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 OF THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL AND THE COLORADO CATHOLIC CONFERENCE IN SUPPORT OF DEFENDANT-APPELLANT FAITH BIBLE CHAPEL AND IN SUPPORT OF REVERSAL OF THE DISCTRICT COURT'S DECISION

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CORPORATE DISCLOSURE STATEMENT

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

Respectfully submitted,

/s/ Christian Poland
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IDENTITY AND INTERESTS OF AMICI CURIAE [1, 2]

The amicus parties are the Association of Christian Schools International and the Colorado Catholic Conference. They seek to represent the interests of religious educational institutions that may face claims similar to those brought against Appellant Faith Bible Chapel International d/b/a Faith Christian Academy, to ensure that such institutions are protected from intrusive litigation that violates the constitutional protection offered 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 the decisions of religious employers as to those who carry out their religious mission.

Amicus Association of Christian Schools International ("ACSI") is a Christian educational organization. ACSI exists to strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ. ACSI advances excellence in Christian schools by enhancing the professional and personal development of Christian educators and providing vital support functions for Christian schools. Its vision is to be a leading international organization that promotes

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution intended to fund the brief's preparation or submission.

[2] All parties have consented to the filing of this amicus brief.

Christian education and provides training and resources to Christian schools and Christian educators, resulting in schools that contribute to the public good through effective teaching and learning and that are biblically sound, academically rigorous, socially engaged, and culturally relevant; and educators who embody a biblical worldview, engage in transformational teaching and discipling, and embrace personal and professional growth. Founded in 1978, ACSI has more than 23,000 member schools in 100 countries, which serve over five million students worldwide.

The Colorado Catholic Conference is comprised of the Archdiocese of Denver and the dioceses of Pueblo and Colorado Springs. Together they oversee 54 Catholic elementary and secondary educational institutions with a total enrollment of approximately 14,400 students. They also oversee hundreds of other Catholic employers whose key personnel positions and decisions are protected by the ministerial exception. The three dioceses employ over 4,500 seminary, parish, and other pastoral and ministerial workers.

Representing religious educational institutions entitled to the protection of the ministerial exception, the amicus parties argue that the ministerial exception deserves individualized and priority treatment in litigation and on appeal. As a form of immunity from suit, the ministerial exception cannot simply be joined with other issues at trial because that would defeat the constitutional protection offered by the exception and render its intended purpose a nullity. Courts must also defer to the religious institution's view of the religious and ministerial nature of the job position at issue. If the ministerial exception is

satisfied, the suit is barred, and the court must enter judgment without delay to minimize the court's entanglement with the religious institution's autonomy.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutionally derived "ministerial exception" recognized by the Supreme Court in *Our Lady of Guadalupe Sch. v. Morrissey-Berru* and *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is a limitation on the authority of the courts and a form of immunity from suit enjoyed by religious entities with respect to the selection and retention of those who serve as their leaders and message-bearers. Because of the constitutional protection offered by the ministerial exception, which is a form of immunity from the travails of litigation, the adjudication of such protection must take center stage in litigation, so that at each phase courts are initially addressing what is necessary (and only what is necessary) to ensure that the ministerial exception is honored. If a case cannot be decided on a Rule 12(b)(6) motion to dismiss, the district court must focus discovery on the adjudication of the ministerial exception, with a view to deciding its applicability on a dispositive motion or through an evidentiary hearing, before permitting full discovery on the merits and certainly before a full-merits trial. District courts that leave the application of the ministerial exception to the jury, as if the case is a typical employment discrimination trial, eviscerate the protection of the ministerial exception. When district courts stray outside these constitutional boundaries, interlocutory appeal is readily available because the immunity offered by the ministerial exception is irreparably harmed and effectively unreviewable if the religious organization must await final judgment on

the merits before an appellate challenge to a constitutionally erroneous decision.

