ORAL ARGUMENT REQUESTED
No. 20-1230

In the United States Court of Appeals for the Tenth Circuit

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

APPELLANT FAITH BIBLE CHAPEL INTERNATIONAL'S REPLY BRIEF

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INTRODUCTION

Under the First Amendment, chaplains cannot use federal employment laws to contest their termination by a church. Nor may chaplains use such laws to settle an internal religious dispute about how to lead chapel services. Tucker seeks to do both. Unless this Court intervenes, the district court proceedings below will run headlong into a religious thicket, to the detriment of both church and state.

Tucker's counterarguments fail to meaningfully engage controlling precedent and instead fruitlessly search for a genuine dispute of material fact. But the facts established by Tucker's own testimony and concessions to this Court about the deeply religious nature of his role make Tucker's search irrelevant. Namely, he signed a contract to serve as Faith Bible's chaplain, held himself out to his students as their chaplain, provided them spiritual guidance and counseling, led them in prayer, organized their chapel services, and taught them classes about Christian principles. This evidence alone establishes all the Court need find: Tucker held a position of religious importance for Faith Bible, and thus held ministerial status. That his claims turn on a religious dispute over the content of a chapel service only further confirms that they must fail.

ARGUMENT

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

This case presents an unusually straightforward application of the ministerial exception. Tucker concedes the legal standard: the exception bars claims like his against a religious ministry like Faith Bible, when brought by "any employee who serves in a position that is important to the spiritual and pastoral mission of the church." *Skrzypczak v. Roman Catholic Diocese of Tulsa,* 611 F.3d 1238, 1243 (10th Cir. 2010); *accord Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (rejecting race discrimination claim); *Rweyemamu v. Cote*, 520 F.3d 198 (2d Cir. 2008) (same). Nor does Tucker dispute that determining whether an employee held such a position turns primarily on the functions he performed, and is supported by considerations such as religious training and title. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2069 (2020); Br.20-23. And Tucker fails to engage the numerous cases, including from the Supreme Court, finding that teachers, chaplains, and leaders at religious schools held ministerial roles. Br.20-23.

So the only remaining question is whether Tucker's functions—and, to a lesser extent, his training and title—show he held a key religious role for Faith Bible. The record shows that he did. Indeed, Tucker's concessions *to this Court* provide sufficient evidence of his ministerial status, more than in many cases applying the ministerial exception to

religious school officials. Hence the determination by a motions panel of this Court that "Faith [Bible] has made a strong showing that it is likely to succeed on the merits" of this appeal. Order Granting Mot. to Stay 2 (cleaned up).

Although Tucker's response brief strains to find disputes of fact, he fails to identify any material to the determination that he was a minister. Thus, as a matter of law, Tucker held ministerial status for Faith Bible.

A. The undisputed material facts show that Tucker held a ministerial role.

1. Tucker carried out important religious functions.

As the record and his own representations to this Court show, Tucker actively carried out important religious functions for Faith Bible. For instance, he concedes that:

- He "provide[d] spiritual guidance and counseling" to students. Jdx.Opp.3, 5; Aplt.App.Vol.1 at 123.
- Reflecting the "undisputed character of [his] role," he organized chapel services "on matters of spiritual importance" and "in a manner that was sensitive to the religious interests of students." Stay Resp.4; Add.8-9.
- He planned these "religiously oriented" chapel services "weekly." Jdx.Opp.3, 5; Aplt.App.Vol.1 at 57 ¶39.
- He also taught courses "housed within the Bible Department" including a "leadership course [that] covered leadership

principles from a general Christian perspective." Resp.4, 46; Aplt.App.Vol.2 at 373.

- His role required him to maintain 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." Aplt.App.Vol.1 at 218; Resp.47.

Moreover, Tucker leaves uncontested numerous other facts confirming his religious leadership role. For instance, he does not dispute that he signed a contract accepting the "position of Chaplain" at Faith Bible, agreeing to be "responsible for the … spiritual wellbeing of students" and affirming that "God ha[d] called [him] to minister" to students in this role. Aplt.App.Vol.1 at 218, 99. Nor does Tucker contest his testimony that he personally introduced himself to each of his classes by "holding [him]self out to the students as being the Director of Student Life and also Chaplain." Aplt.App.Vol.2 at 373. In fact, his introduction was accompanied by a PowerPoint presentation he created to inform his students that he was the "Director of Student Life/Chaplain" and, for hours each day, he was "[f]ocused on the physical, relational, and spiritual wellbeing of [Faith Christian] students," and on planning "chapels, retreats, outreach projects and student mentoring opportunities that are designed to provide opportunities for student

spiritual growth." Aplt.App.Vol.1 at 271; Aplt.App.Vol.2 at 368-69, 373.[1] Tucker confirmed in his deposition that these functions were "indeed what [he] was doing" at Faith Bible. Aplt.App.Vol.2 at 373.

