

**ORAL ARGUMENT REQUESTED**

**No. 20-1230**

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**In the United States Court of Appeals for the Tenth Circuit**

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

*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. 1:19-cv-01652-RBJ-STV**

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**APPELLANT FAITH BIBLE CHAPEL INTERNATIONAL'S  
OPENING BRIEF**

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## **CORPORATE DISCLOSURE STATEMENT**

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

Respectfully submitted,

*/s/ Daniel H. Blomberg*

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## **GLOSSARY**

Add.	Faith Bible's Addendum
Aplt.App.	Faith Bible's Appendix
Jdx.Mem.	Faith Bible's Jurisdictional Memorandum
Jdx.Opp.	Gregory Tucker's Jurisdictional Memorandum

## **PRIOR AND RELATED APPEALS**

Pursuant to Tenth Circuit Rule 27.3(B)(2), Defendant-Appellant Faith Bible Chapel International represents that there are no prior appeals in this case and that it is not aware of any related appeals.

## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral order doctrine. *See* Jdx.Mem. On May 18, 2020, the district court denied Faith Bible's converted motion for summary judgment. Add.1. On June 17, 2020, Faith Bible filed a timely appeal of that order. Aplt.App. Vol.2 at 494. On September 16, 2020, following the district court's September 14 denial of its Rule 59(e) reconsideration motion, Faith Bible timely filed an amended notice of appeal to include the order denying reconsideration in this appeal. Add.15; Aplt.App. Vol.2 at 518.

## STATEMENT OF THE ISSUES

Plaintiff-Appellee Gregory Tucker was the chaplain, a teacher in the Bible department, and a member of the leadership at Faith Bible's religious high school. After his employment ended due to a religious dispute over his leadership of a chapel service, Tucker sued, claiming wrongful termination under federal and state law. The parties conducted targeted discovery focused on Faith Bible's First Amendment church autonomy defenses. The district court denied summary judgment to Faith Bible and ordered the case to proceed to merits discovery and trial. This appeal followed.

The issues presented are:

1. Whether Tucker's claims are barred by the ministerial exception because he performed important religious functions as a religion teacher, leader, and chaplain.
2. Whether Tucker's claims are barred by the church autonomy doctrine because they arise from an internal religious doctrinal dispute regarding the religious content of a chapel service he led.
3. Whether collateral order review is appropriate because the district court denied Faith Bible's First Amendment immunity from merits discovery or trial.

## STATEMENT OF THE CASE

### INTRODUCTION

The Supreme Court has long recognized that “church authorities”—not government officials or judges—“determine what the essential qualifications of a chaplain are.” *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929). Recent decisions only underscore this principle, with both the Supreme Court and this Court repeatedly holding that, under the Religion Clauses of the First Amendment, religious bodies have autonomy in their internal religious governance. This autonomy covers the selection and control of employees in key religious roles, like chaplains and teachers. And it is virtually absolute where it concerns resolution of internal religious disputes.

These foundational religious autonomy principles control this case. Tucker helped lead Faith Bible’s Christian high school as both a teacher of religion and chaplain. As a teacher, he taught religion and integrated Faith Bible’s beliefs into all subjects. And as the chaplain, he was undisputedly and uniquely responsible for the spiritual welfare of his students, a responsibility he discharged in part by organizing and leading chapel services featuring worship, prayer, and religious instruction. This lawsuit arises over Tucker’s leadership of one of those chapel services, where he led a discussion offering Scriptural interpretations that Faith Bible disagreed with and then later began insubordinately expressing his religious disagreement within the school community. Tucker now asks a

federal court both to take his side in this internal religious dispute and to take away Faith Bible's right to select and control its school chaplains. The First Amendment requires this Court to reject those requests.

The lower court committed reversible error—and started down the path of causing irreparable harm—by rejecting the First Amendment's application here and requiring the parties to proceed with merits discovery and trial. As the Supreme Court just reiterated, “[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith,” then “judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020). That is doubly true where the teacher is also a chaplain, and where the dispute arises over the religious content of a chapel service. Additional “judicial interventions” into this dispute beyond what is necessary to resolve the threshold First Amendment questions are unconstitutional.

The district court's first error was to vaguely suggest that there was a genuine dispute of material fact over whether Tucker was the school's “chaplain” or its “director of student life.” But there was no dispute, much less a genuine one: Tucker admitted that he was the chaplain, signed a contract stating as much, and held himself out to students as such. Nor would the dispute be material even if it existed, since Tucker also admits

(and the record amply shows) that he carried out the important religious functions that Faith Bible assigns its chaplain and teachers.

The lower court's second error was to simply ignore Faith Bible's argument that, regardless of Tucker's role at Faith Bible, courts cannot adjudicate his claims over a religious dispute about the religious content of a religious chapel service. Although "any attempt" to use judicial power "to dictate or even to influence such matters" would "obviously" violate the Religion Clauses, *Our Lady*, 140 S. Ct. at 2060, the court failed to even address this argument, either initially or on reconsideration.

Both errors should be reversed by this Court. Moreover, these errors must be corrected via interlocutory appeal. As this Court has long recognized, the First Amendment provides religious organizations with a crucial immunity from certain types of unnecessary discovery and trial. And here, further merits proceedings would irreparably harm Faith Bible and impermissibly entangle the courts in religious questions. Accordingly, the decision below must be reversed.

## **FACTUAL BACKGROUND**

### **A. Faith Bible Chapel and Faith Christian Academy**

Faith Bible Chapel is a church in Arvada, Colorado, that exists for the purpose of "[b]ringing people to Jesus and to membership in His Family" and "[e]quipping people for their ministry in the church and life mission in the world." Aplt.App. Vol.1 at 235; *see also id.* at 28 ¶16; Vol.2 at 474 ¶16. Faith Christian Academy ("Faith Christian") is Faith Bible's

“Christian educational ministry”—a religious school that offers kindergarten through twelfth grade education. Aplt.App. Vol.1 at 115. Both legally and as a religious matter, “the school and the church are one ... entity.” *Id.* at 203.

Faith Christian advances Faith Bible’s mission by “providing a biblically integrated education” that prepares students to “glorify God and serve others through the power of the Holy Spirit.” *Id.* at 107. The first of Faith Christian’s “Core Values” is encouraging every student “to develop an increasingly vital relationship with Jesus.” *Id.* Faith Christian also prepares its students to express their faith, training them “to articulate the Gospel message and defend the Christian Worldview, while understanding opposing worldviews and commit to be disciples who make disciples as they participate in the great commission.” *Id.*<sup>1</sup>

To fulfill these purposes, Faith Christian maintains “an intentionally Christian environment.” Aplt.App. Vol.1 at 110. Students take Bible classes and attend the school’s weekly Chapel services. *Id.* at 115; Add.11. Students also commit to “be actively involved in [their] home church, attend church regularly, and do what [they] can to support the ministry of [their] church.” Aplt.App. Vol.1 at 115. They further commit to “wholeheartedly develop [their] God-given spiritual, intellectual, and

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<sup>1</sup> The “great commission” refers to Jesus Christ’s final command to his disciples to “go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you.” *Matthew* 28:19-20 (NIV).

physical gifts to honor and glorify God,” to “seek, understand and follow God’s will for [their lives],” and to “trust Jesus for direction and help in living an obedient life.” *Id.*

Faith Christian’s teachers are an integral part of the school’s ministry. The teacher handbook states that “becom[ing] a teacher ... at Faith Christian Academy is a calling from the Lord Jesus Christ to minister.” *Id.* at 109. Each teacher must “firmly” uphold Faith Christian’s thirteen-point Statement of Faith, which includes that “[t]he Bible is the inspired, inerrant Word of God,” that “God is triune, three distinct persons, yet one God,” that “Jesus, who is true God and true man, is the only way of salvation,” and that “[i]t is both a privilege and a duty to share the good news of salvation with all people.” *Id.* at 108-09. The Teacher Handbook further includes a three-page explanation of Faith Christian’s “Position Regarding the Holy Spirit,” which is affirmed as the position from which “the school itself will teach about the Holy Spirit,” despite the “wide array of believers ... represented at Faith Christian Academy.” *Id.* at 162; *see also id.* at 109 (“In our essential beliefs, we have unity.”).

In addition to holding certain Christian beliefs, teachers are also required to exemplify specific Christian conduct. For instance, they must actively attend “a biblically based church,” and attend Faith Christian’s chapel services and staff “morning devotions.” *Id.* at 115, 138, 216. They are also required to “abstain from all appearance of evil,” “[l]ive in a vital relationship with God (Father, Son and Holy Spirit),” seek God “through

prayer and the Scriptures,” and “[d]iscern and follow the leading of the Holy Spirit throughout the day.” *Id.* at 111.

In the classroom, teachers are expected to “integrate Scriptural concepts, truths, and application into the instruction within all disciplines” “[u]nder the direction of the Holy Spirit.” *Id.* at 112. They are also instructed to teach “[a]ll subjects ... from a Biblical perspective, emphasizing that all truth is God’s truth and that Jesus Christ is the ultimate source of wisdom.” *Id.* at 107. Moreover, “every” teacher of the Bible at Faith Christian is entrusted with the responsibility “to help each student more fully develop his/her own understanding and experience regarding the work of the Holy Spirit based upon Scripture.” *Id.* at 162. Further, Bible teachers personally help students set and review their spiritual goals. *Aplt.App. Vol.2* at 410.

### **B. Tucker’s Religious Roles at Faith Christian Academy**

In 2000, Gregory Tucker applied for and accepted a high school teaching position at Faith Christian, initially teaching mostly science classes. *Aplt.App. Vol.1* at 205 ¶2. He felt a “spiritual calling” to “help teach kids in a spiritual setting.” *Aplt.App. Vol.2* at 314:20-315:2. In his job application, Tucker expressed “great interest” in the “ministry” at Faith Christian because it was “in line with [his] Christian philosophy of education.” *Id.* at 471. He explained that, “as a Christian, my philosophy of education is shaped by the Bible, which I believe to be the inerrant, infallible Word of God” that “conveys truth in every area of life, including

all academic disciplines.” *Id.* at 468. He emphasized that a Christian teacher’s “main goal in educating students should be to help them become more like Jesus Christ.” *Id.*

As a part of his application, Tucker also highlighted that he attended a Christian college, Pepperdine University, that he minored in religious studies, and that he was involved in Christian organizations such as “Campus Crusade for Christ.” *Id.* at 471. He represented that he had the “necessary skills and experience” to teach at Faith Christian, in part because of his “extensive work in ministry.” *Id.*

As a teacher, Tucker understood Faith Christian as setting the “clear expectation” that he and his fellow teachers “endorse Christianity,” set a “good moral example,” and “allow the Christian worldview to influence [their] teaching.” *Aplt.App. Vol.1 at 208 ¶18.* He was further instructed that he must “integrate’ a Christian worldview into [his] teaching,” which the school required to be “Bible-oriented.” *Id.* at 207 ¶14. From the beginning of his employment, Tucker believed it was his duty as a teacher to “demonstrate the Christian character in every area of his[] studies” and “continually grow in his[] ability to teach Christ as the center” of his students’ education. *Aplt.App. Vol.2 at 468-69.* To achieve this end, Faith Bible encouraged Tucker “to read the Bible and engage in private spiritual reflection.” *Aplt.App. Vol.1 at 207 ¶13.*

Tucker left after the 2005-2006 school year to serve as a missionary in the Dominican Republic. *Aplt.App. Vol.2 at 347-49.* He returned to Faith

Christian in the 2010-2011 school year, hired part time to teach classes in the Bible department. *Id.* at 345, 347; Aplt.App. Vol.1 at 269-71.