The district court's decision, *Tucker v. Faith Bible Chapel Int'l*, No. 19-cv-01652-RBJ, 2020 WL 2526798 (D. Colo. May 18, 2020), did not properly evaluate the ministerial exception, did not appropriately segregate and advance consideration of the ministerial exception, and violated First Amendment principles by forcing Faith Bible Chapel to go to trial on the merits of the plaintiff's claims just because the court believed, in ruling on a motion to dismiss that it had converted to a motion for summary judgment, that the plaintiff did not view himself as a minister.

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 recently in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), is grounded in, and compelled by, both the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S. Constitution. *See* 565 U.S. at 188. The Free Exercise Clause ensures that religious groups maintain 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 are not just rights and prohibitions to be enforced by the courts as between litigants; they impose structural limitations on the courts and the adjudicatory process.

Consider first the larger context of the constitutionally derived religious-autonomy doctrines (of which the ministerial exception is just one). Bearing labels such as the "church-autonomy doctrine," "ecclesiastical abstention," and the "deference rule," these principles have consistently been held by the courts to limit the very power of the

courts to consider matters touching on religious expression, including the selection, discipline, and termination of those employed as leaders or message-bearers of a religious body or ministry. *See Watson v. Jones*, 80 U.S. 679, 714, 733 (1871) (secular courts are prevented from reviewing disputes that would require an analysis of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required"); *Korte v. Sebelius*, 735 F.3d 654, 677-78 (7th Cir. 2013) (reversing the denial of preliminary injunctions sought under the Religious Freedom Restoration Act; "where it applies, the church-autonomy principle operates as a complete immunity, or very nearly so"); *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.'" [internal quotation marks omitted]); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 653, 659 (10th Cir. 2002) (holding that church employee and her same-sex partner could not bring sexual harassment claims based on anti-gay statements made by reverend in letters and at church meetings because the church autonomy doctrine, rooted in the Religion Clauses, gives the church the right "to engage freely in ecclesiastical discussions"); *Lee v. Sixth Mount Zion Baptist Church*, No. 15-1599, 2017 WL 3608140, at *30-35 (W.D. Pa. Aug. 22, 2017) (the "deference rule" and ministerial exception barred court from considering pastor's claims that he was terminated without "cause"

under his employment agreement; "the very process of inquiry into church motives and good faith as it relates to the mission of the church can impinge on rights guaranteed by the First Amendment"), *aff'd,* 903 F.3d 113 (3d Cir. 2018). Under these religious-autonomy doctrines, the courts have no authority to adjudicate matters relating to religious doctrine, the termination of employees based on matters of religious belief, the reasons for the separation of a religious organization's leaders and message-bearers, or allegations that a religious group's stated reason for an employment action was instead a pretextual reason disguising unlawful discrimination. *See, e.g.*, *Myhre v. Seventh-Day Adventist Church Reform Movement Am. Union Int'l Missionary Soc'y*, 719 Fed. App'x 926, 927-29 (11th Cir. 2018) (former employee's breach-of-contract claim against church denomination for terminated retirement benefits was properly dismissed because ecclesiastical abstention doctrine prevented court from evaluating denomination's view of the propriety of plaintiff's conduct); *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241 (S.D.N.Y. 2014) (dismissing based on the ecclesiastical abstention doctrine priest's libel per se claim over press release stating that he engaged in sexual abuse as determined by church court; adjudicating claim would require evaluation of church's decisions regarding matter of church discipline); *Nevius v. Africa Inland Mission Int'l,* 511 F. Supp. 2d 114, 120 (D.D.C. 2007) (dismissing missionary's breach-of-contract claim because "[d]etermining whether [the religious organization's] termination of [plaintiff] fell within the[] contractually-permitted parameters—or whether, as [plaintiff] alleges, her termination was motivated by other concerns—would involve inquiring

into a core matter of ecclesiastical self-governance not subject to interference by a state").