It is likewise uncontested that Tucker's job description required him to enhance "student spiritual growth," assist the Bible department with the "Bible curriculum," monitor "the spiritual pulse" of the school, and support parents regarding "their student's spiritual growth." Aplt.App.Vol.1 at 218, 271. Tucker suggests that objective, pre-dispute evidence such as the job description, contracts, and handbook "may" only have some "bearing" on the ministerial status inquiry, Resp.49, but the Supreme Court has rejected that view. Evidence showing a religious employer's expectation that its employees will play a religiously significant role is both "important" in its own right and a crucial resource for courts to avoid religious entanglement. *Our Lady*, 140 S.Ct. at 2066.

Nor is it disputed that Tucker carried out his religious responsibilities in multiple ways, including collaborating with Bible teachers to help students take "tangible steps" to "improve [their] relationship with God," and helping students set spiritual goals. Aplt.App.Vol.2 at 410. Most notably, Tucker started planning weekly "Chapel Meetings" in 2017, a

[1] Although Tucker refers to this as a "single PowerPoint slide," Resp.36, his testimony confirms that he used it as his standard introduction for "multiple classes." Aplt.App.Vol.2 at 369.

senior-leader responsibility "assigned to Tucker as a token of trust and respect." Aplt.App.Vol.1 at 57 ¶40.

In that role, he led and joined students and staff in prayer during chapel services and picked reading materials to help students grow as the "body of Christ." Aplt.App.Vol.2 at 377, 408. Tucker organized small-group chapel sessions "to give students an opportunity to have Biblically grounded, honest, open, and broad conversations about spiritual topics," such as "progress[ing] toward Christlikeness," and overcoming "false gods" that "keeps [them] from truly following Jesus." *Id.* at 402, 404-06, 415. He instructed faculty on how to conduct these sessions, using Scripture and guidance on how to direct students "to the heart of God." *Id.* at 406-08. Tucker also controlled the main chapel services' content, having students provide a short religious "devotional" presentation "either before or during worship," *id.* at 414, and choosing religious speakers who instructed students "how their faith informs their lives," all with the aim of "point[ing] our students back to the gospel and how that impacts the entirety of their lives." Aplt.App.Vol.1 at 163. And Tucker's own assessment was that he had been "successful" in accomplishing that aim. *Id.*

Tucker also undisputedly taught numerous courses within the Bible department. Resp.46; Aplt.App.Vol.1 at 271 (acknowledging he taught "Sophomore/Senior Bible" and "Junior Bible"). These included his "Christian Leadership" class, where he testified that he taught "specific

leadership principles … from a Christian perspective." Aplt.App.Vol.2 at 373; Aplt.App.Vol.1 at 206 ¶7 (Tucker declaration listing other classes). And he admits that, for *all* his classes, Faith Bible set the "clear expectation" that he was to "endorse Christianity," "set a good moral example," and "allow the Christian worldview to influence [his] teaching." Aplt.App.Vol.1 at 208 ¶18; *id.* at 107, 112 (handbook requiring Tucker to use "Scriptural concepts" and "emphasiz[e] … that Jesus Christ is the ultimate source of wisdom"); Jewish Coalition Br. 5-7 (teaching faith-based worldview is central to religious schools). Indeed, Tucker himself said he applied to teach at Faith Bible because it aligned with his "spiritual calling" to do "ministry" by "teach[ing] kids in a spiritual setting" and "help[ing] them become more like Jesus Christ." Aplt.App.Vol.2 at 314-15, 468, 471.

Finally, Tucker's declaration confirms that Faith Bible regularly "review[ed] [his] job performance related to religion," and that he "always scored well in that category." Aplt.App.Vol.1 at 208 ¶17; *id.* at 216 (review found Tucker "consistently illuminated Biblical principles").

2. Tucker's title and training confirm his ministerial status.

The undisputed record shows that Tucker was a teacher in the Bible department, the Director of Student Life, and the school's sole Chaplain. Any of the three titles are significant; all three together underscore his important religious role. Br.32-33.

So too Tucker's religious training, experience, and qualifications. He concedes he received religion training at a Christian undergraduate school and participated in multiple Christian student ministries. Resp.48; Aplt.App.Vol.2 at 471. He doesn't dispute he claimed to have "extensive work in ministry" qualifying him to teach at Faith Bible. *Id.* at 471. And he does not contest he spent four years working as a Christian missionary overseas, which was a precursor to Faith Bible accepting him back as a teacher in the Bible department and promoting him to chaplaincy service. *Id.* at 347, 417; Supp.App.22 ("life experience" relevant preparation for ministry roles). Finally, there's no dispute Tucker met Faith Bible's religious qualifications, such as "firmly" believing Faith Christian's 13-point statement of faith, attending a biblically-based church, and having a "vital relationship with God." Aplt.App.Vol.1 at 108, 111, 117.

