No. 22-741

In the Supreme Court of the United States

FAITH BIBLE CHAPEL INTERNATIONAL,

Petitioner,

v.

GREGORY TUCKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

MICHAEL W. MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

ROBERT W. HATCH II
CHRISTOPHER J. CONANT
HATCH RAY OLSEN CONANT LLC
730 17th Street Suite 200
Denver, CO 80202

DANIEL H. BLOMBERG
Counsel of Record
LUKE W. GOODRICH
DANIEL D. BENSON
REBEKAH P. RICKETTS*
DANIEL L. CHEN
COLTEN L. STANBERRY*
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW, Suite 400
Washington, DC 20006
(202) 955-0095
dblomberg@becketlaw.org

* Not admitted to the DC Bar; admitted to the Texas Bar; supervised by licensed DC Bar members.

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. The decision below created three sharp splits that have only deepened. 2

  A. Courts are divided on whether the Religion Clauses provide a form of immunity. 2

  B. Courts are divided on whether ministerial status is a question of law. 6

  C. Courts are divided on whether Religion Clauses defenses are immediately appealable. 7

II. The decision below fails to properly apply the ministerial exception, since the undisputed material facts show Tucker was a minister. 9

III. This appeal is an excellent vehicle to resolve these important questions. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Axon Enterprise v. *FTC*,
143 S.Ct. 890 (2023) 3, 4, 7

Behrens v. *Pelletier*,
516 U.S. 299 (1996) 9, 10

Belya v. *Kapral*,
45 F.4th 621 (2d Cir. 2022) 4

Combs v. *Central Tex. Ann. Conf.*,
173 F.3d 343 (5th Cir. 1999) 2

Conlon v. *InterVarsity Christian Fellowship*,
777 F.3d 829 (6th Cir. 2015) 3, 6

Dayner v. *Archdiocese of Harford*,
23 A.3d 1192 (Conn. 2011) 5, 8

Demkovich v. *St. Andrew the Apostle Parish*,
3 F.4th 968 (7th Cir. 2021) 2, 9

In re Diocese of Lubbock,
624 S.W.3d 506 (Tex. 2021) 8

Doe v. *Roman Catholic Bishop*,
190 N.E.3d 1035 (Mass. 2022) 4, 5

EEOC v. *Catholic Univ. of Am.*,
83 F.3d 455 (D.C. Cir. 1996) 2, 5

Gordon Coll. v. *DeWeese-Boyd*,
142 S.Ct. 952 (2022) 11

Grussgott v. *Milwaukee Jewish Day Sch.*,
882 F.3d 655 (7th Cir. 2018) 6, 7, 12

Herx v. *Diocese of Fort Wayne S. Bend*,
772 F.3d 1085 (7th Cir. 2014) 8

Hosanna-Tabor v. *EEOC*,
565 U.S. 171 (2012) 3, 4, 9, 12

Kedroff v. *St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*,
344 U.S. 94 (1952) 3, 4

Kirby v. *Lexington Theological Seminary*,
426 S.W.3d 597 (Ky. 2014) 5, 8

Konchar v. *Pins*,
---N.W.2d---, 2023 WL 2939140 (Iowa 2023) 5

Lee v. *Sixth Mount Zion Baptist Church*,
903 F.3d 113 (3d Cir. 2018) 3

McCarthy v. *Fuller*,
714 F.3d 971 (7th Cir. 2013) 4, 5, 8

Mitchell v. *Forsyth*,
472 U.S. 511 (1985) 7

NLRB v. *Catholic Bishop*,
440 U.S. 490 (1979) 2, 3, 4

Our Lady of Guadalupe v. *Morrissey-Berru*,
140 S.Ct. 2049 (2020) 3, 4, 7, 9, 10, 12

Plumhoff v. *Rickard*,
572 U.S. 765 (2014) 7

Serbian E. Orthodox Diocese for U.S. & Can. v. *Milivojevich*,
426 U.S. 696 (1976) 3, 4

Starkey v. *Roman Catholic Archdiocese*,
No.20-3265, 2021 WL 9181051
(7th Cir. July 22, 2021) 5

Tilton v. *Marshall*,
925 S.W.2d 672 (Tex. 1996) 5-6

Tomic v. *Catholic Diocese of Peoria*,
442 F.3d 1036 (7th Cir. 2006) 3

Trinity Christian Sch. v. *Commission on Hum. Rts.*,
189 A.3d 79 (Conn. 2018) 8

Watson v. *Jones*,
13 Wall. 679 (1872) 3, 4

Whole Woman's Health v. *Smith*,
896 F.3d 362 (5th Cir. 2018) 4, 8

INTRODUCTION

First things go first. The first step in a ministerial exception case has always been resolving ministerial status. But the panel below put this step last—after merits discovery, jury trial, and final judgment.

