Tabor*, 565 U.S. at 206 (Alito, J., concurring). This is constitutionally problematic, to say the least. *See Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022) ("Any attempt to . . . scrutinize[] whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion . . . ."); *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713, 718 (1976) (holding that "religious controversies are not the proper subject of civil court inquiry" and that Illinois Supreme Court's "detailed review" of church procedures was "impermissible under the First and Fourteenth Amendments").

Put differently, the ministerial exception is not just a personal right of religious believers and their respective organizations. It is also an important constitutional limitation on governmental power in the realm of religion. *Cf. EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 465 (D.C. Cir. 1996) ("In this case, the EEOC's two-year investigation of Sister McDonough's claim, together with the extensive pre-trial inquiries and the trial itself, constituted an impermissible entanglement . . . ."). In the end, *Amici* States do not

want their citizens on juries tasked with determining who is and is not a minister in their fellow citizens' religious institutions, nor do they want their judges and enforcement arms having the power and duty to oversee (or even spearhead) a full-on litigation effort poking and prodding into this question. Such a requirement is unconstitutional, and certiorari is warranted.

II. In Denying an Appeal, the Panel Failed to Recognize the Constitution's Structural Protection Against Interference in Religious Leadership Disputes.

After wrongly concluding that ministerial status is a quintessential jury question, the Tenth Circuit panel compounded its error by assuming that a (mistaken) rejection of ministerial status early in litigation has no consequences and thus cannot be appealed immediately. The panel dismissed the Tenth Circuit's own prior analogy between religious autonomy and qualified immunity defenses on the ground that whether a religious employer is wrongly subjected to discovery and trial involves no relevant "public interest." App.7a. In the panel's view, wrongly entangling a church in an extended judicial inquiry apparently does not involve *even a private interest*: "requiring a religious employer to incur litigation costs to defend against claims" by a religious leader "does not punish a religious employer" and is not "even entanglement at all." App.32a n.11, App.49a. This is incorrect.

The Tenth Circuit's own precedents and many other cases refute these views. The public has overwhelming interests in protecting free exercise of religion and avoiding church-state entanglement of this sort. As discussed above, *Amici*'s courts and enforcement bodies likewise seek to avoid unnecessary and intrusive

judicial probing of religion. And religious institutions and their adherents have a compelling interest in choosing and supervising their leaders without the inherently coercive threat of protracted litigation. In lay terms, religious groups should be able to make leadership decisions without looking over their shoulder at every turn.

As this Court has explained, the "very process of inquiry" into internal religious matters can "impinge on rights guaranteed by the Religion Clauses." *Catholic Bishop of Chi.*, 440 U.S. at 502. Recognizing as much, the Tenth Circuit once held that the Religion Clauses "prohibit[] civil court review of internal church disputes." *Bryce*, 289 F.3d at 655. Before its current about-face, the Tenth Circuit said that like "a government official's defense of qualified immunity," religious autonomy defenses should be "resolv[ed]" "early in litigation." *Id.* at 654 & n.1. The Tenth Circuit agreed that the rule applies "when considering the ministerial exception": "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." *Skrzypczak*, 611 F.3d at 1242, 1245 (cleaned up). The Tenth Circuit was correct in *Skrzypczak*, and wrong below.

Courts broadly agree that the ministerial exception, like other religious autonomy defenses, is a "structural limitation" that "categorically prohibits" the judiciary "from becoming involved in religious leadership disputes." *Conlon*, 777 F.3d at 836. These courts also recognize "the prejudicial effects of incremental litigation" on rights protected by the Religion

Clauses. *Demkovich*, 3 F.4th at 982. After all, "[a] Title VII action is potentially a lengthy proceeding, involving state agencies and commissions, the EEOC," and courts. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). During the action, "[c]hurch personnel and records would inevitably become subject 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." *Id.* And intrusions like these pressure churches to make decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than" basing decisions on doctrinal assessments. *Id.*; *see also* App.61a (Bacharach, J., dissenting); *Skrzypczak*, 611 F.3d at 1245 (noting discovery's "coercive effect" on religious ministries); *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 (3d Cir. 2006) (even "limited inquiry" into religious matters is constitutionally problematic).