Tucker's titles and training thus support the same conclusion as his functions: the ministerial exception bars his claims.

B. Tucker fails to identify a genuine dispute of material fact disproving his ministerial status.

Tucker's contrary arguments focus on manufacturing fact disputes. But they stumble right out of the gate by leaving the core facts of the case conceded or undisputed. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there

be no *genuine* issue of *material* fact." *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009) (cleaned up). "[O]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Allen v. United Servs. Auto. Ass'n*, 907 F.3d 1230, 1233 (10th Cir. 2018). Here, the material facts conclusively show Tucker held "a position that is important to the spiritual and pastoral mission" of Faith Bible. *Skrzypczak*, 611 F.3d at 1243 (cleaned up); *Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 655, 662 (7th Cir. 2018) (existence of "[s]ome factual disputes" did not "preclude summary judgment" on the ministerial exception). Nothing more is necessary to rule for Faith Bible.

Further, Tucker tellingly fails to defend the district court's decision on its own terms: namely, that there was a dispute over whether Tucker was "Director of Student Life or Chaplain." Add.1. But this dispute is neither genuine (the record shows he held *both* roles) nor material (regardless of title, he *functioned* as a minister). Br.35. Nor, as Tucker concedes, is this Court bound by the district court's mistake. *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (allowing "*de novo* view of which facts a reasonable jury could accept."); Resp.23 n.6. *See also McCraw v. Oklahoma City*, 973 F.3d 1057, 1065 (10th Cir. 2020) ("In a First Amendment case, we have an obligation to make an independent examination of the whole record."). Thus, the district court should be reversed.

Unable to defend the ruling below, Tucker instead tries to raise other fact disputes. Each attempt fails.

1. Tucker misuses his declaration.

Tucker relies heavily on his self-serving declaration to manufacture disputes, citing it over 50 times. But he cannot "create a genuine fact issue sufficient to survive summary judgment simply by contradicting his … own previous sworn" deposition testimony. *Cleveland v. Policy Mgmt. Sys.*, 526 U.S. 795, 806 (1999); *Skrzypczak*, 611 F.3d at 1244-45 (rejecting use of declarations to create factual disputes about ministerial exception). As shown above, Tucker's deposition testimony unambiguously demonstrates his significant religious role.

What's more, his declaration undermines his assertions to this Court. For instance, he claims that his Worldview and Apologetics course was just a "comparative-religion course" that taught Christianity alongside other equally "credible worldviews." Resp.4, 46. But his declaration confirms his course "taught that *Christianity*"—not other religions—"reflected a credible worldview," Aplt.App.Vol.1 at 206 ¶7 (emphasis added), and that the course was rooted in a "Christian worldview" reflecting the school's "Bible-oriented" beliefs. *Id.* at 207 ¶¶14-15.

Similarly, Tucker's brief asserts that he was ordered "not to try to answer" "religious questions" from students, Resp.42, and to "avoid advancing particular religious principles," Resp.37. But, once again, his declaration says the opposite: he was "explicitly" required to "promote

Christianity" and regularly taught "Christian principles." Aplt.App.Vol.1 at 207 ¶¶13, 15, 18.

Tucker also tries to use Faith Bible's status as an ecumenical non-denominational Christian church against it. But the school's ecumenism is a formal part of its ecclesiology, which is why its statement of faith requires both "unity" in "essential beliefs" and allowance of "liberty" in "non-essential beliefs." *Id.* at 109. Tucker's approach would impermissibly "use the school's promotion of inclusion as a weapon," requiring non-denominational Christian schools to strictly "exclude members of other [Christian] faiths" to maintain their religious autonomy. *Grussgott*, 882 F.3d at 658. That is not the law. To the contrary, "non-denominational Christian schools … with the aim of inculcating Biblical values" are quintessential examples of religious schools protected by the ministerial exception. *Our Lady*, 140 S.Ct. at 2065.

2. Tucker mischaracterizes the facts.

Just as in his amended complaint, *see* Br.13, Tucker engages in a labeling exercise to diminish the religious significance of his duties. For instance, he re-labels "chapel services" as "weekly assemblies," Resp.9; the content of chapel services as "pep rallies" that "had little to do with religion," Resp.7, 44; the Race and Faith Chapel as merely a "symposium" about "insensitivity, ignorance, and apathy," Resp.8-9; and his role as being "foremost, a *science* teacher," Resp.46.