Among his other duties, Tucker prepared curriculum and taught classes in the Bible department. He described one class, “Christian Leadership,” as “cover[ing] ... specific leadership principles ... from a Christian perspective.” Aplt.App. Vol.2 at 373. And he explained that another, “Worldviews and Apologetics,” taught students that “Christianity reflected a credible worldview.” Aplt.App. Vol.1 at 206 ¶7. Consistent with Faith Christian’s goal of preparing its students to “defend the Christian Worldview, while understanding opposing worldviews,” *id.* at 107, Tucker assembled and prepared the curriculum so that it also surveyed other major world religions and nonreligious worldviews, Aplt.App. Vol.2 at 371.

In 2014, Tucker returned to a full-time role by agreeing to additionally serve as the school’s Chaplain. Aplt.App. Vol.1 at 208-09 ¶20; *id.* at 99. Tucker’s work as Chaplain required about 20-25 hours per week, in addition to his other teaching duties. *Id.* at 218. The job description for the Chaplain role was explicit that he was to demonstrate “a passionate relationship with Jesus Christ and a desire to see students grow in their ability and desire to build a daily trust relationship with Christ.” *Id.* Faith Christian saw these qualifications as necessary because the Chaplain was uniquely “responsible for the physical, relational and spiritual wellbeing” of Faith Christian’s students. *Id.* In formally

accepting this position, Tucker expressly affirmed that “the hand of the Lord” was on him, that he had “the gift necessary to perform in the position of Chaplain,” and that “God has called [him] to minister this gift” at Faith Christian. *Id.* at 99. Additionally, Tucker agreed to “abide by and be subject to the scriptural and other principles and policies stated in the [Faith Bible and Faith Christian] handbooks.” *Id.* at 100.

As Chaplain, Tucker was required to plan activities that enhance “student spiritual growth,” work “with the Bible department to review and enhance the 9-12th grade Bible curriculum,” conduct “follow-up meetings” with students who violated Faith Christian’s religiously-based Honor Code, maintain “awareness of the spiritual pulse at” Faith Christian to “promote the most positive spiritual growth climate possible,” and provide “support to parents with questions regarding their student’s spiritual growth.” *Id.* at 218. He also collaborated with the Bible teachers as they helped students take “tangible steps” to “improve [their] relationship with God.” *Aplt.App. Vol.2* at 410. For example, Tucker helped students set “spiritual goals” by organizing surveys that were distributed in Bible class. *Id.* at 390.

Tucker subjectively preferred the title “Director of Student Life” instead of “Chaplain.” *Aplt.App. Vol.1* at 208-09 ¶¶20-21. But, consistent with his employment contract, he still held himself out to students as *both* their “Chaplain” and their “Director of Student Life,” and—regardless of the title—was still responsible for all the duties of the

chaplaincy role, including nurturing the students’ “spiritual wellbeing” and “spiritual growth.” *Id.* at 99, 271.

In 2017, Tucker took on an additional duty previously reserved to the school’s principal—planning Faith Christian’s weekly chapel services. *Id.* at 209 ¶25. Chapel services at Faith Christian are “a time for staff and students alike to hear from the Lord and to draw together spiritually.” *Id.* at 138. Tucker was charged with ensuring these services were “designed to provide opportunities for student spiritual growth.” *Id.* at 218. Most chapel services included “worship” and “singing praise songs to God.” Aplt.App. Vol.2 at 391-92. As part of this role, Tucker led the students and staff in prayer during chapel services. *Id.* at 377. Tucker focused chapel services on religious testimony that would “ultimately point [Faith Christian] students back to the gospel and how that impacts the entirety of their lives.” Aplt.App. Vol.1 at 163.

About once a month, Tucker altered the chapel service time to hold “Breakout Groups” to “give students an opportunity to have Biblically grounded, honest, open, and broad conversations about spiritual topics.” Aplt.App. Vol.2 at 415. Topics he chose for Breakout Groups included how students “shared and modeled Christ” during religious missionary trips, *id.* at 404, how to “progress[] toward Christlikeness,” *id.* at 402, and how to overcome “false gods” that “keep[] us from truly following Jesus,” *id.* at 406. Tucker also prepared a list of books to be used as discussion

material during Breakout Groups in order to help students “grow[] corporately as a school and a body of Christ.” *Id.* at 408.

In its evaluations, Faith Christian considered Tucker’s religious performance. Specifically, the evaluations took into account whether he met expectations to “consistently illuminate[] Biblical principles” and to do so “in a manner which leads students” to either “evaluate their personal worldview” or “challenges them to respond via worship.” *Aplt.App. Vol.1 at 216.* They also considered whether Tucker “follow[ed] Matt[hew] 18” to resolve conflict, created and accomplished “spiritual goals,” and attended the school’s “morning devotions.” *Id.* at 217-18.

### **C. This Dispute**

Tucker’s service at Faith Christian ended after a religious disagreement with the school about the content of a chapel service he led in January 2018. *Id.* at 43-44. Tucker proposed to focus a chapel service on issues of race and faith, and Faith Christian’s principal and superintendent strongly supported that plan since it was consistent with the school’s religious beliefs and policies against racism. *Id.* at 35 ¶72; *id.* at 108, 238; *Vol.2 at 481 ¶72.* After receiving their blessing, Tucker engaged in “MUCH thought and prayer,” and consulted with a pastor known for “challenging the church to move toward racial reconciliation and justice.” *Aplt.App. Vol.1 at 164.* Tucker intended the chapel service to reflect his views of how the “Bible repeatedly explains” the “kingdom of God” should function. *Id.*

Faith Bible was surprised when Tucker’s chapel service ultimately included interpretations of Bible passages that were inconsistent with Faith Bible’s interpretation of Scripture. *Id.* at 36 ¶80; Vol.2 at 481 ¶72. Following the chapel service, the superintendent and principal talked with Tucker about the specific Bible verses that had been misinterpreted during the chapel service, but Tucker refused to acknowledge the validity of their concerns or their interpretations of the Bible. *Id.* Tucker published a letter to the school community airing his views, Aplt.App. Vol.1 at 163-66, and then began openly expressing his disagreement with the school’s leadership in an insubordinate manner, *see, e.g., id.* at 36 ¶80, 41 ¶113; Vol.2 at 474, 481 ¶72, 486 ¶113, 490-91 ¶11. Due to this religious disagreement over how Tucker performed the chapel service and handled the aftermath, Tucker’s employment ended in February 2018. *Id.* at 486 ¶116; Vol.1 at 164-65.<sup>2</sup>

#### **D. Proceedings Below**

Tucker then sued Faith Bible, alleging that he was fired in retaliation “for a supposedly flawed message” he shared at the chapel service, in violation of Title VII of the Civil Rights Act of 1964 and Colorado common law. Aplt.App. Vol 1 at 36 ¶80.<sup>3</sup>

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<sup>2</sup> Tucker alleges he was involuntarily terminated. Faith Bible’s position is that the parties voluntarily agreed to separate their employment relationship. This dispute is irrelevant to this appeal.

<sup>3</sup> Tucker made a claim under Title VI, but later agreed to its dismissal. Add.1.

Tucker’s original complaint expressly identified the religious nature of Faith Christian and his work there. He stated that “Faith Christian” was a “religious organization,” *id.* at 12 ¶2, 13 ¶11, and that he was terminated for his “Chapel” service, *id.* at 12 ¶3. But after realizing that his claims would fail under the ministerial exception, Tucker amended his complaint to attempt to diminish the religious significance of his role and Faith Bible’s ministry. *Id.* at 50, 52-53. The chapel service for which he was terminated became a “symposium,” “Faith Christian” became “FBCI,” and “religious organization” was replaced with “vast business network”:

~~3.— Plaintiff Tucker had been given authority to organize the Chapel-symposium and was at first praised for it by the school’s administration. However, after the symposium-Chapel,~~

\*\*\*\*

~~14.— The foregoing Defendant entities collectively referred to as “Faith Christian” terminated Plaintiff’s employment as a teacher and Dean at Faith Christian High School in Arvada, Colorado.~~

\*\*\*\*

~~12. FBCI operates a vast business network. Each business activity of FBCI is carried out by a distinct enterprise, doing business under a trade name of FBCI. At all times applicable herein, Defendant Faith Bible Chapel International Inc. is a religious organization incorporated within the laws of the State of Colorado.~~

*Id.*

Faith Bible moved to dismiss the amended complaint for failure to state a claim, arguing that Tucker's claims were barred by the First Amendment's Religion Clauses both because he was a "minister" and because its employment decision was made for religious reasons. Aplt.App. Vol.1 at 85, 93-94 (citing, *e.g.*, *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002); *Seefried v. Hummel*, 148 P.3d 184 (Colo. App. 2005)).

On Tucker's motion, and before Faith Bible had a chance to respond, the district court converted Faith Bible's motion to dismiss into one for summary judgment. Aplt.App. Vol.1 at 5-6. The parties then engaged in discovery limited to resolution of the Religion Clauses defenses. At the close of limited discovery, Tucker filed his response to the converted motion. He did not argue that genuine disputes of material fact precluded summary judgment. Instead, he attempted to characterize his undisputed responsibilities as "secular." *Id.* at 179-80; *see also id.* at 209 ¶21. For example, despite admitting that most chapel services included worship and prayer, Tucker described them as merely "assemblies or symposiums" covering "matters of interest." *Id.* at 210 ¶26. Similarly, although he conceded his obligations to "endorse Christianity" and teach from a "Christian worldview," he portrayed those duties as lacking religious significance because Faith Christian welcomes students "from a diversity of Christian backgrounds" rather than from a single denomination. *Id.* at 208 ¶18, 210 ¶26.

On May 18, 2020, the district court denied summary judgment. Add.13. The court “f[ound] that whether Mr. Tucker was a ‘minister’” was a disputed issue that must be resolved by a jury. Add.12. The court did not, however, specify which material facts were in dispute other than to vaguely suggest that there was a dispute over whether Tucker held himself out as “Director of Student Life or Chaplain.” Add.1. The court ignored and never addressed Faith Bible’s additional argument that Tucker’s claims must be dismissed under the religious autonomy doctrine because his separation occurred for religious reasons.

#### **E. This Appeal**

On June 17, Faith Bible timely appealed under the collateral order doctrine. This Court then ordered Faith Bible to file a brief by July 15 explaining why that doctrine applied. On July 16, the day after Faith Bible filed its brief, this Court issued an order combining consideration of the collateral order issue with resolution of the merits.