Finally, this Court itself has emphasized the "ministerial exception bars . . . a *suit*" by a minister "challenging her church's decision to fire her." *Hosanna-Tabor*, 565 U.S. at 196 (emphasis added). In his dissent below, Judge Bacharach expressed appropriate surprise at the majority's refusal to take this phrasing seriously: "The Supreme Court's language was unmistakable: It characterized the ministerial exception as a defense that would prevent the proceeding itself." App.68a (Bacharach, J., dissenting). Like Judge Bacharach, *Amici* agree that lower courts should "take the Supreme Court's choice of words at face value." *Id.* The Tenth Circuit did not, and as such, it should be reversed.

Of course, "[t]he ministerial exception's status as an affirmative defense makes some threshold inquiry

necessary." *Demkovich*, 3 F.4th at 983. (The Tenth Circuit panel's emphasis on this point is difficult to understand: the same is true of qualified immunity. *See* App.69a (Bacharach, J., dissenting).) But limited "discovery to determine who is a minister differs materially from discovery to determine how that minister was treated, especially because admissible evidence is only a subset of discoverable information." *Demkovich*, 3 F.4th at 983.

Against these precedents, the Tenth Circuit panel selectively quoted one law review article, *see* App.31a, App.35a n.13, omitting the rather significant point that even the article agrees that "the ministerial exception closely resembles qualified immunity for purposes of the collateral-order doctrine" and should likewise be immediately appealable. Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1881 (2018). Indeed, one of the authors of that article argued as an *amici* in this very case 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, *Tucker v. Faith Bible Chapel Int'l*, (No. 20-1230), 2022 WL 2400414, at *3 (June 28, 2022).

Though the panel majority also suggested that "[i]mmunity from suit is a benefit typically only reserved for governmental officials," App.37a (citation omitted), it quickly admitted that "collateral orders can arise in the course of private civil litigation." App.38a. Indeed, the Tenth Circuit recently approved a new category of collateral order appeals by private parties raising a state statutory defense. *Los Lobos*

Renewable Power, LLC v. AmeriCulture, Inc., 885 F.3d 659 (10th Cir. 2018). The panel's meager response—that this First Amendment case does not involve that specific "New Mexico law"—practically speaks for itself. App.38a n.15.

Finally, in denying an *en banc* rehearing, Judge Ebel claimed that it "contradicts the Supreme Court" to "posit[] that the ministerial exception presents a structural limitation on courts' authority to hear employment cases." App.122a. But Judge Ebel's only support for this proposition was a footnote in *Hosanna-Tabor* that says nothing about "structural" limitations. 565 U.S. at 195 n.4. Rather, the footnote simply held that the ministerial exception is an affirmative defense, right before stating that "[d]istrict courts have power to . . . decide whether the claim can proceed *or is instead barred by the ministerial exception*." *Id.* (emphasis added). That is to say, the very footnote relied upon to prohibit interlocutory appeal and send a ministerial exception question to the jury indicates that district courts should decide—before a claim *proceeds*—whether the claim is "barred by the ministerial exception" once it is raised as a defense. This is hardly a refutation of the widely accepted notion that the ministerial exception is structural.

Hosanna-Tabor does not support the idea that the ministerial exception is a run-of-the-mill defense against liability, with no broader structural implications. As the dissenters below observed, the panel's opinion "reflects a fundamental misconception," as the exception "protects a religious body from the suit itself" and plays a "structural role . . . in limiting governmental power." App.126a (Bacharach, J., dissenting).

In sum, a "protracted legal process pitting church and state as adversaries" entangles the government and religion in ways that are constitutionally forbidden. *Demkovich*, 3 F.4th at 982 (quoting *Rayburn*, 772 F.2d at 1171). Avoiding this entanglement and protecting the structure of our government and the free exercise of religion are constitutional interests of the highest order, and an immediate appeal must be available to vindicate them. The stakes here are indeed "exceptionally important," App.126a (Bacharach, J., dissenting), both for religious believers and *Amici*. Certiorari is warranted.

CONCLUSION

For the reasons stated, this Court should grant certiorari and reverse the decision below.

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