As part of these religious-autonomy doctrines, the nearly 50-year history of the ministerial exception is based on the fact that the Free Exercise Clause and the Establishment Clause set limits on what the courts may properly adjudicate. *Our Lady*, 140 S. Ct. at 2060-61. Indeed, until the Supreme Court decided in *Hosanna-Tabor* that the ministerial exception was not specifically a limitation on the subject matter jurisdiction of the federal courts, *see* 565 U.S. at 195 n.4, many courts had held that the exception was a jurisdictional constraint. *See, e.g.*, *Friedlander v. Port Jewish Ctr.*, 347 Fed. App'x 654, 655 (2d Cir. 2009) (affirming grant of 12(b)(1) dismissal for lack of subject matter jurisdiction of rabbi's claim that his Jewish temple breached his employment contract, as barred by the ministerial exception); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007) (ministerial exception deprives a court of jurisdiction and the defense should be raised under Fed. R. Civ. P. 12(b)(1)); *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1038-39 (7th Cir. 2006) (ministerial exception is a jurisdictional limitation); *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (affirming Rule 12(b)(1) dismissal based on ministerial exception). The courts now describe the constraints imposed by the First Amendment as structural limitations of the courts' power to adjudicate matters of religious autonomy. *See* discussion Part I.B *infra*. Thus, as discussed more fully below, 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. In typical litigation, almost no affirmative defenses have a constitutional basis or import. For example, when Federal Rules of Civil Procedure 8 lists 18 common defenses that must be raised affirmatively, none is of constitutional origin. *See* Fed. R. Civ. P. 8(c)(1). By contrast, the ministerial exception has qualities that plainly circumscribe the authority of the courts, providing "structural" limitations on the courts' power, which cannot be waived. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018) ("Although the District Court, not the Church, first raised the ministerial exception, the Church is not deemed to have waived it because the exception is rooted in constitutional limits on judicial authority."); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 581-82 (6th Cir. 2018) (a defendant cannot waive the protection of the ministerial exception by failing to raise it because the "constitutional protection is . . . structural"), *aff'd on other grounds sub nom. Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) ("[t]he constitutional protection [provided by the ministerial exception] is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes").

The ministerial exception's priority status in litigation has led several courts, including this Court, to analogize the exception to a qualified immunity. *See, e.g.*, *Skrzypczak*, 611 F.3d at 1242; *Bryce*, 289 F.3d at 654. Qualified immunity ensures that the fear of litigation and the burden of litigating cannot be used to upset the balance of important rights. For example, government actors are provided qualified immunity for a variety of official actions. In this setting, "[q]ualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity helps to reduce the social costs of litigation against the protected, costs which include not only "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office," but also "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (internal quotations omitted). When qualified immunity applies, courts process the protected party's defenses with enhanced priority and focus, to ensure that the burden of litigation does not itself deter action and the reasonable exercise of judgment. *See id.* at 818 ("Until this threshold [qualified] immunity question is resolved, discovery should not be allowed.").

It is for similar reasons that courts have treated the application of the ministerial exception and other religious-autonomy doctrines as a form of immunity. For example, in the district court decision reviewed in *McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013), the district court had ruled that a federal jury must decide whether Defendant Patricia Fuller was a member of a Roman Catholic religious order, which, if answered in the affirmative, would be "rejecting the contrary ruling of the religious body (the Holy See) authorized by the Church to decide such matters." *Id.* at 976. The Seventh Circuit granted interlocutory review: "The conditions for collateral order review are satisfied . . . , the district judge's ruling challenged by the plaintiffs 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*). The court explained:

> [T]he immunity conferred by the doctrine of official immunity is immunity from the travails of a trial and not just from an adverse judgment. If the defense of immunity is erroneously denied and the defendant has to undergo the trial before the error is corrected he has been irrevocably deprived of one of the benefits—freedom from having to undergo a trial—that his immunity was intended to give him.

Id. The Seventh Circuit went on to reverse the district court's holding, finding that the federal judiciary has no authority to review, and instead must accept, a ruling by a religious body as to whether a person is a member of its religious order. *Id.* at 976-79.