The Court’s order also allowed Tucker to file a separate brief regarding the collateral order doctrine by July 29, which he did. In his brief, Tucker conceded that his duties at Faith Christian required him to “provide spiritual guidance and counseling” to students, organize weekly “religiously oriented” chapel services, “endorse Christianity in general terms, set a good moral example, and allow a Christian worldview to influence [his] teaching,” including by “integrat[ing] a Christian worldview” in the classroom. Jdx.Opp.3, 5. Tucker agreed that the

collateral order doctrine permits interlocutory appeals of governmental immunity defenses because they “include[] a right to avoid ... the burden of litigation,” and he also agreed that “[t]he ministerial [exception] defense bears some resemblance to governmental immunity” in its protection of a religious group’s autonomy from judicial interference. *Id.* at 9, 11. But, jumping to the merits of the ministerial exception, he disagreed that its immunity protections applied since “the church bestowal of ministerial title is [in]sufficient to establish the defense.” *Id.*

On September 16, Faith Bible timely amended its appeal to include the district court’s September 14 denial of Faith Bible’s motion to reconsider the denial of summary judgment. *See* Fed. R. Civ. P. 59(e); Add.15-16; Aplt.App. Vol.2 at 518.

### **SUMMARY OF THE ARGUMENT**

Tucker’s claims are barred in two ways by the First Amendment. First, Tucker’s claims fail under the church autonomy doctrine’s “ministerial exception,” which forbids judicial interference in a religious organization’s selection, supervision, or termination of individuals who hold positions of religious importance. Faith Bible is indisputably a religious organization, and Tucker held a key religious leadership role for the school. Tucker admits he was responsible for the spiritual growth of students, provided them with spiritual guidance and counseling, held himself out as their religious advisor, taught them religious subjects, led them in prayer, and planned their chapel services. Whether he is called

“Chaplain,” “Director,” “Dean,” or just “teacher,” he functioned as a minister of a religious school, and so his claims challenging Faith Bible’s supervision and termination decisions must fail under the Religion Clauses.

Second, Tucker’s claims are independently barred by the church autonomy doctrine’s rule that courts may not entangle themselves in church personnel decisions that are based on matters of faith, doctrine, or church governance. Here, Tucker’s employment claims require exactly that kind of forbidden judicial entanglement: civil adjudication of an internal religious dispute about how he led a chapel service and about his ensuing open disagreement with Faith Bible’s beliefs. The First Amendment thus does not permit courts to hear Tucker’s claims.

Finally, this Court has jurisdiction to resolve this case now and prevent unnecessary lower court proceedings from inflicting irreparable harm on Faith Bible’s First Amendment rights. Under the collateral order doctrine, Faith Bible can immediately appeal the denial of summary judgment because it has asserted First Amendment defenses that provide an immunity from unnecessary discovery and trial. This Court has long held that immunities rooted in the First Amendment are eligible for interlocutory appeal. And many courts and leading experts like Professor Michael McConnell have agreed that church autonomy defenses provide such an immunity. A collateral appeal serves both Faith Bible’s interest in the autonomy of its internal religious affairs *and* the

judiciary's interest in avoiding improper entanglement in those affairs. Absent this appeal, Faith Bible will be subject to merits discovery and a full adjudication of Tucker's claims—including a jury deciding how religious a "Chaplain" is and whether a chapel service included misinterpretations of the Bible.

The Court should accept Faith Bible's appeal and reverse.

### ARGUMENT

The application of the church autonomy doctrines at issue here are pure questions of law that are reviewed *de novo*. *Bryce*, 289 F.3d at 655; *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1244 (10th Cir. 2010) ("the ministerial exception's application" is a "legal conclusion"); accord *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015) (exception is "pure question of law"). Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Skrzypczak*, 611 F.3d at 1243 (quoting Fed. R. Civ. P. 56(c)).

#### **I. Tucker's claims are barred by the ministerial exception.**

The First Amendment's Religion Clauses protect against government interference in internal church affairs, guaranteeing a heightened "independence" for churches "from secular control or manipulation." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S.

171, 186 (2012). This independence includes “the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities.” *Our Lady*, 140 S. Ct. at 2060. Often called the “ministerial exception,” this rule bars “employment discrimination claims brought against religious organizations,” *id.* at 2061, by “any employee who serves in a position that is important to the spiritual and pastoral mission of the church,” *Skrzypczak*, 611 F.3d at 1243 (internal quotation marks omitted). The rule is required by both Religion Clauses of the First Amendment. Judicial interference in a ministerial relationship “infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments,” and it “also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.” *Hosanna-Tabor*, 565 U.S. at 188-89. Thus, with roots firmly grounded in “general principle[s] of church autonomy,” *Our Lady*, 140 S. Ct. at 2061; *Skrzypczak*, 611 F.3d at 1243, the ministerial exception gives religious groups independence to choose and control those “who will preach their beliefs, teach their faith, and carry out their mission.” *Hosanna-Tabor*, 565 U.S. at 196.

Here, Faith Bible is a religious school protected by the ministerial exception, and the undisputed facts show Tucker held a ministerial role for Faith Bible. Thus, the ministerial exception bars both his Title VII and state-law wrongful-termination claims. *See, e.g., Hosanna-Tabor*,

565 U.S. at 194 n.3 (ministerial exception barred “retaliation claim under the ADA” as well as “her retaliation claim under Michigan law”); *Conlon*, 777 F.3d at 837 (the “ministerial exception bars federal and state employment-law claims”). The contrary decision below was error.

**A. The ministerial exception applies to teachers, chaplains, and other leaders at religious schools.**

Courts have repeatedly recognized that the ministerial exception applies to the teachers, chaplains, and leaders of religious schools. This comes as no surprise, given the “close connection that religious institutions draw between their central purpose and educating the young in the faith.” *Our Lady*, 140 S. Ct. at 2064-66. Indeed, both of the Supreme Court’s two ministerial exception decisions concern teachers at religious schools.

In the first case, *Hosanna-Tabor*, the Court unanimously found that the ministerial exception barred claims by a fourth-grade teacher of a Lutheran elementary school for wrongful termination under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* 565 U.S. at 179. The teacher qualified as minister because of her formal title (“minister”), the substance reflected in that title (significant religious training and formal commissioning), her use of the title (including availing herself of ministerial tax breaks), and “the important religious functions she performed” (such as teaching religion 45 minutes per day in addition to secular subjects, leading students in prayer, taking student

to chapel services, and helping lead chapel services twice per year). *Id.* at 192. The Court declined to identify any of the four considerations as essential, since they were altogether more than enough to assure her ministerial status. *Id.* at 190-91.

In its next ministerial exception case, *Our Lady*, the Court clarified what *Hosanna-Tabor* left open: while many considerations may be relevant, the key ministerial consideration was the employee's religious function. Thus, what matters is "what an employee *does*." 140 S. Ct. at 2064 (emphasis added). *Our Lady* involved Title VII claims brought by two "lay" teachers at Catholic schools. 140 S. Ct. 2049. The teachers had no clerical titles, no formal commissioning, and no substantial religious training. *Id.* at 2077-78 (Sotomayor, J., dissenting). Both taught primarily secular subjects and were not required to be Catholic. *Id.* at 2077-79. Yet the Supreme Court, by a 7-2 vote, held that both teachers came within the ministerial exception because of the important religious functions they performed in "carry[ing] out th[e] mission" of "[e]ducating and forming students in the Catholic faith." *Id.* at 2066. Specifically, the teachers taught religion class, "guide[d] their students, by word and deed, toward the goal of living their lives in accordance with the faith," "prayed with their students," "attended Mass" with them, and prepared them to participate in "other religious activities." *Id.*

Numerous other appellate courts have reached the same conclusion for teachers, chaplains, and leadership at religious schools. *Grussgott v.*

*Milwaukee Jewish Day Sch. Inc.*, 882 F.3d 655 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 456 (2018) (grade-school teacher at Jewish elementary school); *Fratello v. Roman Catholic Archdiocese of N.Y.*, 863 F.3d 190 (2d Cir. 2017) (principal at Catholic elementary school); *Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006) (chaplain at Catholic university); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (part-time music teacher at Catholic elementary school); *Clapper v. Chesapeake Conf. Seventh-day Adventists*, 166 F.3d 1208 (4th Cir. 1998) (teacher at Seventh-day Adventist elementary school); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d 433 (Mass. 2012) (Jewish after-school teacher); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192 (Conn. 2011) (principal of Catholic school); *Coulee Catholic Schs. v. Labor & Indus. Rev. Comm'n*, 768 N.W.2d 868 (Wis. 2009) (first-grade teacher at Catholic elementary school); *Pardue v. Ctr. City Consortium Schs.*, 875 A.2d 669 (D.C. 2005) (principal at Catholic elementary school); *see also Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 424 (2018) (chaplain at Methodist hospital); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991) (chaplain at hospital).

As shown next, the same result applies here. Faith Bible is a religious organization that considers religious education central to its mission, and—as a chaplain, teacher, and school leader—Tucker held an

important religious role for Faith Bible. The ministerial exception bars his claims.

**B. Faith Bible is a religious organization.**

A religious group qualifies for the ministerial exception's protection whenever its "mission is marked by clear or obvious religious characteristics." *Conlon*, 777 F.3d at 834; *Penn*, 884 F.3d at 425 (same); *Grussgott*, 882 F.3d at 658 (same).

The district court correctly held that Faith Bible meets this standard. From its name ("Faith Bible Chapel") to its mission (to "propagate the Gospel of our Lord and Savior Jesus Christ among all people"), it is marked by unmistakably clear religious characteristics. That's just as true in its operation of Faith Christian Academy as a "Christian educational ministry" that "provid[es] a biblically integrated education" and prepares students to "glorify God and serve others through the power of the Holy Spirit." Aplt.App. Vol.1 at 115; Add.3.

As shown above, religious schools are regularly protected by the ministerial exception. And *Our Lady* makes things clearer yet, expressly listing "non-denominational Christian schools" among the types of religious groups that the exception protects. *See* 140 S. Ct. at 2065 (noting these protected religious groups have "the aim of inculcating Biblical values in their students.").

**C. Tucker was a “minister.”**

Tucker’s positions as a chaplain, Bible teacher, and member of the leadership at a Christian school put him in the heartland of the ministerial exception.

The exception “include[s] any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.” *Our Lady*, 140 S. Ct. at 2064 (cleaned up). Tucker performed several of those functions all at once. As the chaplain, he organized and led weekly chapel services that featured prayer, worship, and religious teaching. As both chaplain and teacher, he was responsible for “educating young people in their faith, inculcating its teachings, and training them to live their faith,” all of which lie “at the very core of the mission of a private religious school.” *Id.* And as a chaplain, teacher, and a director/dean at the school, he held a leadership role for Faith Christian. Any one of those important religious functions is sufficient to find that the ministerial exception applies. All of them together make this an easy case.

It only gets easier by looking at additional considerations that courts can also weigh, such as an employee’s religious title and training. *See id.* at 2062-63. These considerations “are not inflexible requirements” and often have “far less significance” than the religious functions a minister performed, *id.* at 2064, but are nonetheless helpful here to further

confirm that Tucker's role was important to Faith Christian's "spiritual and pastoral mission," *Skrzypczak*, 611 F.3d at 1243.

**1. Tucker carried out important religious functions.**

The most significant consideration for determining if the exception applies is "what an employee does." *Our Lady*, 140 S. Ct. at 2064. In evaluating the religious functions an employee performed, courts look to evidence of their job descriptions and duties, "employment agreements and faculty handbooks," and performance evaluations. *Id.* at 2066; *accord Skrzypczak*, 611 F.3d at 1243-44. Here, a wealth of that kind of undisputed evidence shows Tucker's role as a chaplain and religion teacher is covered by the ministerial exception.