But:

- Tucker's testimony (Aplt.App.Vol.2 at 377, 384, 398), original complaint (Aplt.App.Vol.1 at 15, 17), amended complaint (*id.* at 30, 56), and letter to the school (*id.* at 163) all refer to his chapel services as "chapels," "chapel services," or "chapel meetings."
- Tucker touted his "success[]" in ensuring that chapel services guide "students back to the gospel," *id.* at 163, and admitted that most chapel services included religious devotional activities such as "worship," "singing praise songs to God," and prayer, Aplt.App.Vol.2 at 377, 391-92.
- Tucker affirmed that the Race and Faith Chapel was intended to teach that the "Bible repeatedly explains" how the "kingdom of God" should function, Aplt.App.Vol.1 at 164.
- Tucker testified that he regularly held himself out to students as their "Chaplain" for years before his termination (Aplt.App.Vol.2 at 373); described his role as the "Chapel director" (Aplt.App.Vol.1 at 17, 21, 44); and fulfilled the role's religious responsibilities—in addition to his duties as a teacher in the Bible department and member of school leadership.[2]

[2] Tucker's "*science* teacher" assertion is unsupported by any record evidence. Resp.46. Since he's gone outside the record, the Court may wish to ask him at oral argument whether any more than two of the 54 classes he taught since rejoining Faith Bible in 2010 were science classes, and if the rest were in the Bible department.

Courts have uniformly rejected similar lawyerly attempts to downplay religious significance. Teachers have unsuccessfully portrayed their religious instruction as merely teaching "from a book," *Our Lady*, 140 S.Ct. at 2068; worship leaders cast their playing as "'robotic,'" *Sterlinski v. Catholic Bishop of Chi.*, 934 F.3d 568, 571 (7th Cir. 2019); religious leaders framed their role as "purely administrative," *Skrzypczak*, 611 F.3d at 1244-45; and Hebrew instructors claimed their subject was no more religious than German, *Grussgott*, 882 F.3d at 660. But it is the "religious institution's explanation of the role" that is "important." *Our Lady*, 140 S.Ct. at 2066. Tucker's made-for-litigation "opinion does not dictate what activities the school may genuinely consider to be religious." *Grussgott*, 882 F.3d at 660.

3. Tucker focuses on unnecessary facts.

Finally, Tucker tries misdirection. He complains that he wasn't eligible for ministerial tax credits. Resp.45. But neither were the teachers in *Our Lady*. 140 S.Ct. at 2080 (Sotomayor, J., dissenting). He claims the worship, prayer, and religious devotional teaching at his chapel services are irrelevant because he didn't lead them. Resp.44. But not only did he participate in or lead each of those religious activities, Aplt.App.Vol.2 at 377, he—as the chapel director—oversaw everyone who did. *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 n.10 (3d Cir. 2006) ("supervis[ing] spiritual functionaries" is a spiritual function). Tucker emphasizes that he performed some secular duties. Resp.14. But so does the Pope.

Hosanna-Tabor Evangelical Lutheran Church & Sch v. EEOC, 565 U.S. 171, 193-94 (2012). Tucker alleges that some teachers at Faith Christian disagree with some of its beliefs. Resp.5. But there's no dispute they all agree to "firmly" uphold Faith Bible's statement of faith, Aplt.App.Vol.1 at 108-09. And, regardless, *Our Lady* directly rejected this kind of "co-religionist" limitation as unworkable and entangling. 140 S.Ct. at 2068-69. Tucker complains that Faith Bible considers *all* of its staff ministers. Resp.49. But that's both irrelevant (courts, not churches, decide the legal question of who is a "minister," Br.18) and inaccurate (Faith Bible saw this as an "individual" question of whether an employee's duties included both "being a messenger of the faith" and supervising students, Supp.App.22). Tucker claims *he* doesn't view his training as sufficient for the ministerial role that he held. Resp.46. But that's not what he told Faith Bible when it hired him, Aplt.App.Vol.2 at 471, nor what he testified to, *id.* at 345, 417. And courts can't privilege his views over Faith Bible's in any event. *Our Lady*, 140 S.Ct. at 2066.

Finally, Tucker falsely accuses Faith Bible of gross racism—while admitting the accusation is irrelevant to the legal questions on appeal (and using that admission to excuse his absence of proof). *See* Resp.54; *compare* Br.11 (Faith Bible believes racism is immoral and enforces policies against it). Other than illuminating the problem of allowing ministers to use federal courts as leverage in religious disputes, Tucker's allegations are immaterial to this appeal.

* * *

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. Allowing Tucker's claims to proceed would accordingly "undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.*

II. Because Tucker's dismissal stemmed from a dispute over the content of a religious service, his claims are barred by the church autonomy doctrine.