That's too late to prevent the entanglement inherent in adjudicating a minister's employment claims. And it stems from the panel's central error infecting its entire analysis: reducing the ministerial exception to a mere liability defense. Before that holding, courts universally saw the Religion Clauses as barring any judicial interference in religious leadership disputes, including via discovery and trial. But now there is a sharp, intractable split over whether ministerial decisions belong to the church alone or may first be probed and second-guessed by civil courts and enforcement agencies.

The stakes are high. Previously, almost all ministerial exception defenses were resolved pre-trial. But if a chaplain can take a church to trial over a chapel service, then summary adjudication is virtually always off the table. Entanglement will become the norm, with judges often presiding over ministerial jury trials. For many religious groups, that unconstitutional process will itself be a punishment too heavy to bear. And those groups that do eventually prevail will have nonetheless irreparably lost a key part of their religious autonomy.

As Judge Cabranes said when his circuit deepened the split, "the issues at hand are of 'exceptional importance'" and need "review[] by the Supreme Court."

I. The decision below created three sharp splits that have only deepened.

A. Courts are divided on whether the Religion Clauses provide a form of immunity.

Tucker embraces the Tenth Circuit's liability-only holding, BIO.28, which is the foundational premise of the panel's disposition, App.29a (appeal permitted "if we treat the 'ministerial exception' as immunizing a religious employer" from merits litigation). And he leaves uncontested—indeed, entirely unmentioned—that the Second Circuit and Massachusetts joined that holding.

1. Thirteen federal circuits and state high courts disagree. Pet.17-20. In those courts, "the very process of inquiry" into ministerial disputes—not merely the imposition of liability—can "impinge on rights guaranteed by the Religion Clauses." *Demkovich* v. *St. Andrew the Apostle Parish*, 3 F.4th 968, 982-983 (7th Cir. 2021) (en banc) (quoting *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 502 (1979)). That's because allowing judges and juries to "investigat[e] employment discrimination claims by ministers against their church" imposes an "*independent*" constitutional harm that "*alone* is enough to bar the involvement of the civil courts," as such investigation "*necessarily* intrude[s] into church governance." *Combs* v. *Central Tex. Ann. Conf.*, 173 F.3d 343, 350 (5th Cir. 1999) (emphasis added); *EEOC* v. *Catholic Univ. of Am.*, 83 F.3d 455, 466-467 (D.C. Cir. 1996) (judicial inquiries into ministerial selection are "*in themselves* * * * forbidden by the First Amendment"). Scholars concur. Scholars Br.12-20; Professors Br.4-7.

2. Tucker's attempts to counter the split fail. And it bears noting what he *doesn't* say: one word about this Court's precedents in *Catholic Bishop*, *Milivojevich*, *Kedroff*, or *Watson*—all cited in the petition and the Tenth and Second Circuit dissents, and all mainstays in ministerial exception cases and scholarship.

Tucker largely concedes that almost half the courts in the split *do* break with the panel below, but says those cases don't count because *Hosanna-Tabor* overruled them all *sub silentio*. BIO.20 (citing 565 U.S. 171, 195 n.4 (2012) and Pet.17 & 19, attacking "decades-old cases" such as from the First, Fourth, Fifth, and Eighth Circuits and the District of Columbia). Not so: *Hosanna-Tabor* "agree[d]" with most existing precedent, including the cases supporting Faith Bible. 565 U.S. at 188 & n.2. *Our Lady of Guadalupe* v. *Morrissey-Berru* did the same, recognizing the leading Fourth and Fifth Circuit precedent at issue here as "pioneering." 140 S.Ct. 2049, 2060 (2020). Tucker thus leaves much of the split unaddressed.

He also fails to reconcile Third, Sixth, and Seventh Circuit cases recognizing the structural nature of the ministerial exception. Compare BIO.19-20, *with* Pet.19 (citing *Sixth Mount Zion*, *Conlon*, and *Tomic*). He has no response to *Tomic*, and his attempt to distinguish *Sixth Mount Zion* and *Conlon* ignores that the panel said its liability-only holding "contradicts" theirs. App.42a. The panel was right. All three circuits treat the ministerial exception as barring judicial interference even when parties invite it—confirming that the exception concerns more than just liability. Pet.19-21. Indeed, where "structural constitutional claims" contest "subjection to an illegitimate proceeding" and not only the outcome, that's comparable to

"established immunity doctrines." *Axon Enterprise* v. *FTC*, 143 S.Ct. 890, 903-904 (2023). In such contexts, resolving liability on appeal is too little, too late. *Ibid*.