Indeed, as an initial matter, this Court hardly needs to look beyond Tucker's briefing to this Court, where he has already admitted that he performed important religious functions as a chaplain and a teacher. He confirmed his duties as chaplain included "organiz[ing] religiously oriented" chapel services and providing students "spiritual guidance and counseling." Jdx.Opp.3. And he admits his duties as a teacher required him to "endorse Christianity in general terms, set a good moral example, and allow a Christian worldview to influence [his] teaching," including by "integrat[ing] a Christian worldview" in the classroom. Jdx.Opp.5. These admissions alone are sufficient to show that his position was "important to the spiritual and pastoral mission" of Faith Bible.

*Skrzypczak*, 611 F.3d at 1243. And there is much more evidence in the record building on those admissions.

**Chaplain.** As chaplain, Tucker spent 20-25 hours per week “[f]ocused” on students’ “spiritual wellbeing” and “provid[ing] opportunities for student spiritual growth.” Aplt.App. Vol.1 at 226. One manifestation of this responsibility was the weekly chapel services Tucker held, where he led in prayer, Aplt.App. Vol.2 at 377:18-19, helped students “hear from the Lord” and “draw together spiritually,” Vol.1 at 163, 138, 30 ¶39, and allowed students to “worship” together by “singing praise songs to God,” Vol.2 at 391:24-392:6. He also organized monthly small-group services to facilitate more personal—but still “Biblically grounded”—discussions “about spiritual topics.” Aplt.App. Vol.2 at 415. Topics at both types of services included “shar[ing] and model[ing] Christ,” *id.* at 404 “progressing toward Christlikeness,” *id.* at 402, and overcoming “false gods” that “keep[] us from truly following Jesus,” *id.* at 406.

Tucker viewed chapel services as requiring significant spiritual preparation. Take the chapel service on which this case is based. There, Tucker engaged in “MUCH thought and prayer,” consulted with a pastor, committed the plan once “again [to] much prayer,” and then personally led the chapel service—all to teach students about the “kingdom of God” and “ultimately point [them] back to the gospel and how that impacts the entirety of their lives.” Aplt.App. Vol.1 at 163-64.

Further, Tucker testified that he was “viewed as a member of leadership” and that he had to commit to practicing his faith consistently to “be in a position to effectively minister to others.” Aplt.App. Vol.2 at 344:14-24. This leadership role allowed him to supervise the teachers who helped lead the small-group services he organized by providing them religious materials and agendas to guide discussion, and then encouraging them to “go in whatever direction you feel the Holy Spirit is leading.” *Id.* at 406-07; *Fratello*, 863 F.3d at 210 (acknowledging religious significance of supervisory roles at religious schools); *Petruska*, 462 F.3d at 307 n.10 (where employee “supervises spiritual functionaries, at least some of the functions he performs are, by definition, spiritual ones”). And it gave him a platform from which to direct the spiritual growth of students. For instance, he helped ensure students set “spiritual goals” by organizing surveys that were distributed in Bible class. Aplt.App. Vol.2 at 389.

Finally, Tucker *knew* he was signing up for a religiously important role. The chaplaincy contract Tucker signed “expressed his ... belief” that “God has called him[] to minister” at the school as a chaplain. Aplt.App. Vol.1 at 99. The contract further confirmed that he had “discussed with [the school] the necessity that the hand of the Lord be upon” him, and that he agreed that he “exhibits the gift necessary to perform in the position of Chaplain.” *Id.* Finally, he agreed to hold “Christian beliefs”

and to display a “commitment to God’s Word and the teachings of His Son, Jesus Christ.” *Id* at 101.

Based on his chaplaincy role alone, there is no question Tucker performed important religious functions for Faith Bible. Under longstanding law, then, it was solely for Faith Bible to “determine what the essential qualifications of a chaplain are and whether [Tucker] possesse[d] them.” *Gonzalez*, 280 U.S. at 16. Faith Bible made its choice, and Tucker cannot now ask federal courts to gainsay that determination.

**Teacher.** Tucker also had significant religious duties as a teacher because Faith Christian’s teachers are an integral part of the school’s ministry. The teacher handbook states that “becom[ing] a teacher ... at Faith Christian Academy is a calling from the Lord Jesus Christ to minister.” Aplt.App. Vol.1 at 109. Each teacher must “firmly” uphold Faith Christian’s Statement of Faith, which includes that “[t]he Bible is the inspired, inerrant Word of God,” that “God is triune, three distinct persons, yet one God,” and that “Jesus, who is true God and true man, is the only way of salvation.” *Id.* at 108-09. Teachers must actively attend “a biblically based church,” *id.* at 117, attend Faith Christian’s chapel services, *id.* at 120, and “abstain from all appearance of evil,” *id.* at 113. In the classroom, teachers are expected to teach “[a]ll subjects ... from a Biblical perspective, emphasizing that all truth is God’s truth and that Jesus Christ is the ultimate source of wisdom.” *Id.* at 107.

Tucker had the same highly religious view of teachers at the school. He testified that he saw his “teaching as a ministry” because “[t]eaching was a space where [he] was able to express [his] faith.” Aplt.App. Vol.2 at 365:19-366:6. Indeed, he “often” discussed “doctrines” and “theology” with both teachers and students at Faith Christian. *Id.* at 327:9-11.

Nor was that frequency any surprise. An important part of Tucker’s teaching responsibilities included preparing curriculum and teaching classes in the Bible department. For instance, his “Christian Leadership” class covered “leadership principles ... from a Christian perspective.” *Id.* at 373. And his “Worldviews and Apologetics” class advanced Faith Christian’s goal of preparing its students to “defend the Christian Worldview, while understanding opposing worldviews,” Aplt.App. Vol.1 at 107, by surveying world religions and teaching students that “Christianity reflected a credible worldview.” *Id.* at 206 ¶7; Vol.2 at 371.

Further, Faith Christian did not leave to chance whether Tucker taught in accordance with its religious beliefs. Instead, it regularly evaluated whether Tucker’s teaching “consistently illuminat[ed] Biblical principles,” and did so “in a manner which leads students” to either “evaluate their personal worldview” or “challenges them to respond via worship” and “service.” Aplt.App. Vol.1 at 216. It also confirmed that Tucker “follow[ed] Matt[hew] 18” to resolve conflict, created and accomplished “spiritual goals,” and attended the school’s “morning devotions.” *Id.* at 216-17.

Finally, Tucker's testimony confirms that he understood his role at Faith Christian as a teacher would have deep spiritual significance. For instance, Tucker testified that he believes that, as a teacher at a Christian school, his "*main goal* in educating students should be to help them become more like Jesus Christ," that "the *most important part* of a student's education should be the enlivening and growth of his/her Christian character," and that a Christian teacher should "seek to continually grow in his/her ability to teach Christ as the *center* of their education." Aplt.App. Vol.2 at 318:15-320:12 (emphasis added). He explained that his "philosophy of education is shaped by the Bible" and that he "believe[s] that prayer is vitally important to any philosophy of education." *Id.* at 468-469. He felt a calling to be a "spiritual influence on kids or help to teach kids in a spiritual setting." *Id.* at 314:20-315:2. It was precisely for these reasons that he joined Faith Christian, to participate in the "ministry it provides to high school students." *Id.* at 471.

This undisputed evidence of Tucker's religious duties as a teacher is yet again more than sufficient to show that Tucker "serve[d] in a position that [wa]s important to the spiritual and pastoral mission" of Faith Bible. *Skrzypczak*, 611 F.3d at 1243.

***Faith Bible's View.*** Further important confirmation of the religious significance of Tucker's undisputed religious duties comes from Faith Bible's express "definition and explanation of [Tucker's] role[]." *Our*

*Lady*, 140 S. Ct. at 2066. As the Supreme Court explained, “judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition.” *Id.* Thus, “[a] religious institution’s explanation of the role of [its] employees in the life of the religion in question is important.” *Id.* Here, it was clear that Faith Bible saw Tucker “as playing a vital part in carrying out the mission of the” school. *Id.* at 2066-67.

As noted above, Tucker’s chaplaincy contract repeatedly emphasizes that Faith Bible viewed the role as religiously significant. Likewise, Tucker’s teaching duties at Faith Bible were expressly religious in purpose and were required to include “a Biblical perspective” with the goal of “always directing the student’s focus to Jesus Christ.” *Aplt.App. Vol.1 at 107-09.* Further, Faith Christian set extensive religious conduct and church-attendance requirements for all teachers. *Id.* at 111, 115, 138, 216. And Faith Bible zealously guards its ability to ensure teachers represent its faith, emphasizing in its employee handbook that it “**does discriminate** on the basis of religion” when making employment decisions. *Aplt.App. Vol.1 at 238* (emphasis in original).

Thus, Faith Bible’s own explanation of Tucker’s role in the life of its ministry fully confirms the religious significance of the role. Tucker’s claims are barred by the ministerial exception.

**2. Tucker’s title and training confirm his religious role.**

Given Tucker’s religious duties at Faith Bible, nothing else is needed to show that he falls within the ministerial exception. *Our Lady*, 140 S. Ct. at 2063-64 (while “a variety of factors” can be helpful, “[w]hat matters, at bottom, is what an employee does”). But confirmation of Tucker’s ministerial role is reflected in the “the formal title given” to Tucker’s role by Faith Bible, along with “the substance reflected in that title” as shown by the training and qualifications required for that role. *Hosanna-Tabor*, 565 U.S. at 192; accord *Our Lady*, 140 S. Ct. at 2060, 2064 (title, training not necessary, but helpful).

**Title.** That Faith Christian gave Tucker the title of “Chaplain” and “teacher” provides additional evidence that it viewed his duties as religious. Tucker signed a contract with Faith Christian agreeing to be its “Chaplain,” Aplt.App. Vol.1 at 99, and held himself out to students as their Chaplain, *id.* at 271. “Chaplain” is undoubtedly a religious title. *See, e.g., Chaplain*, Merriam-Webster.com Dictionary (2020) (“a clergyman in charge of a chapel” or “a person chosen to conduct religious exercises”). Moreover, as demonstrated both in the contract and in the discussion above, there is no question that Faith Bible understood its Chaplain position to be religiously significant. Faith Christian only had one chaplain, and Tucker was it.

Tucker’s additional role as a teacher in the Bible department of Faith Christian further confirms his ministerial status. “The concept of a

teacher of religion is loaded with religious significance.” *Our Lady*, 140 S. Ct. at 2067 (noting that “[t]he term ‘rabbi’ means teacher, and Jesus was frequently called rabbi”). Some teachers at religious schools might not be ministers. But ones who—like Tucker—bear that title as both a Bible teacher and senior leader of a religious school certainly are. Here, Tucker’s teaching title reflects his role in “teaching and conveying the tenets of the faith to the next generation.” *Hosanna-Tabor*, 565 U.S. at 200.