Tucker's suit is also independently barred by the church autonomy doctrine because it arises solely from an internal religious dispute over the "message" of a chapel service.

A. Faith Bible raised its church autonomy defense below.

Tucker argues that church autonomy wasn't "properly raised below." Resp.32. Not so.

Faith Bible's motion to dismiss repeatedly argued that the court was barred from considering Tucker's claims because, according to Tucker's own complaint, his employment ended due to the "supposedly flawed message" conveyed at the chapel service he organized. Aplt.App.Vol.1 36 ¶80; Br.12 (assuming Tucker's termination for purposes of appeal). Under the ministerial exception, the *reason* for a termination decision is irrelevant, because the decision is "the church's alone" *regardless* of its

reasoning. *Hosanna-Tabor*, 565 U.S. at 194-95. Yet throughout its motion, Faith Bible emphasized its religious reasons. From the introduction to the conclusion, the motion repeatedly argued *both* that Tucker "was unequivocally a 'minister' under *Hosanna-Tabor*" and "[*m*]*oreover*," that "his claims, by his own admission, all arise out of the fallout from the religious message that he conveyed at the Race and Faith Chapel" and thus are "ecclesiastical disputes" that "[c]ourts simply cannot adjudicate." Aplt.App.Vol.1 at 85, 90 (emphasis added). This latter line of argument arose not from *Hosanna-Tabor*, but from more general church autonomy rights, as recognized by this Circuit in *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002). *Id.* at 95 (quoting *Seefried v. Hummel*, 148 P.3d 184, 190 (Colo. App. 2005) for authority prohibiting "'an examination of the church's reasons for dismissal of the plaintiff'" "where the actions giving rise to the alleged tort claim stem from 'conflicts confined within the church'").

After the district court ignored the church autonomy argument in its summary judgment order, Faith Bible again raised it in its motion to reconsider. Aplt.App.Vol.1 at 293-94. *United States v. Huff*, 782 F.3d 1221, 1224 (10th Cir. 2015) (reconsideration appropriate when court "misapprehend[s] … a party's position").

Faith Bible thus "fairly present[ed] the district court with the substance of [the] current argument," *Stender v. Archstone-Smith Operating Tr.*, 910 F.3d 1107, 1112 (10th Cir. 2018), particularly given

the "liberal reading" used for these purposes, *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1271 (10th Cir. 2019).

In any event, because church autonomy is rooted in "constitutional limits on judicial authority," it cannot be forfeited. *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018). And even if it could, this Court can exercise its discretion to consider the issue "because it is purely a matter of law and because its proper resolution is certain." *Ross v. U.S. Marshal*, 168 F.3d 1190, 1195 n.5 (10th Cir. 1999) (citation omitted).

B. Courts cannot adjudicate Tucker's claims arising from the religious message of a chapel service.

As shown above, church autonomy defenses can bar claims related to a church's religiously-grounded personnel decision *regardless* of whether the employee was a "minister." *Bryce*, 289 F.3d at 658 & n.2. Tucker wrongly contends that this renders the ministerial exception "superfluous." Resp.55. But this Court rejected Tucker's view in *Bryce* when it relied on church autonomy to reject a non-minister's claims. The central question was whether the claim involved a "purely secular dispute," or rather one that implicated the church's "discipline, faith, internal organization, or ecclesiastical rule, custom or law." 289 F.3d at 658. Because the claims stemmed from "religious topics" and statements made "in the context of an internal church dialogue," they were barred by the First Amendment. *Id.* at 659.

Here, like the plaintiff in *Bryce*, Tucker was a church employee subject to its internal governance. He himself alleges that he was terminated for a dispute over the "message" of a chapel service he led. Aplt.App.Vol.1 at 36 ¶80. And there is no question that his chapel's "message" was deeply religious: Tucker titled it the "Race and *Faith* Chapel," consulted a pastor, engaged in "MUCH … prayer," and told the Faith Bible community that he intended the chapel service to promote a "unified family of God." Aplt.App.Vol.1 at 163-64 (emphasis added). A chaplain's termination for the religious message of a chapel service is not the stuff of a "purely secular dispute." *Bryce*, 289 F.3d at 658. It is quintessentially a dispute over the "discipline, faith, [and] internal organization" of a religious organization. *Id.*

Tucker next argues (Resp.53-54) that resolution of this defense is premature because he needs to probe the church's religious reasons for firing him for pretext, and to seek discovery on that score. Not so. There is no need for discovery when the plaintiff's own complaint states that he was fired for the message he shared at a chapel service, and his own words show that the message was deeply religious. *Bryce*, 289 F.3d at 658.