Tucker further claims that church autonomy precedent—such as from the Fifth and Seventh Circuits and the Texas and North Carolina high courts—is irrelevant to the scope of the ministerial exception. BIO.19-21. But he fails to acknowledge that the "constitutional foundation" for the ministerial exception *is* the "principle of church autonomy"; the exception is "a component of th[at] autonomy." *Our Lady*, 140 S.Ct. at 2060-2061. Far from irrelevant, cases not "exclusively concerned with the selection or supervision of clergy"—*Watson*, *Kedroff*, and *Milivojevich*—are what this Court "primarily relied" on in recognizing and defining the ministerial exception. *Id.* at 2061.

Indeed, *all* the ministerial exception cases on the majority side of the split have treated *Catholic Bishop*, *Milivojevich*, *Kedroff*, or *Watson* as fundamental to the prohibition on judicial inquiry into church leadership decisions. Pet.17-20. Likewise, church autonomy cases often rely on ministerial exception decisions to find that the Religion Clauses protect against more than just liability. For instance, both *Whole Woman's Health* v. *Smith*, 896 F.3d 362, 374 (5th Cir. 2018), and *McCarthy* v. *Fuller*, 714 F.3d 971, 975 (7th Cir. 2013), relied on *Hosanna-Tabor* to conclude religious entities are protected from discovery or trial.

Even the cases on Tucker's side reject his doctrinal tunnel vision. *Belya* v. *Kapral* addresses the ministerial exception and church autonomy doctrine together. 45 F.4th 621, 628 & n.4 (2d Cir. 2022). *Doe* v. *Roman Catholic Bishop* places both types of cases on either

side of the split—including *McCarthy* opposite the Tenth Circuit. 190 N.E.3d 1035, 1044 (Mass. 2022).[1]

Coming to the end of the split, Tucker says Connecticut's conflicting precedent has been "revisited." BIO.20. But *Doe* again betrays him—recognizing *Dayner* v. *Archdiocese of Harford*, 23 A.3d 1192 (Conn. 2011), as good law holding that the "ministerial exception provided immunity from suit." 190 N.E.3d at 1044. And he claims the Kentucky Supreme Court's immunity holding was too "vague." BIO.19. But his preferred Kentucky case confirms that the exception functions like an immunity. *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 608-609 & n.45 (Ky. 2014); *Konchar* v. *Pins*, ---N.W.2d---, 2023 WL 2939140, at *13 (Iowa 2023) (Waterman, J., concurring) (*Kirby* supports conclusion that "proceed[ing] to trial defeats the purpose of the ministerial exception").

3. Thus, the split is sharp, acknowledged, and growing. On the minority side, houses of worship can be "haled into court" over whom they choose as pastor, priest, imam, rabbi, or chaplain—and the First Amendment has nothing to say unless they are on the wrong end of a judgment. App.39a. But in the majority courts, being "haled into court" over such internal governance can, without more, offend the First Amendment. *Catholic Univ.*, 83 F.3d at 466-467; *Tilton* v.

[1] Tucker counters *McCarthy*'s immunity analysis with dicta from an unpublished one-page order. BIO.15 (citing *Starkey* v. *Roman Catholic Archdiocese*, No.20-3265, 2021 WL 9181051 (7th Cir. July 22, 2021)). The order turned on conclusiveness considerations, not immunity, and did so because ongoing proceedings in the trial court might avoid the problem unavoidable here: proceeding to merits discovery or trial before resolving the ministerial exception.

Marshall, 925 S.W.2d 672, 682 (Tex. 1996) ("trial itself," not "merely the imposition of an adverse judgment, would violate [defendant's] constitutional rights"). Certiorari is warranted to resolve this dispute over "structural issues at the heart of the Religion Clauses." App.137a.

B. Courts are divided on whether ministerial status is a question of law.

The decision below also split with "every federal or state appellate court to address the issue," App.134a, by declaring ministerial status a "binary factual question" that a "jury must resolve," App.49a. Tucker doesn't contest that five circuits and state high courts have held the ministerial exception is a question of law, Pet.23, nor that a host of other cases agree, EPPC Br.12 n.2.