**Training.** Tucker’s training and the qualifications required for his position also reflect that Faith Bible “regard[ed] [his] position as having an important responsibility in elucidating or teaching the tenets of the faith.” *Our Lady*, 140 S. Ct. at 2064 (noting that no “rigid academic requirements” are necessary). Faith Bible hired Tucker after reviewing his “extensive work in ministry,” including service with collegiate ministries, his minor in Religious Studies from a well-known Christian university, and his “Christian philosophy of education.” Aplt.App. Vol.2 at 471. Faith Bible later promoted Tucker to its Chaplaincy position after years of experience with him teaching its Bible classes and after he spent four years working as an overseas missionary for a local church. *Id.*; *id.* at 347:18-348:10.

The qualifications for the job were also expressly religious. In his application, Tucker had to “subscribe” “[w]ithout mental or other reservation” to Faith Bible’s Statement of Faith. *Id.* at 419. Among the

“Qualifications” listed in his Teacher Handbook was a requirement that he “[b]e able to perform ... essential dut[ies]” like “[d]iscern[ing] and follow[ing] the leading of the Holy Spirit throughout the day,” teaching “[a]ll subjects ... from a Biblical perspective,” and “integrat[ing] Scriptural concepts, truths, and application into the instruction.” Aplt.App. Vol.1 at 107, 111-12. And he was evaluated on whether he “consistently illuminate[d] Biblical principles” in fulfilling his duties. *Id.* at 216.

Given his training and the job requirements of his position, Faith Bible indisputably “thought that [Tucker] had a sufficient understanding of [Christianity] to teach [his] students, and judges have no warrant to second-guess that judgment or to impose their own credentialing requirements.” *Our Lady*, 140 S. Ct. at 2068.

In sum, Tucker had a religious position imbued with religious duties at a religious organization. The ministerial exception bars his suit.

**D. The district court erred in denying summary judgement.**

The district court committed reversible error in refusing to grant Faith Bible summary judgment. The record amply shows that Tucker was a minister. No material fact necessary to show Tucker’s ministerial status was in genuine dispute. Thus, summary judgment was warranted.

In its order, the district court said “that whether Mr. Tucker was a ‘minister’ within the meaning of the ‘ministerial’ exception’ is genuinely

disputed.” Aplt.App. Vol.1 at 284. But that was error, and for four reasons.

First, whether the exception applies is a “legal conclusion,” not a factual question. *Skrzypczak*, 611 F.3d at 1244; *Conlon*, 777 F.3d at 833 (“whether the exception attaches at all is a pure question of law”).

Second, the only purported factual dispute that the district court vaguely identified was whether Tucker was “Director of Student Life or Chaplain.” Add.1. But there’s also no *genuine* dispute about that. No one disputes that (1) Faith Bible’s contract identified him as “Chaplain” or (2) Tucker preferred to identify himself as “Director of Student Life” or (as in his memorandum) “Dean of Students.” Indeed, Tucker expressly told students that his role was *both*, identifying his title as “Director of Student Life/Chaplain.” *Id.* at 271; Vol.2 at 373:10-13.

Third, there’s also no *material* dispute of fact on that score because, regardless of his title, Tucker *functioned* as a minister. Under *Our Lady*, “[w]hat matters, at bottom, is what an employee does.” 140 S. Ct. at 2064. The fact that Tucker taught religion, led chapel services, and provided spiritual guidance to students brings him squarely under the ministerial exception, no matter his title. In any event, even Tucker’s preferred title of “Director” or “Dean” (in addition to “Chaplain” and “teacher”) conveys that he held a leadership position at the school and thus affirms his ministerial role. *Fratello*, 863 F.3d at 210 (finding a “principal” to be a minister, and listing other courts reaching same conclusion).

Finally, the district court erred by rejecting Faith Bible’s well-established, sincere views and instead accepting Tucker’s post-hoc, self-serving minimization of his religious role. That’s exactly backwards: “it is the school’s expectation ... that matters,” since the exception exists to protect the school’s control over “those with the ability to shape the practice of their faith.” *Grussgott*, 882 F.3d at 661. Thus, for instance, in *Petruska*, the Third Circuit found that a chaplain’s claim was barred by the ministerial exception, even though the chaplain protested that “she was not a ‘chaplain’ as that term is understood in the Roman Catholic Church.” 462 F.3d at 307 n.10. And in *Skrzypczak*, this Court rejected an attempt to create a dispute of fact via a plaintiff’s self-serving declarations claiming her role “was purely administrative” and not religious. 611 F.3d at 1244-45.

The same issue arose in *Our Lady*. There, the teachers tried to introduce factual disputes over the nature of their roles—saying they merely taught religion from a workbook (rather than seeking to inculcate religious faith), joined students in prayer (rather than leading them), and accompanied students to Mass to keep them quiet (rather than joining them in worship). But the Court said that what mattered was that the “schools expressly saw [the teachers] as playing a vital part in carrying out the mission of the church, and *the schools’ definition and explanation of their roles is important.*” *Our Lady*, 140 S. Ct. at 2066 (emphasizing added).

In sum, because the district court erred and Tucker failed to “bring forward specific facts showing a genuine issue for trial,” *Skrzypczak*, 611 F.3d at 1243, Faith Bible is entitled to summary judgment. As in *Our Lady*, “although there are differences of opinion on certain facts,” no “*material* fact is genuinely in dispute.” 140 S. Ct. at 2056 n.1. The district court’s contrary order should be reversed.

\* \* \*

The “very reason for the existence” of schools like Faith Bible is “the religious education and formation of students,” which places “the selection and supervision of the teachers upon whom the schools rely to do this work” directly at “the core of their mission.” *Our Lady*, 140 S. Ct. at 2055. Thus, allowing Tucker’s claims to proceed “would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.” *Id.*

**II. Because Tucker’s dismissal was based on religious doctrine, his claims are barred by the church autonomy doctrine.**

Tucker’s claims are also independently barred under the church autonomy doctrine because his dismissal was “based on religious doctrine.” *Bryce*, 289 F.3d at 660. As explained above, one aspect of church autonomy is the ministerial exception, which bars employment discrimination claims *by ministers* regardless of the *reason* for discharge. But church autonomy *also* bars employment claims *by any personnel* (including non-ministers), when the employment decision “involv[es]

matters of faith, doctrine, church governance, and polity.” *Skrzypczak*, 611 F.3d at 1242 n.4, 1246.

Here, the focus of Tucker’s suit is an employment separation that occurred “[i]n direct response to Tucker’s organization of” a chapel service and the internal conflict within Faith Bible as to the “flawed message” conveyed at that chapel. Aplt.App. Vol.1 at 25-26 ¶2, 36 ¶80. Because any attempt to adjudicate that conflict would punish Faith Bible for a decision based on religious doctrine and would excessively entangle the courts in religious questions, Tucker’s federal and state employment claims are barred by the church autonomy doctrine.

**A. The church autonomy doctrine bars adjudication of Tucker’s Title VII claim.**

Under “the general principle of church autonomy,” the Religion Clauses protect a religious organization’s “independence in matters of faith and doctrine and in closely linked matters of internal government.” *Our Lady*, 140 S. Ct. at 2061. This ensures that “churches have autonomy in making decisions regarding their own internal affairs.” *Bryce*, 289 F.3d at 655. It also ensures that “[r]eligious questions are ... answered by religious bodies,” *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013), and courts “refrain from trolling through a person’s or institution’s religious beliefs.” *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (McConnell, J.) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000)); *see also McCarthy*, 714 F.3d at 980 (“[F]ederal courts are not

empowered to decide (or to allow juries to decide) religious questions.”). To do otherwise would be “wholly inconsistent with the American concept of the relationship between church and state.” *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 445-46 (1969).

The church autonomy doctrine has been held to bar civil authorities from intervening in a broad range of internal church matters. *See Our Lady*, 140 S. Ct. at 2061. For example, in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, the Supreme Court struck down a New York law that would have transferred control over a cathedral from one church authority to another. 344 U.S. 94, 119 (1952). The Court emphasized that “religious organizations” must have “an independence from secular control or manipulation” and the concomitant “power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* at 116. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, applying the same principle, the Court barred civil courts from interfering in a church’s decision to reorganize itself and remove a bishop. 426 U.S. 696, 713 (1976).

Most relevant here, church autonomy also bars civil courts from intervening in disputes over whether a person meets a religious organization’s doctrinal qualifications for membership or employment. As the Supreme Court recognized over a century ago, when a religious

association organizes itself and provides for its governance, all who later “unite themselves to [it] do so with an implied consent to this government, and are bound to submit to it,” “in all cases of ecclesiastical cognizance.” *Watson v. Jones*, 80 U.S. 679, 728-29 (1871). It is therefore well-recognized that suits challenging a religious organization’s disciplining or expulsion of a member on religious grounds are off-limits: Civil courts “have no power to revise or question ordinary acts of church discipline, or of excision from membership.” *Bouldin v. Alexander*, 82 U.S. (15 Wall.) 131, 139 (1872).

This Court’s decision in *Bryce* is controlling. There a church’s youth minister sued under Title VII after she was allegedly harassed following her entrance into a civil commitment ceremony with another woman; she alleged that church officials’ statements about homosexuality and her activities constituted sex discrimination. 289 F.3d at 651-53. But this Court affirmed judgment for the church on grounds of church autonomy. The court expressly declined to decide whether the plaintiff was a “minister” for ministerial-exception purposes. *Id.* at 658 n.2. Instead, the court explained that even where the plaintiff is *not* a minister, claims challenging religious organizations’ “personnel decision[s]” are precluded where “the alleged misconduct is ‘rooted in religious belief.’” *Id.* at 657-58 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). Thus, because the plaintiff had suffered adverse action for “violating Episcopal doctrine,” and the challenged conduct consisted of “meetings to discuss

that decision and the ecclesiastical doctrine underlying it, the courts [could] not intervene.” *Id.* at 652, 660.

As in *Bryce*, Tucker’s claims are barred by church autonomy because the “church ma[de] a personnel decision based on religious doctrine.” 289 F.3d at 660. Tucker expressly alleged and argued below “that he was fired from the School in retaliation for his role in planning a Chapel Meeting” and the “message” conveyed at that chapel. *Aplt.App. Vol.1* at 173 ¶34, 36 ¶80. The district court likewise understood that the basis for Tucker’s separation was that Faith Bible “objected to a ‘chapel’ he organized.” *Add.1*. And as Faith Bible has explained, the reason for those objections and ultimately Tucker’s separation was that “there were several assertions and applications of Scripture presented” at the chapel that it “did not believe were correct,” *Aplt.App. Vol.2* at 481 ¶72, and Tucker “refused to acknowledge the validity of [Faith Bible’s] concerns and interpretation of the Bible, *id.* at 491 ¶11.

Thus, adjudicating Tucker’s Title VII claim would allow a civil court to punish a religious organization for a personnel decision based on religious doctrine—interfering with the core of religious autonomy. It would also require impermissible judicial decisions on a quintessentially theological dispute—namely, whether the message conveyed at the chapel he organized was consistent with Scripture. Faith Bible has explained that the message was inconsistent with *its* view of Scripture, and the courts may not “second-guess[.]” its “religious beliefs and

practices,” for “[c]ourts are not arbiters of scriptural interpretation.” *Weaver*, 534 F.3d at 1261, 1265 (internal quotation marks omitted). The district court cannot instruct the jury on how to answer this question, and the jury cannot answer it. Because resolving Tucker’s claims “would necessarily involve inquiry into the relationship of the [employment] actions to the school’s religious mission” and “creeds,” the “very process of inquiry” “would create excessive entanglement with the schools’ religious views.” *Id.* at 1263-64 (cleaned up) (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 499, 502 (1979)). The church autonomy doctrine accordingly bars Tucker’s Title VII claim.