Further, to second-guess Faith Bible's religious basis for decisions surrounding a chapel service and attempt to ferret out the "*real reason*" "would dangerously undermine" Faith Bible's "religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., joined by Kagan, J.,

concurring). Nor are there any "neutral principles" (Resp.52) that could appropriately cabin this entangling inquiry. Tucker's alleged "protected activity" was speaking at a chapel service. But Title VII does not "protect all 'opposition' activity." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989), *cited favorably in Vaughn v. Epworth Villa*, 537 F.3d 1147, 1152 (10th Cir. 2008). "An employee is not protected when" his method of opposition "interferes with the attainment of his employer's goals." *Id.* And Faith Bible's goal in holding chapel services was having students and staff "hear from the Lord and to draw together spiritually." Aplt.App.Vol.1 at 138. If Faith Bible believes that Tucker's chapel message failed to present "the word of the Lord," there is no non-entangling way a secular court can evaluate that religious judgment. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261-62 (10th Cir. 2008) (government cannot resolve disputes that "would necessarily involve inquiry into the relationship of the [employment] actions to the school's religious mission").

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

Like his jurisdictional memorandum, Tucker's response ignores the Tenth Circuit law, precedents from other courts, and academic consensus raised by Faith Bible, all which establish that church autonomy defenses are appropriately reviewed on collateral appeal. As this Court has repeatedly explained, these defenses are analogous both to qualified

immunity and to other First Amendment defenses that may be collaterally appealed. Absent collateral appeal, religious groups cannot fully vindicate their Free Exercise right to determine their own internal affairs, and the judiciary cannot avoid getting "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; Jdx.Mem.17-18; Br.44-46. That is why, as the EEOC explains, the ministerial exception "should be resolved at the earliest possible stage before reaching the underlying discrimination claim." EEOC Compliance Manual, Section 12 (Jan. 15, 2021). Thus, it is Tucker's position—which would result in unnecessary and unconstitutional entanglement of church and court—that represents "a radical departure from precedent and procedure." Resp.13. Church autonomy defenses easily satisfy the *Cohen* test, and the constitutional importance of these defenses requires the availability of immediate review.

A. Church autonomy is a First Amendment defense appropriate for collateral appeal.

Primarily relying on a one-Justice concurrence, Tucker initially suggests that "courts should categorically cease relying on *Cohen* and the collateral-order doctrine." Resp.19. But as this Court recently explained, "[w]hatever the merits of discarding *Cohen*, the [Supreme] Court did not take that path in *Mohawk*, and we may not blaze it here." *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659, 667 (10th Cir.

2018) (citation omitted). Indeed, *Mohawk Industries v. Carpenter* expressly declined to address rights with a "structural constitutional grounding." 558 U.S. 100, 113 n.4 (2009). And that is the kind of right at issue here: a "structural limitation imposed on the government by the Religion Clauses" which forbids it from "'interfer[ing] with the internal governance of the church.'" *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015) (quoting *Hosanna-Tabor*, 565 U.S. at 188) (emphasis omitted); *accord Sixth Mount Zion*, 903 F.3d at 118 n.4.

This Court recognized the same principle in *Los Lobos*, where it explained that questions of collateral appealability balance the "costs of piecemeal review" with "the danger of denying justice by delay"—and, importantly, "[t]he latter end of that scale has often tipped in favor of constitutionally based immunities," including when asserted by "private parties … in civil actions." 885 F.3d at 664. *Los Lobos* itself permitted collateral appeal regarding a state statutory defense whose purpose was to indirectly "vindicate First Amendment rights." *Id.* at 671. If such a derivative statutory defense qualifies, then a *direct* assertion of a First Amendment church autonomy right to be free from entangling discovery and trial easily qualifies.

Tucker's leading case, then-Judge Gorsuch's opinion in *McClendon v. City of Albuquerque*, 630 F.3d 1288 (10th Cir. 2011), only confirms the propriety of collateral appeal here. *McClendon*, which held that "[t]he undoing of a settlement agreement is not among those matters

appealable under *Cohen*," repeatedly emphasized that "a statutory *(or, of course, a constitutional*) entitlement that includes a right not to be tried—a right that by its terms contemplates vindication prior to trial—is different in kind" from such agreements, and properly subject to collateral review. *Id.* at 1296 (emphasis added).