The very 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, Justice Alito explained that subjecting to court scrutiny a religious body's decisionmaking process with respect to the employment status of one of its leaders would be 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 (Alito, J., concurring). And it does not matter that a plaintiff contends that the religious organization's stated reason for its employment action is pretextual, which is a typical route for an employment discrimination plaintiff to survive summary judgment and get a jury trial on her claims, for that "misses the point of the ministerial exception." 565 U.S. at 194. "The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical,"—is the church's alone." *Id*. at 194-95 (citation omitted).[3]

[3] Earlier this year the District of Columbia Circuit again emphasized the preeminent status of religious autonomy and the courts' (and the executive branch's) strictly circumscribed authority to adjudicate matters involving religious entities. In *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824 (D.C. Cir. 2020), the court rejected the National Labor Relations Board's assertion of jurisdiction over

Protecting the immunity from the burdens of unconstitutional litigation enjoyed by religious groups is essential. Without such immunity, many such groups would be faced with the unfair dilemma of either not exercising their religious beliefs or closing their doors. Take, for example, the members of amicus Association of Christian Schools International. Many are religious schools that are associated with a local church, both of which operate on a limited budget. Tuition charges provide only a portion of the revenue need to run the school, leaving the balance to be provided by donors to the church and school. Legal expenses, if they even appear as a line item in the church's or school's budget, are for essential consultations only, not for defending litigation. Add to this the impact of increased expenses and declining contributions in the COVID-19 era, and many are already at the breaking point. 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 $300,000 in legal fees if it has to defend the termination decision through trial, is to

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Duquesne University, a Catholic University. Even the acts of attempting to determine whether the university was "sufficiently" religious to be exempt from NLRB jurisdiction or whether the adjunct faculty members who sought to form a union played an important role in the university's religious mission were issues too intrusive to permit the inquiry: "The very process of such an inquiry by the Board, as well as the Board's conclusions, would impinge on rights guaranteed by the Religion Clauses." *Id.* at 835 (internal quotations omitted); *see also NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) (rejecting NLRB's claim of jurisdiction over church-operated schools; given the essential role played by teachers of any level or subject matter at the Catholic schools, exercising jurisdiction over labor disputes involving such teachers "impinge[d] on rights guaranteed by the Religion Clauses").

place the religious entity between Scylla and Charybdis. Without the protection of immunity, religious schools are forced into choices with no acceptable outcome: retain religiously antagonistic personnel to avoid the cost of litigation, or preserve religious identity but risk bankrupting the school with legal fees. *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 "subpoena, discovery, cross-examination, [and] the full panoply of legal process" whenever they decline to hire or 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 of who would best serve the pastoral needs of their members").

C. Courts Must Generally Determine that the Ministerial Exception Does Not Apply Before It Permits Merits Discovery or a Merits Trial

If a case raising the ministerial exception survives a motion to dismiss (or a motion to dismiss converted to a motion for summary judgment), the district court must focus discovery on the ministerial exception (and any other religious-autonomy defenses) in light of the constitutional issues at stake. Although a district court generally has discretion to manage the scope and sequencing of discovery, such

authority is circumscribed when the rights of a party—especially the constitutional rights of a party—would be violated or irreparably harmed if certain discovery is conducted. In almost every ministerial exception case, this obligation requires the trial court to limit discovery to that which is relevant to the ministerial exception, with a view to hearing a dispositive motion on the application of the exception. Many district courts have honored the protection provided by the exception, bifurcating discovery and then entertaining motions for summary judgment targeted to the ministerial exception and other constitutional doctrines. *See, e.g.*, *Sterlinski v. Catholic Bishop of Chicago*, No. 16 C 00596, 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"; "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."); *Grussgott v. Milwaukee Jewish Day Sch. Inc.*, 260 F. Supp. 3d 1052, 1053 (E.D. Wis. 2017) ("Plaintiff was permitted to conduct limited discovery" on the ministerial exception defense), *aff'd*, 882 F.3d 655 (7th Cir. 2018).