**B. Tucker’s state-law claim is also barred by the church autonomy doctrine.**

The same analysis applies to Tucker’s state-law claim for wrongful termination, Aplt.App. Vol.1 at 46, which challenges the same actions and piggy-backs off his federal claim. Tucker relies on Colorado’s public policy exception to the at-will employment doctrine, which means his wrongful termination claim can only succeed if he shows (among other things) that he was “terminated for refusing to engage in unlawful or unethical conduct.” *Crawford Rehab. Servs., Inc. v. Weissman*, 938 P.2d 540, 552 (Colo. 1997).

As an initial matter, Tucker’s claim must fail because the “public policy” on which Tucker bases his state claim is “abid[ing]” by “Title VI,” and he has already let that claim be dismissed without opposition.

Aplt.App. Vol.1 at 46 ¶142; *id.* at 285. In any event, that claim itself was based on his alleged termination. *See id.* at 46 ¶138. Thus, “the alleged misconduct”—Tucker’s employment separation—is again “rooted in religious belief,” *Bryce*, 289 F.3d at 657 (cleaned up), and “resolution of th[at] claim would require an impermissible inquiry into the church’s bases for its action,” *Seefried*, 148 P.3d at 189 (rejecting ministers’ defamation claims arising from a church members’ meeting). Courts cannot decide whether Faith Bible’s religious beliefs are “unlawful” or “unethical” within the meaning of Colorado common law, and “attempts to separate arguably impermissible ... grounds for a decision from grounds stemming from the church beliefs excessively entangles a court with religion.” *Van Osdol v. Vogt*, 908 P.2d 1122, 1132 (Colo. 1996). Tucker’s state-law claim is barred.<sup>4</sup>

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<sup>4</sup> *Accord, e.g., Myhre v. Seventh-day Adventist Church Reform Movement Am. Union Int’l Missionary Soc’y*, 719 F. App’x 926, 928-30 (11th Cir. 2018) (dismissing state tort claims premised on employee’s defrocking and termination of benefits “due to a ‘theological disagreement’”); *Gaddy v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 451 F. Supp. 3d 1227, 1234-41 (D. Utah, 2020) (dismissing both state and federal claims on religious-autonomy grounds); *In re Episcopal Sch. of Dallas, Inc.*, 556 S.W.3d 347, 358 (Tex. App. 2017) (dismissing state law claims because “all concern a faith-based organization’s internal affairs, governance, administration, membership, or disciplinary procedures”).

**III. This Court has jurisdiction under the collateral order doctrine.**

**A. The First Amendment provides Faith Bible an immunity from suit here, which justifies interlocutory appeal.**

As explained in detail in Faith Bible’s jurisdictional memorandum, this Court has jurisdiction under the collateral order doctrine. That doctrine applies when orders resolve rights that are “too important to be denied review and too independent of the cause [of action] itself to justify waiting out the rest of the adjudication.” *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 664 (10th Cir. 2018) (cleaned up). Qualifying collateral orders include those that involve a party’s “entitlement not to stand trial or face the other burdens of litigation.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

First Amendment claims of immunity from trial have long been found to fit the bill. *United States v. P.H.E., Inc.*, 965 F.2d 848, 856 (10th Cir. 1992); Jdx.Mem.11-13. That kind of immunity is available from First Amendment church autonomy defenses. Such defenses are a constitutional “protect[ion] from [a] suit” and “prevents adjudication” of the merits of certain claims “against churches.” *Bryce*, 289 F.3d at 656, 659; accord *Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., joined by Kagan, J., concurring) (“the mere adjudication of [religious] questions would pose grave problems for religious autonomy” (emphasis added)). Indeed, two sets of important First Amendment interests are at issue: Faith Bible’s own constitutionally protected right to autonomy with

respect to “the selection of the individuals who play certain key roles,” *Our Lady*, 140 S. Ct. at 2060, and the judiciary’s independent duty not to get “embroil[ed] ... in line-drawing and second-guessing regarding [religious] matters about which it has neither competence nor legitimacy.” *Weaver*, 534 F.3d at 1265. *Accord Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

For these reasons, “the First Amendment does not tolerate” either a finding of liability against a church for its internal management decisions *or* any “[j]udicial review” of the merits of those decisions, since such review “would undermine the independence of religious institutions.” *Our Lady*, 140 S. Ct. at 2055. That is, the Religion Clauses protects both the “right to select, manage, and discipline [the] clergy,” *and* to do so “free from government control and scrutiny.” *Skrzypczak*, 611 F.3d at 1245

Why? Because, as this Court has explained, any “investigations a court would be required to conduct” to resolve the merits of Title VII claims 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.” *Id.* (quoting *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972)). Merits discovery and trial “inevitably affect” future internal leadership decisions, pressuring the church to make them “with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of [its] own ... doctrinal assessments.” *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996) (quoting *Rayburn v.*

*Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)); *Skrzypczak*, 611 F.3d at 1245 (forbidding judicial scrutiny that causes the church to select ministers who “lower its exposure to liability rather than those that best ‘further [its] religious objective[s]’”). Thus, allowing the Church to be “deposed, interrogated, and haled into court” over its internal religious personnel decisions *is itself* “impermissible entanglement” and thus “forbidden by the First Amendment.” *Catholic Univ.*, 83 F.3d at 466-67 (quoting *Young v. N. Ill. Conf.*, 21 F.3d 184, 187 (7th Cir. 1994)).

For these reasons, church autonomy defenses are a threshold question that must be resolved before reaching the merits. Hence this Court’s instruction that church autonomy questions must be resolved “early in litigation” so that “courts avoid excessive entanglement in church matters.” *Bryce*, 289 F.3d at 654 n.1. Defenses under the church autonomy doctrine and ministerial exception, like qualified immunity defenses, accordingly provide an immunity from merits discovery and trial, the denial of which can be immediately appealed. *Accord Skrzypczak*, 611 F.3d at 1242 (“[T]he ministerial exception, like the broader church autonomy doctrine, can be likened to ... qualified immunity.” (internal quotation marks omitted)). Interlocutory appeal is therefore appropriate in this case.

**B. Tucker's counter-arguments fail.**

Tucker's responsive memorandum mostly ignores Faith Bible's jurisdictional argument and the judicial and academic consensus in its favor. He does not once cite, much less distinguish, any of the central Tenth Circuit cases: *Bryce*, *Skrzypczak*, *Los Lobos*, and *P.H.E.* See Jdx.Mem.13-17. He ignores the Supreme Court's treatment of church autonomy defenses as a form of nonjurisdictional immunity to unnecessary trial and discovery. See *id.* at 15. Nor does he address the academics like Professor Michael McConnell and others who agree that church autonomy defenses should be treated like qualified immunity ones. See *id.* at 15-16, 20-21.<sup>5</sup> In fact, Tucker agrees that "[t]he ministerial defense bears some resemblance to governmental immunity" because religious organizations have an interest "in protecting their autonomy" and avoiding "governmental interference." Jdx.Opp.11. Finally, he disregards the federal and state appellate consensus that interlocutory appeal is necessary under the First Amendment to prevent both irreparable harm to a religious defendant's rights and to the judiciary's corresponding duty to avoid entanglement in internal religious affairs. See Jdx.Mem.20.

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<sup>5</sup> 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.").

By leaving these points uncontested, he concedes them. *See Eaton v. Pacheco*, 931 F.3d 1009, 1031 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 2771 (2020); *accord Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) (“Failure to respond to an argument ... results in waiver.”). And the three arguments he does make are unpersuasive.

*First*, he repeatedly argues that collateral order appeals are “reserved” for “appeals by state and local government officials in their official capacity.” Jdx.Opp.1, 9. Not so. Orders denying qualified immunity are just *one* category of appealable orders—and a category that this Court has often used to compare to orders denying religious autonomy defenses. *See* Jdx.Mem.16. Moreover, this Court has routinely applied the doctrine to appeals by private parties too, especially in the context of First Amendment and other “constitutionally based immunities.” *Los Lobos*, 885 F.3d at 664; *see id.* (collecting cases demonstrating that “the Supreme Court has also protected private parties from delay”); *P.H.E.*, 965 F.2d at 854 (concluding “that the district court’s order satisfies the collateral order doctrine because ... the [private] appellants are presenting a First Amendment ‘right not be to tried’”). If anything, orders implicating constitutional immunities like Faith Bible’s are *more* deserving of

immediate appeals than qualified immunity orders. Jdx.Mem.16 (citing *Bryce*, 289 F.3d at 654 n.1).<sup>6</sup>

*Second*, Tucker argues that an immediate appeal is impermissible because “there is a triable issue of fact” and “the ministerial exception is, by its nature, an issue of fact.” Jdx.Opp.14. Wrong again. As established above, the only “dispute” identified by the district court was over a legal question, not a factual one, and one that—like qualified immunity—precedes and is separate from a plaintiff’s allegations and claims. *Skrzypczak*, 611 F.3d at 1244; *accord Conlon*, 777 F.3d at 833. Such “legal issues” are perfectly appropriate for interlocutory appeal, and “are quite different from ... purely factual issues.” *Plumhoff v. Rickard*, 572 U.S. 765, 773 (2014). The district court’s “conclusory legal ruling” accordingly cannot “constitute findings of fact” that would inhibit Faith Bible’s interlocutory appeal. *Lewis v. Tripp*, 604 F.3d 1221, 1227 (10th Cir. 2010).<sup>7</sup>

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<sup>6</sup> Tucker is wrong to argue that church autonomy defenses must be jurisdictional to confer immunity. Jdx.Opp.11. As shown by the qualified immunity example and other cases addressing First Amendment interests like *Los Lobos* and *P.H.E.*, a defense need not be jurisdictional to give rise to an immunity that satisfies the collateral order doctrine.

<sup>7</sup> Tucker’s unpublished case, *Valdez v. Motyka*, 804 F. App’x 991 (10th Cir. 2020), confirms jurisdiction here. In *Valdez*, the Court held that it lacked jurisdiction over a collateral qualified immunity appeal because of “the sheer number of factual disputes presented by the record” and where “the district court clearly articulated which factual disputes precluded granting qualified immunity.” *Id.* at 995. Here, by contrast, the district court articulated no material factual disputes, and there are none.

Further, even where there are some disputed facts, interlocutory appeal is still appropriate where “no *genuine* issue of *material* fact” precludes summary judgment. *Scott v. Harris*, 550 U.S. 372, 376, 380 (2007) (exercising jurisdiction over a collateral appeal where the district court found “material issues of fact”). As shown above, that is this case.

*Third*, and finally, Tucker argues that the Seventh Circuit’s decision in *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085 (7th Cir. 2014), helps him here. It does not. As an initial matter, *Herx* did not question the Seventh Circuit’s previous conclusion in *McCarthy* that First Amendment church autonomy and ministerial exception defenses can be eligible for collateral order appeal. *See* Jdx.Mem.22-23. That’s because *Herx* concerned only a statutory defense under Title VII, 772 F.3d at 1091, which was not at issue in *McCarthy* and is not at issue here.