Contrary to Tucker's concern about "an entirely new class of appealable collateral orders," Resp.16, church autonomy interlocutory appeals fit comfortably within this Court's precedent, as well as its explanation in *United States v. P.H.E., Inc.*, that such appeals are appropriate where "the actual act of going to trial" would have "a chilling effect on" a claimed "First Amendment 'right not to be tried.'" 965 F.2d 848, 854, 856 (10th Cir. 1992); *see Fort Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989) ("Adjudicating the proper scope of First Amendment protections has often been recognized by [the Supreme] Court as a 'federal policy' that merits" interlocutory appeal to prevent an unnecessary trial.).[3]

Thus, courts—federal and state—routinely permit collateral appeals of similar church autonomy defenses. *E.g.*, *Whole Woman's Health v.*

[3] Tucker cites two criminal cases to argue that not all "First Amendment rights" are subject to collateral appeal. Resp.31-32. But some First Amendment rights—including church autonomy—*are*. Moreover, collateral appeals in criminal cases are treated "with the utmost strictness" "[b]ecause of the compelling interest in prompt trials." *United States v. Quaintance*, 523 F.3d 1144, 1146 (10th Cir. 2008).

Smith, 896 F.3d 362, 373 (5th Cir. 2018) (accepting collateral appeal to consider defenses rooted in the "structural protection afforded religious organizations and practice under the Constitution"); Jdx.Mem.19-21 (collecting cases). Tucker complains that existing federal cases have not involved the ministerial exception specifically. Resp.20-21. But the ministerial exception has its "constitutional foundation" in "the general principle of church autonomy," *Our Lady*, 140 S.Ct. at 2061, so it would make little sense to treat it differently from other church autonomy defenses. And Tucker ignores the logic of state precedents, which expressly apply *Cohen*'s factors and related federal precedents to ministerial exception defenses. *See, e.g.*, *United Methodist Church v. White*, 571 A.2d 790, 792-93 (D.C. 1990). Although in passing Tucker cites the Seventh Circuit's decision in *Herx*, he fails to respond to Faith Bible's explanation of why that Title VII decision does not help him. *See* Br.50-51. In short, "just as in the other types of case in which the collateral order doctrine allows interlocutory appeals," the "irreparable harm" attending the inevitable "governmental intrusion into religious affairs" from further litigation requires immediate appeal here. *McCarthy v. Fuller*, 714 F.3d 971, 975-76 (7th Cir. 2013).

B. Like qualified immunity, church autonomy defenses satisfy the *Cohen* test.

Though he eventually reaches the three-part *Cohen* test, Tucker all but ignores Faith Bible's explanations of why its church autonomy

defenses satisfy it. *See* Jdx.Mem.11-24; Br.44-46. Tucker misstates the law as to all three elements, which are as readily satisfied here as they are in qualified immunity cases.

1. Unreviewable after trial. "The decisive consideration in determining whether an order is effectively unreviewable is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order." *Miller v. Basic Research, LLC*, 750 F.3d 1173, 1177 (10th Cir. 2014) (cleaned up). Tucker (again) ignores this "decisive consideration," instead dwelling on the irrelevant argument that the ministerial exception is an affirmative defense that could be considered at and after trial. Resp.27. That is always true of affirmative defenses. The relevant question is whether deferring consideration of church autonomy defenses would "imperil a substantial public interest" in the same way as deferring consideration of other defenses that qualify for collateral appeal, like qualified immunity. It would.

Church autonomy defenses are a constitutional "protect[ion] from [a] suit" and "prevent[] 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"). These defenses implicate *both* Faith Bible's own constitutional 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." *Weaver*, 534 F.3d at 1265; Jdx.Mem.12-22, Br.44-49. Both the church's Free Exercise right and the court's Establishment Clause duty are irretrievably violated by discovery and trial in a suit that should be barred by a church autonomy defense.

For these reasons, this Court has repeatedly compared church autonomy defenses to qualified immunity, urging early resolution of both. *Bryce*, 289 F.3d at 654 n.1; *Skrzypczak*, 611 F.3d at 1242. Legal experts agree. Jdx.Mem.15-16, 20-21; Br.47 & n.5; Constitutional Law Scholars Br.16-17; Religious Liberty Scholars Br.6-11. And consistent with the Supreme Court's and other courts' treatment of church autonomy defenses as a type of nonjurisdictional immunity that cannot be waived, other federal and state courts have consistently permitted interlocutory appeals in this context. Jdx.Mem.15, 20; *see* Ass'n of Christian Schools Br.5-10.

Tucker has no answer as to why "a judicial creation" like qualified immunity, Resp.30—which his own case emphasizes "is *inexplicit*" in the law, *McClendon*, 630 F.3d at 1296 n.2—should be favored over the *constitutional* right of religious autonomy, which implicates both a limitation on government entanglement and freedom of religious institutions. Why would this Court instruct trial courts to treat these defenses similarly but then treat them differently on appeal, particularly

since church autonomy involves interests of a *constitutional* dimension? *See Bryce*, 289 F.3d at 654 n.1.