The federal courts of appeal, including this Court, have reinforced that focused discovery is not only proper but necessary to honor the protection provided by the ministerial exception and other religious-autonomy doctrines:

> *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.'" [quoting *McClure*, 460 F.2d at 560])

Sterlinski v. Catholic Bishop of Chicago, 934 F.3d 568, 569-72 (7th Cir. 2019) (ministerial exception is not just as an affirmative defense to liability, but also a limitation on discovery, because the ministerial exception exists "precisely to avoid . . . judicial entanglement in, and second-guessing of, religious matters"—including by "subjecting religious doctrine to discovery")

Fratello v. Archdiocese of N.Y., 863 F.3d 190, 198 (2d Cir. 2017) (stating that the district court "appropriately ordered discovery limited to whether [the plaintiff] was a minister")

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 "subpoena, discovery, cross-examination, [and] the full panoply of legal process" whenever they decline to hire or 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 of who would best serve the pastoral needs of their members")

McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (a court's "investigation and review" of "matters of church administration and government" relating to a religious organization's relationship with one of its ministers naturally produces an improper "coercive effect" on that organization's governance)

Last, and of course not least, the Supreme Court's decisions require that discovery and trial not proceed as in every other case, if the ministerial exception has been raised. In his *Hosanna-Tabor* concurrence that was later adopted by the majority in in *Our Lady*, *see* 140 S. Ct. at 2064, Justice Alito wrote, "the mere adjudication of" factual questions about church teaching can "pose grave problems for religious autonomy." 565 U.S. at 205-06. And in rejecting the NLRB's assertion of jurisdiction over certain Catholic secondary schools, the Supreme Court noted that it is not just a finding of liability that can "impinge on rights guaranteed by the Religion Clauses," but also the "very process of inquiry." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979); *cf. Serbian E. Orthodox Diocese for U.S. & Canada v. Milivojevich*, 426 U.S. 696, 718 (1976) (a court's "detailed review of the evidence" regarding internal church procedures is "impermissible" under the First Amendment).

In light of this, a district court generally must determine that the ministerial exception does not apply before it permits merits discovery or a merits trial. The district court in this matter failed do so. While the district court appropriately took up the issue of the ministerial exception on Appellant's motion to dismiss, and appropriately limited discovery at that stage to matters relating to the ministerial exception, the district court rushed to judgment in converting the church's motion to dismiss to a motion for summary judgment, denying it, ordering full merits discovery, and planning for trial on issues that included religious questions. In so doing, the district court has set this matter on a course

that, if continued, will not only deprive Appellant of the immunity to which it is entitled but also will decide religious issues that neither courts nor juries are permitted to adjudicate.

D. The District Court's Approach Is Headed for Another Constitutional Violation, Namely, the Exploration of "Pretext" in Discovery and the Adjudication of "Pretext" at Trial

Because the district court denied Appellant's motion for summary judgment and indicated that there is a genuine issue of material fact as to whether Appellee is a minister within the ministerial exception, the district court seems headed for another constitutional violation, namely, the exploration of "pretext" in discovery and the adjudication of "pretext" at trial.

In the ordinary case, an employment discrimination plaintiff may assert that her employer's stated "legitimate, nondiscriminatory reason" for the adverse employment action is "pretextual," that is, "a lie, specifically a phony reason for some action," which is designed to cloak the employer's true and unlawful reason for taking the adverse employment action. *See, e.g., Graham v. Arctic Zone Iceplex, LLC*, 930 F. 3d 926, 929 (7th Cir. 2019). Discovery is then required on a variety of matters such as the factual support for the employer's stated reason for the action, similarly situated employees and the employer's treatment of them compared to the plaintiff, and evidence potentially supporting the plaintiff's claimed discriminatory reasons for the action. Then, if there exists a genuine issue of material fact as to whether the employer's stated reason is the "true" reason or the reason is instead

the alternative discriminatory reason presented by the plaintiff, a jury trial must be held.