Further, the Seventh Circuit in *Herx* emphasized that “[t]he district court has not ordered a religious question submitted to the jury for decision.” 772 F.3d at 1091. Here, however, Tucker and the district court would not only have a jury decide how religious a “Chaplain” (or “Dean”) is, but also whether Faith Bible’s interpretations of scripture and beliefs about the conduct of chapel services are wrong. That *is*, to quote Tucker, “an imminent and impermissible entanglement of judicial and ecclesiastical interests.” Jdx.Opp.14. And, as shown above, *any* merits discovery or trial that goes beyond what is necessary to confirm

application of the Religion Clauses’ immunity is too much. *Catholic Univ.*, 83 F.3d at 466-67.

Finally, *Herx* was careful to emphasize it merely held that defendant “ha[d] not made a persuasive case” for allowing interlocutory appeal. 772 F.3d at 1091. Which was no surprise, since the defendant focused almost entirely on “the merits,” sparing “only a few sentences ... addressed to the criteria for collateral-order review.” *Id.* at 1090. Here, Faith Bible has submitted substantial arguments backed by Supreme Court holdings, this Circuit’s precedent, other caselaw, and academic consensus—all of which was ignored by Tucker.

This Court has jurisdiction.

### CONCLUSION

The lower court’s decisions qualify as collateral orders that this Court can and should immediately hear and resolve as a matter of law. Tucker’s claims are barred by the ministerial exception and the broader church autonomy doctrine. Accordingly, this Court should reverse the district court and instruct it to grant Faith Bible’s motion for summary judgment.

Respectfully submitted this 13th day of October 2020,

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## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1), Faith Bible requests oral argument because this appeal presents important questions arising under the First Amendment, including sensitive issues regarding the separation of church and state. This Court has not yet previously resolved the applicability of the collateral order doctrine to the type of church autonomy defenses presented in this case, nor has it had occasion to apply either *Hosanna-Tabor* or *Our Lady* to the merits of a church autonomy or ministerial exception defense. Oral argument will allow the Court to examine the issue thoroughly before ruling on an issue that will affect the constitutional rights of churches, synagogues, mosques, and other religious organizations across the Tenth Circuit.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,113 words, excluding the parts of the brief exempted under Rule 32(f) and 10th Cir. R. 32(B), according to the count of Microsoft Word.

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

- a) all required privacy redactions have been made per 10th Cir. R. 25.5 and Fed. R. App. P. 25(a)(5);
- b) the hard copies that will be or have been submitted to the Clerk's Office are *exact* copies of the ECF filing; and
- c) the ECF submission was scanned for viruses with the most recent version of a commercial virus-scanning program (last updated October 13, 2020) and, according to the program, is free of viruses.

/s/ Daniel H. Blomberg  
Daniel H. Blomberg

Dated: October 13, 2020

## CERTIFICATE OF SERVICE

I certify that on October 13, 2020, I caused the foregoing to be served electronically via the Court's electronic filing system on all parties to this appeal.

*/s/ Daniel H. Blomberg*

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# **ADDENDUM**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
Judge R. Brooke Jackson

Civil Action No 19-cv-01652-RBJ

GREGORY TUCKER,

Plaintiff,

v.

FAITH BIBLE CHAPEL INTERNATIONAL d/b/a Faith Christian Academy Inc.,

Defendant.

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ORDER on MOTION FOR SUMMARY JUDGMENT

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Gregory Tucker was for many years a science teacher at Faith Christian Academy in Arvada, Colorado. In 2014 he was given additional responsibilities as either Director of Student Life or Chaplain (disputed) at the school. He was fired on February 26, 2019, after some parents, students and ultimately administrators objected to a “chapel” he organized and held a month earlier. Mr. Tucker then brought this action under Titles VI and VII of the Civil Rights Act of 1964 and Colorado common law, claiming that he was terminated in retaliation for opposing racial harassment at the school.<sup>1</sup> The defendant moved to dismiss the complaint, claiming that the “ministerial exception” bars the suit. As discussed herein, the ministerial exception precludes the application of anti-discrimination laws to employment decisions made by religious organization with respect to their own ministers.

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<sup>1</sup> Plaintiff does not oppose dismissal of his Title VI claim.

At plaintiff's request, and because the motion was supported by three attached exhibits, the Court elected to convert the motion to dismiss to a motion for summary judgment. *See* ECF No. 32. The Court has considered the parties' briefs and now grants the motion in part and denies it in part.

## **FACTS**

The following is not intended to be a comprehensive statement of all the evidence presented with the parties' briefs, but it is enough for purposes of this order.

### **A. Defendant's Evidence.**

Defendant's motion and exhibits include the following admissible evidence:

1. The primary purpose for which the defendant, Faith Bible Chapel International, was formed was "to propagate the Gospel of our Lord and Saviour Jesus Christ among all people who are susceptible to the Gospel by recruiting, educating, and supporting Christian workers throughout the United States and in foreign countries; to preach, teach, witness, and disseminate the Gospel according to Holy Writ on a non-sectarian, and interdenominational basis; to establish, support, maintain, and conduct schools, conferences, and assemblies for worship, religious, educational, and charitable work. ... Notwithstanding anything herein set forth, the corporation shall not engage in any activities which are not directly in furtherance of its primary religious, educational, and charitable purposes." ECF No. 41-1 (Articles of Incorporation) at 1, §II.

2. Faith Bible Chapel International operates the Faith Christian Academy. The "vision statement" of the Faith Christian Academy, according to its 2017-2018 Teacher Handbook, was "inspiring and equipping students with an excellent education, as they use their

unique gifts to passionately represent Christ.” ECF No. 25-2 at 6. It’s “mission statement” was “By providing a biblically integrated education, Faith Christian Academy ... guides students to discover and develop their unique spiritual, mental, creative and physical gifts, so that they may glorify God and serve others through the power of the Holy Spirit. In an atmosphere of grace and truth, we partner with parents and churches, as we empower students to fulfill God’s purpose for their lives.” *Id.*

3. For many years Gregory Tucker was employed as a teacher at Faith Christian Academy. He received additional responsibilities as Chaplain beginning in 2014.

4. On February 16, 2017 Faith Christian Academy and Mr. Tucker entered into an Extension Agreement, extending his employment as “Chaplain” for the August 6, 2017 to August 4, 2018 school year. ECF No. 25-1. The agreement states, among other things: “The Superintendent of Faith Christian Academy or his designee (‘Superintendent’) discussed with Employee the necessity that the hand of the Lord be on Employee and that he/she exhibits the gift necessary to perform in the position of Chaplain. Employee expressed his/her belief that he/she has this gift and that God has called him/her to minister this gift at FCA.” *Id.* at 1, §II. It notes that “Employee is currently assigned to a/an **Chaplain** position.” *Id.*, §IV (emphasis in original).

5. The Extension Agreement also states that the employee is required to attend faculty prayer sessions; to attend “a Christian, Bible believing church regularly;” and to “abide by and be subject to the scriptural and other principles and policies stated in the FBCI/FCA handbooks.” *Id.* at 1-2, §V, ¶¶2, 4 and 5.

6. The Faith Christian Academy Teacher Handbook in effect for the 2017-2018 school year states:

To become a teacher or full time worker at Faith Christian Academy is a calling from the Lord Jesus Christ to minister. You are joining this ministry, not as an employee, but as a minister to FCA students and families. FCA's ministry focus emphasizes the following items:

1. FCA desires to provide an academic program that is based on the scriptural principles found in the Word of God, the Holy Bible. FCA teachers are committed to the integration of biblical truth within each academic and extra-curricular discipline. Additionally, teachers are responsible to facilitate godly character development, teach good study habits and encourage academic excellence. Each teacher must be thoroughly prepared and use effective instructional methods and techniques.
2. Although FCA is a Christian academic institution, an additional emphasis is placed upon the spiritual life of all students. FCA's desire is to train and lead students into attitudes and habits, which will bring them to Christ-like maturity. This includes encouraging all students to develop a prayer life, a passion to share to Gospel message, and characteristics such as honesty, humility, purity, faithfulness, love, and service. For students who may not yet be born again, or are new believers in Christ, all staff members will pray, teach, and set an example, seeking opportunities and the empowering of the Holy Spirit to lead them to experience an abiding relationship with Christ.
3. All staff members must be aware of the importance of our ministry to one another. Each teacher needs to be open to the Holy Spirit to offer words of encouragement, prayer, and concern for one another. It is important that teachers be willing to work as a team, make and receive positive suggestions, stand, as much as possible, with fellow teachers (especially in times of hardship), and guard the reputation of others. Trusting in the Lord in areas of personal needs as well as school needs and looking to Him as the primary source of wisdom, help, knowledge, and strength is critical.

ECF No. 25-2 at 8.

7. As Chaplain Mr. Tucker organized a chapel service referred to by him as the "Race and Faith Chapel." The chapel was held on January 12, 2018.

8. The chapel was not well received by some students and parents.

9. In a letter to students, parents, and teachers dated February 6, 2018, Mr. Tucker stated, “The Bible repeatedly explains the kingdom of God as made up of a diverse group of people from every tribe, language, people, and nation (Rev. 9, John 11). My prayer was that this [Race and Faith Chapel] would be a step toward recognizing and appreciating this beautiful picture.” *Id.* at 2.

10. During his deposition Mr. Tucker acknowledged that he had a minor degree in Religious Studies, which required that he take religious classes, and that when he applied for a position at FCA, he indicated that he would be comfortable teaching certain Bible classes, but not others. *Id.* (Depo. At 10: 2-10; 49:1-4; 50:20-22).

11. Mr. Tucker was also asked at his deposition. “And so you were holding yourself out to the students as being the Director of Student Life and also Chaplain, correct?” He answered, “Yes.” ECF No. 46-4 (Depo. at 77:10–13).

12. In an introductory PowerPoint that Mr. Tucker presented to his classes in 2017, he described his position for class periods 1-4 as “Director of Student Life/Chaplain,” with job duties including to “focus on the physical, relational, and spiritual wellbeing of students” and to plan “chapels, retreats, outreach projects, and student mentoring opportunities that are designed to create opportunities for student spiritual growth.” ECF No. 46-2 at 3. For periods 5-7 his duties were to teach Sophomore/Senior Bible leadership and Junior Bible Worldview and Apologetics. *Id.*

**B. Plaintiff’s Evidence.**

Plaintiff’s evidence can be divided into two groups: evidence suggesting that defendant is not a religious organization, and evidence that Mr. Tucker’s positions did not qualify for the ministerial exception.

Religious organization.

1. Faith Bible Chapel International is a non-profit corporation governed by a Board of Directors that oversees all its enterprises. ECF No. 41-1 at 1 (Articles of Incorporation) and 41-2 and 3 (Bylaws).

2. The Bylaws do not set forth ecclesiastical policies, regulations, or standards, nor do they grant the Board the power to ordain or otherwise commission clergy. *Id.* (Bylaws).