Instead, Tucker fixates on *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986). This is a sure sign of a failing case, as the plaintiffs in *Our Lady* and *Hosanna-Tabor* did the same. Both times, the Supreme Court ignored *Dayton* entirely, and for good reason. *Dayton* is a *Younger* abstention case and has nothing to do with the ministerial exception or the collateral order doctrine. *See id.* at 626. *Dayton* was based in comity, "respect[ing] … the fundamental role of States in our federal system," with the Court emphasizing that "constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Id.* at 626, 629. Comity is not at issue here, and accepting Tucker's absolute rule against interlocutory appeals would mean that Faith Bible could *not* "receive an adequate opportunity to raise its constitutional claims" later. *Dayton*, 477 U.S. at 628. Indeed, unlike state courts that routinely respect church autonomy boundaries by permitting collateral appeals, Jdx.Mem.20, Tucker's rule would subject Faith Bible to full merits discovery and adjudication of his claims—including a federal jury trial over how religious a "Chaplain" is and whether the jury believes Faith Bible's view that Tucker's chapel service

misinterpreted Scripture. That kind of judicial interference in religious matters causes "irreparable" harm. *McCarthy*, 714 F.3d at 975.[4]

2. Conclusive determination. *Mitchell v. Forsyth* disposes of Tucker's argument that the district court's "denial of a motion for summary judgment" cannot be a conclusive determination as to an asserted immunity. 472 U.S. 511 (1985); Resp.23, 33. As *Mitchell* explained, "the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." 472 U.S. at 527. That is true regardless of whether the trial court rejects the defense or "rule[s] only that if the facts are as asserted by the plaintiff, the defendant is not immune." *Id.* Any correction after trial—which might not be possible, *McCarthy*, 714 F.3d at 976—would come far too late to redress the harm of merits discovery and trial that the First Amendment prevents. Jdx.Mem.20.

3. Collateral to the merits. Finally, Tucker argues that church autonomy defenses are not distinct from the merits because these defenses and employment claims both involve "questions about qualifications and what an employee does" or the "reasons" for particular employment actions. Resp.24, 34. But the legal inquiries are obviously

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[4] Contrary to Tucker's suggestion, collateral appeals are not limited to "explicit constitutional immunities from suit," Resp.28-29. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (qualified immunity); *Sell v. United States*, 539 U.S. 166 (2003) (privacy); *Los Lobos*, 885 F.3d at 668 (state statute).

different. And *Mitchell* squarely rejected the proposition that "any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." 472 U.S. at 529 n.10. As this Court recognized in *Bryce*, application of the church autonomy doctrine is a "question of law" that, like qualified immunity, is separate from a plaintiff's claims. 289 F.3d at 654. Even apart from the separateness of the inquiries, a claim of "an entitlement not to be forced to litigate" "is conceptually distinct from the merits." *Mitchell*, 472 U.S. at 527.

Because all three *Cohen* factors are satisfied, this Court has jurisdiction.

C. Accepting this appeal will not lead to a flood of fact-bound disputes.

Retreating to atmospherics, Tucker argues that "[r]ecognizing appellate jurisdiction here would open the door to interlocutory appeals involving all manner of nonfinal district-court rulings respecting fact-bound questions." Resp.24-25, 30, 35-40. But, as shown above, the questions on appeal do *not* require the Court to "resolve" any "factual dispute." Resp.35. Nor does the existence of factual considerations that show Tucker's claims are barred by the Religion Clauses change the fundamentally legal nature of those conclusions. *See Skrzypczak*, 611 F.3d at 1244; *Conlon*, 777 F.3d at 833. This appeal focuses on cognizable "abstract issue[s] of law," *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996);

reviewing it would not require review of future appeals that *do* turn on some substantial factual dispute.

Tucker's speculation about repeated appeals is both irrelevant and contrary to reality. Resp.25-26. As this Court has explained, for "constitutionally based immunities" like church autonomy defenses, courts must focus on "the danger of denying justice by delay" rather than any "costs of piecemeal review." *Los Lobos*, 885 F.3d at 664 (cleaned up). Even in the qualified immunity context, the Supreme Court has rejected any "one-interlocutory-appeal rule." *Behrens*, 516 U.S. at 311. And because courts can "'establish summary procedures and calendars to weed out frivolous claims,'" "successive pretrial assertions of immunity" in that context have been "rare." *Id.* at 310. So too here, and even more clearly. Church autonomy cases are uncommon, and those in need of interlocutory review rarer yet. Jdx.Mem.21. There is no flood behind Tucker's imaginary floodgate.

CONCLUSION

This Court should reverse the district court and instruct it to grant Faith Bible's motion for summary judgment.

Respectfully submitted,

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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 6,492 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);

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/s/ *Daniel H. Blomberg*
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Dated: February 17, 2021

CERTIFICATE OF SERVICE

I certify that on February 17, 2021, I caused the foregoing to be served electronically via the Court's electronic filing system on all parties to this appeal.

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