In the context of a religious employer's decisions relating to an employee who carries out the employer's religious mission (i.e., one of its "ministers"), however, this motive-probing discovery and ultimate jury trial are precisely the sort of intrusive inquiries that are prohibited by the Religion Clauses. The Supreme Court called out this issue in *Hosanna-Tabor*:

> The EEOC and Perich [i.e., the terminated employee] suggest that Hosanna–Tabor's asserted religious reason for firing Perich—that she violated the Synod's commitment to internal dispute resolution—was pretextual. That suggestion misses the point of the ministerial exception. The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone.

565 U.S. at 194-95 (citation omitted); *see also id.* at 205 (Alito, J., concurring) ("For civil courts 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."). The federal appellate courts have also expressly held that "pretext" inquiries are off limits when the ministerial exception is in play. *See, e.g.*, *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113 (3d Cir. 2018) (holding that the ministerial exception barred the court from considering the pastor plaintiff's claim that the church breached his written employment

agreement, because a component of the analysis would be the church's reasons for terminating the pastor's employment and whether such reasons amounted to "cause"; "parsing the precise reasons for [plaintiff] Lee's termination is akin to determining whether a church's proffered religious-based reason for discharging a church leader is mere pretext, an inquiry the Supreme Court has explicitly said is forbidden by the First Amendment's ministerial exception" [citing *Hosanna-Tabor*, 565 U.S. at 194-95]); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 197, n.15, 202, n.25, 203 (2d Cir. 2017) (if a religious employer offers a religious reason for the employment decision, courts may not adjudicate the matter because courts have no authority to evaluate the genuineness of religious reasons or pretext; dismissal of claims brought by Catholic school principal affirmed); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (affirming Rule 12(b)(6) dismissal, under the ministerial exception, of Title VII claims of gender discrimination and retaliation of female Catholic university chaplain following reorganization of the chaplain's office; plaintiff argued that the university's decision was "merely pretext for gender discrimination," but the court held that adjudicating the university's reasons for its decisions would be to impermissibly evaluate its decisions as to ministerial functions); *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980) (if the religious organization presents a plausible case that the adverse employment action was religiously motivated, the EEOC is constitutionally prohibited from investigating whether the decision is pretext for gender or race discrimination). For the same reasons, the principle that pretext determinations are off limits applies

to non-minister positions too, if the religious employer proffers a religious motivation for its employment decision, for adjudicating questions of religious sincerity are not within the authority of the courts. *See Bryce*, 289 F.3d at 657.

The district court's denial of Appellant's dispositive motion and its recent efforts to proceed with full merits discovery leading to a jury trial on all issues does not heed these pretext-is-off-limits rulings. This Court's review is thus especially important to reverse the district court's erroneous ruling that the ministerial exception does not apply on the presented facts.

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

When a district court rejects the application of the ministerial exception, review under the collateral-order doctrine is available and warranted. The collateral-order doctrine allows for appeal of certain 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." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)); *see also Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659 (10th Cir. 2018) (reciting the same standard and quoting from *Coopers & Lybrand*). The district court's denial of Appellant's invocation of the ministerial exception meets these

criteria. First, the court's rejection of the ministerial exception on summary judgment may have become the "law of the case," preventing Appellant from further arguing the issue prior to trial. Second, the application of the ministerial exception, as an affirmative defense that negates liability, is separate from the merits of the case. The ministerial exception inquiry focuses on the religious nature of Appellant and the religious nature of position held by Appellee, whereas the merits issues will involve typical retaliation issues under Title VII. The third element is satisfied because the district court has denied summary judgment to Appellant and will be setting this matter for trial. "The decisive consideration . . . is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)). As explained above, the constitutional protection offered by the ministerial exception is not just a defense to liability but a form of immunity from the burdens of litigation. And courts have consistently allowed for collateral-order appeals when one party claims an immunity that is constitutionally derived. *See, e.g.*, *Puerto Rico Aqueduct*, 506 U.S. 139 (1993) (approving interlocutory appeal of decision regarding Eleventh Amendment immunity); *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (approving interlocutory appeal of decision regarding qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (approving interlocutory appeal of decision regarding absolute immunity); *Abney v.*

United States, 431 U.S. 651 (1977) (approving interlocutory appeal of decision regarding double jeopardy immunity).