3. Its business operations include the Faith Christian Academy but also a publication operation, a coffee shop, a church, an American Girls Heritage troop, and others, each carried out as a distinct enterprise operating under its own tradename. ECF No. 41-4 at 2 (Colorado Secretary of State business listing).

4. The school is managed by a superintendent, and the church is managed by a Senior Pastor, both of whom report to the Board, but neither of whom reports to the other. Deposition of Andrew Hasz, ECF No. 41-5 at 50:20-53:9; Deposition of Douglas Newcomb, ECF No. 41-6 at 9:14-10:6.

5. Spiritual affairs of the church are also managed by a group of elders (although members of the Board must also be elders). ECF No. 41-3 (Elder Guidelines) at 1-2.

Mr. Tucker's Positions.

6. Gregory Tucker was a teacher at Faith Christian Academy from August 2000 to July 2006 and from August 2010 to February 2018. Declaration of Gregory Tucker, ECF No. 41-7 at ¶2. He also was Director of Student Life beginning in August 2014. In approximately January 2018 he was demoted from the position of Director of Student Life and was stripped of

the responsibility of organizing weekly chapel meetings. *Id.* at ¶31. When his employment was terminated by Faith Christian Academy in February 2018 his only position was that of teacher. *Id.*

7. Mr. Tucker understood that there was an entity “somewhat related” to the Faith Christian Academy called Faith Church that was led by ordained pastors, but the pastors were not his supervisors, and he rarely, if ever, interacted with them. *Id.* at ¶4.

8. Mr. Tucker was hired to teach biology, physics and chemistry, and he did so throughout his tenure at Faith Christian Academy. He relied on the same textbooks that were used in public schools. There was no theology, nor was there any “distinct or unique Christian principle that I was required to teach in conjunction with the secular content of these subjects.” *Id.* at ¶6.

9. He also taught classes in “Leadership” and “Worldviews and World Religions,” but although he taught that Christianity represented a credible worldview, he was required “to avoid the advancement of one Christian perspective over another because there were many Christian perspectives, as well as non-Christian perspectives, represented in the school.” *Id.* at ¶7.

10. He “did not have any specific training in the Bible and therefore was not qualified to teach any classes that involved instruction regarding the Bible or theology. Teachers who did teach classes regarding the Bible and theology typically had specific training or education in that field, like a seminary education or ordination.” *Id.* at ¶8.

11. Most of his students were not members of the Faith Church. Doctrinal and theological perspectives among students and teachers varied and included conservative

evangelical, liberal evangelical, Lutheran, Catholic, Baptist, Presbyterian, and Mormon; and there were students who had non-Christian views including Buddhism, Hinduism, and atheism. Most teachers attended churches other than Faith Church and were affiliated with different Christian denominations that often held theological beliefs quite different from those promoted by Faith Church. *Id.* at ¶¶9-11.

12. He was instructed to integrate a Christian worldview in his teachings but was not provided any training, instruction or literature as to what that worldview should be, other than Bible-oriented. He was never required to teach a class in religious doctrine or to set aside time in his classes specifically dedicated to a religious message. He was told not to preach but to encourage students to think through their own perceived versions of Christianity and to consult their parents about specific theological matters. He was expected to “endorse Christianity in general terms, set a good moral example, and allow a Christian worldview to influence [his] teaching,” but he was “encouraged to avoid delivering messages on church doctrine or theology.” *Id.* at ¶¶14-15, 18.

13. In August 2014 he was promoted and assumed duties in addition to teaching. He still was informally referred to as teacher, but his formal title most commonly was Director of Student Life. His contract and extensions referred to the position as “Chaplain,” but other than in those documents he was never referred to as Chaplain by students, teachers or administrators. He was asked whether he preferred the title of Director of Student Life, Dean of Student Life, or Chaplain, and he chose Director of Student Life because that title had no religious connotation. His email signature, business cards, and updated job description all used that title. He believes

that the use of the title “Chaplain” would have been “disingenuous” because he was not an ordained clergy member. *Id.* at ¶¶21-22.

14. As Director of Student Life he helped students find service and mentoring opportunities; supported parents who had questions about their child’s growth and achievements; met with students concerning discipline issues; and promoted a positive student environment. He counseled students concerning behavior but did not counsel or discipline students concerning theological principles or principles of faith expressed by Faith Church. *Id.* at ¶24.

15. In his last year he was responsible for organizing weekly “Chapel Meetings.” These were “assemblies or symposiums where people who held a variety of religious perspectives (or sometimes non-religious perspectives) would speak on matters of interest to the school.” *Id.* at ¶¶25-26. These meetings would also include announcements, awards, rallies, student election speeches, and other ordinary high school-related matters. *Id.* The school administration explicitly communicated that these meetings were not regarded as church. *Id.* at ¶27.

16. Mr. Walker has never heard superintendents, principals, teachers, administrative staff, students, parents, or anyone else refer to teachers or the Director of Student Life as “ministers.” He is aware from documents produced in this litigation that Faith Bible Chapel International describes itself as a collection of ministries, but he is unaware of any instance when the Faith Cristian Academy was ever held out to the public as a ministry of Faith Church, nor has he ever heard anyone refer to the school that way internally. *Id.* at ¶29-30.

17. He once heard that there was a tax deduction available to ministers to assist with housing costs and asked the then-Superintendent whether he qualified, but he was told that he did not qualify because he was not a minister. *Id.* at ¶29.

### STANDARD OF REVIEW

The Court may grant summary judgment if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party has the burden to show that there is an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party must “designate specific facts showing that there is a genuine issue for trial.” *Id.* at 324. A fact is material “if under the substantive law it is essential to the proper disposition of the claim.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. The Court will examine the factual record and make reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Concrete Works of Colo., Inc. v. City and Cty. of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994).

### ANALYSIS AND CONCLUSIONS

The First Amendment’s Establishment and Free Exercise clauses “bar the government from interfering with the decisions of a religious group to fire one of its own ministers.” *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171, 181 (2012). In *Hosanna-Tabor* the Court applied this “ministerial exception” to a suit alleging discrimination in employment for the first time. *Id.* at 188. A

“called” teacher who taught kindergarten and fourth grade in an elementary school operated by a congregation of the Lutheran Church developed narcolepsy and ultimately was fired. She claimed that she was terminated in violation of the Americans with Disabilities Act. The district court granted summary judgment dismissing her claim under the “ministerial exception.” The Sixth Circuit reversed, emphasizing that she taught the same classes as “lay” teachers in the school. The Supreme Court reversed the court of appeals and upheld the dismissal.

Significantly, the Court made it clear that it was not adopting “a rigid formula for deciding when an employee qualifies as a minister.” *Id.* at 190. Rather, the Court identified four circumstances that collectively contributed to its decision in that specific case: (1) the school held the teacher out as a minister, (2) her title as a minister “reflected a significant degree of religious training followed by a formal process of commissioning;” (3) the teacher held herself out as a minister in several ways, i.e., “by accepting the formal call to service, according to its terms,” and claiming a special housing tax allowance available only to ministers, and proclaiming that she felt that God was leading her to serve in the “teaching ministry;” and (4) her job duties “reflected a role in conveying the Church’s message and carrying out its mission.” *Id.* at 191-92.

The Court further identified three errors in the analysis of the Sixth Circuit: it assigned no relevance to the fact that the teacher was a commissioned minister; it assigned too much weight to the fact that the teacher taught the same courses as lay teachers; and it placed too much emphasis on the relative portion of the teacher’s day spent teaching secular subjects. *Id.* at 192-94.

In the present case I am inclined to agree with defendant’s argument that it (and in particular the Faith Christian Academy that is the focus of this case) qualifies as a religious group or organization. However, I find that whether Mr. Tucker was a “minister” within the meaning of the “ministerial” exception” is genuinely disputed on the evidence presented. Defendant’s position is substantially grounded in the wording of documents, most notably the extension agreement that characterized Mr. Tucker as “chaplain” and the handbook which purports to make all teachers and other full-time employees “ministers.” To be sure, those documents are relevant to the issue. But the substance of Mr. Tucker’s position turns on the totality of the facts and circumstances of his employment, and he has come forward with facts that, if believed by the jury, could rationally support the opposite conclusion.

Two Ninth Circuit cases involving, as did *Hosanna-Tabor*, the application of the ministerial exception to schoolteachers are presently before the Supreme Court: *Biel v. St. James School*, 911 F.3d 603 (9<sup>th</sup> Cir. 2018), and *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App’x 460 (9<sup>th</sup> Cir. April 30, 2019) (unpublished). I am informed that the cases were argued on May 11, 2020. The Court’s resolution of those cases may well further explain and define the ministerial exception in the schoolteacher context. However, this case is close to a year old and has not yet proceeded even to the Scheduling Conference stage. Convinced as I am that there is a genuine dispute of material fact as to whether Mr. Tucker was a “minister,” both before and after his demotion in January 2018, I find no compelling reason to further delay the resolution of the pending motion.

Finally, I acknowledge defendant’s heavy emphasis on the Tenth Circuit’s decision in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10<sup>th</sup> Cir. 2010), and in

particular, its statement that the minister exception “extends to any employee who serves in a position that ‘is important to the spiritual and pastoral mission of the church.’” *Id.* at 1243 (quoting *Rayburn v. Gen. Conference of Seventh–Day Adventists*, 772 F.2d 1164, 1169 (4th Cir.1985)). In that case the court, affirming the district court’s grant of summary judgment, examined the facts and circumstances of the plaintiff’s employment. The examination of the facts was hampered by plaintiff’s failure to provide a personal affidavit explaining her job duties and functions. Based on the defendant’s evidence the court agreed with the district court that her position, though including some administrative responsibilities, “furthered the core of the spiritual mission of the Diocese.” *Id.*

Summary disposition, whether in *Skrzypzpac*, or the court’s earlier decision in *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10<sup>th</sup> Cir. 2002), or the Supreme Court’s later holding in *Hosanna-Tabor*, turns on whether the facts and circumstances presented raise a genuine dispute of material fact. Because I have found that the facts and circumstances in the record of this case do show that there are genuine disputes of material fact, I am satisfied that summary disposition of this case is inappropriate under the standards set in all these cases.

### **ORDER**

1. Defendant’s motion to dismiss, converted by the Court to a motion for summary judgment [ECF No. 25], is GRANTED IN PART AND DENIED IN PART. It is granted to the extent that the Court dismisses plaintiff’s Second Claim which was brought under 42 U.S.C. § 2000d (Title VI). The motion is otherwise denied.

2. The parties are directed to contact Chambers by email within 14 days to set a Scheduling Conference and to submit a proposed Scheduling Order. Depending on whether and,

if so, what restrictions related to the coronavirus pandemic are still in place, the Court will either schedule an in-person Scheduling Conference, or conduct the conference by video teleconference, or simply review and modify, if necessary, the parties' proposed order.

DATED this 18<sup>th</sup> day of May, 2020.

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Brooke Jackson", written in a cursive style. The signature is positioned above a horizontal line.

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R. Brooke Jackson  
United States District Judge

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## U.S. District Court – District of Colorado

### District of Colorado

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**Docket Text:**

**ORDER denying [56] MOTION for Reconsideration re [52] Order on Motion to Dismiss for Failure to State a Claim. By Judge R. Brooke Jackson on 9/14/2020. Text Only Entry(rbjsec.)**

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