While not specifically in the ministerial exception context, the U.S. Court of Appeals for the Seventh Circuit allowed a collateral-order-doctrine appeal to review a claimed violation of the Establishment Clause arising out of a district court decision that certain religious disputes should go to trial. *See McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013). The court explained that that interlocutory review was proper because of the constitutional issues at stake, citing *Hosanna-Tabor* and liking the matter to collateral order review of denials of official immunity. *Id.* at 975. Although theoretically a jury verdict rejecting (or adopting) the religious judgments of the religious order at issue could have been appealed upon final judgment and reversed, the Seventh Circuit found this result 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.

Id. at 976.

The decision in *Whole Woman's Health v. Smith*, 896 F.3d 362, 368 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1170 (2019), is also

supportive of interlocutory review. There, the court took up interlocutory review under the collateral order doctrine of a district court order requiring certain Catholic bishops to turn over internal church communications related to abortion. The court held that it had jurisdiction to hear the appeal because "the consequence of forced discovery" on rights that "go to the heart of the constitutional protection of religious belief and practice" would be "effectively unreviewable" without an interlocutory appeal. *Id*. at 367-68. The court relied on *Hosanna-Tabor* in stating that "religious organizations" have a strong interest in "maintain[ing] their internal organizational autonomy intact from ordinary discovery." *Id*. at 374. The principles in *Whole Woman's Health* are transferrable to the ministerial exception insofar as the application of the exception provides similar discovery (and trial) protections, particularly with regard to the religious organization's decisionmaking processes, which are factually irrelevant if the exception applies. *See Hosanna-Tabor*, 565 U.S. at 194-95 (noting that to inquire into the motives of a ministerial firing decision would be to "miss[] the point of the ministerial exception").

Finally, this Court's decision in *United States v. P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992), supports acceptance of this interlocutory appeal under the collateral order doctrine. In *P.H.E.* the defendants asserted that the government was pursuing criminal prosecution against them with the vindictive motive of chilling their First Amendment rights of free speech. The district court held that the government had plainly stated a prima facie case against the

defendants and denied defendants' motion to dismiss the indictment. While noting that the denial of defendants' motion to dismiss the indictment did not leave defendants without recourse if they were tried and improperly convicted, this Court granted the defendants' request for interlocutory appeal:

> The gravamen of the appellants' argument is that the actual act of going to trial under a pretextual prosecution has a chilling effect on protected expression. Accordingly, because the right asserted is a "right not to be tried" [*United States v.*] *Hollywood Motor Car* [*Co. Inc.*], 458 U.S. [263,] 267 [(1982)], we will take jurisdiction of this appeal from the order denying the motion to dismiss the indictment; "the decision . . . involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment." *Abney* [*v. United States*], 431 U.S. [651] 658 [(1977)] (quoting *Cohen* [*v. Beneficial Indus. Loan Corp.*], 337 U.S. [541,] 546 [(1949)].

P.H.E., Inc., 965 F.2d at 856 (ellipsis in original).

Given the standards for collateral-order review and the facts of this case, interlocutory appeal is both appropriate and warranted.

CONCLUSION

This Court should hold that it has jurisdiction to hear this interlocutory appeal pursuant to the collateral order doctrine, hold that Appellee's claims are barred by the ministerial exception, reverse the district court's denial of summary judgment in favor of Appellant, and remand with instructions for the district court to enter summary judgment in favor of Appellant.

Respectfully submitted,

/s/ Christian Poland
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/s/ Christian Poland
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Counsel for Amici Curiae

Dated: October 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2020, 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.

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Christian Poland