Tucker tries to distinguish cases resolving motions to dismiss, saying the issue at that stage "is always a purely legal one." BIO.22. But such cases did not rely on the case's stage when holding a court "must determine for itself" whether "the exception attaches." *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015). The panel below, by contrast, insists the issue is a factual question akin to whether parties "were, or were not, present" during a tort, and thus *cannot* "be taken from a jury and decided in the first instance by this court." App.27a, App.54a.

Tucker next claims that "facts weren't in dispute" in the cases decided at summary judgment. BIO.22. He is wrong. See *Grussgott* v. *Milwaukee Jewish Day Sch.*, 882 F.3d 655, 662 (7th Cir. 2018) ("factual disputes exist"). And the claim doesn't help him. Other courts resolve ministerial status "as a matter of law"

on what they determine are the material undisputed facts. *Id.* at 656-657, 662. That's because "courts"—not juries—must "determine whether each particular position implicate[s] the fundamental purpose of the exception." *Our Lady*, 140 S.Ct. at 2067. By "buck[ing] that treatment," App.134a, and refusing to determine materiality, App.54a, the Tenth Circuit became "the only appellate court in the country to classify the ministerial exception as an issue of fact." App.134a.

C. Courts are divided on whether Religion Clauses defenses are immediately appealable.

The panel's holding that the ministerial exception is not a form of immunity led it to hold that denial of the exception is ineligible for interlocutory review (App.29a)—conflicting with two circuits and four state high courts.

Tucker opines at length on the "patchwork" of collateral-order case law, apparently hoping to persuade the Court that this case involves the outer boundaries of that doctrine. BIO.3-6. It does not. The ministerial exception is in the heartland of interlocutory appeal precedent because it is a constitutional immunity to suit. Muller Br.4-9, *Synod of Bishops* v. *Belya*, No.22-824 (Mar. 31, 2023). As such, "orders denying [it] generally fall within the collateral order doctrine" because they won't be reviewable after entry of final judgment. *Plumhoff* v. *Rickard*, 572 U.S. 765, 771-772 (2014). "A proceeding that has already happened cannot be undone," and so claims contesting "subjection to an unconstitutionally structured decisionmaking process" are "effectively lost" if "deferred until after trial." *Axon*, 143 S.Ct. at 904 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)).

Tucker doesn't identify any court that preceded the panel in categorically barring ministerial exception defenses from interlocutory review. The prior cases—and all cited scholarship, old and new—go the other way. Professors Br.3; Scholars Br.6-23. The closest Tucker comes is *Herx*, but Judge Sykes emphasized the case-specific narrowness of her holding and confirmed *McCarthy*'s precedent that church autonomy defenses *can* be eligible for interlocutory appeal. Pet.26-28.

So Tucker tries to dilute the split. But his argument regarding *McCarthy*—church autonomy precedent isn't relevant here—fails for the reasons explained above. And his characterization of *Whole Woman's Health* as solely about third-party subpoenas ignores the Fifth Circuit's analysis and other courts' subsequent treatment. See, *e.g.*, *In re Diocese of Lubbock*, 624 S.W.3d 506, 515 (Tex. 2021).

Tucker concedes four states have found Religion Clauses defenses immediately appealable, BIO.16-17, but asserts they don't matter because they arise under state procedures. Again, though, the issue is whether the Religion Clauses provide an appealable immunity from merits litigation. Pet.28. Each state held they do.

Tucker also claims the state cases are bad law. But the Connecticut case he cites confirms *Dayner*'s interlocutory appeal holding. *Trinity Christian Sch.* v. *Commission on Hum. Rts.*, 189 A.3d 79, 85 (Conn. 2018). His other claims fare no better. *Kirby*, 426 S.W.3d at 608-609 & n.45 (ministerial exception eligible for interlocutory appeal); ACSI Br.18 (collecting District of Columbia cases allowing interlocutory review).

Tucker's missteps reflect a key error in his framing. This case is not about whether "*every* denial of a ministerial-exception defense [i]s immediately appealable." BIO.2. Courts often make a "threshold inquiry" to "determine who is a minister," *Demkovich*, 3 F.4th at 983, and before that threshold is crossed, interlocutory review may be unavailable, *Behrens* v. *Pelletier*, 516 U.S. 299, 312-313 (1996). The question here is different: whether *any* dispositive ministerial exception defense can *ever* be appealed before merits discovery and trial. Review is needed to resolve that important issue.

II. The decision below fails to properly apply the ministerial exception, since the undisputed material facts show Tucker was a minister.

The panel wrongly dismissed Tucker's chaplaincy contract and pre-dispute evidence as "self-serving" while refusing to evaluate if the undisputed material evidence demonstrated ministerial status. Pet.30-31.

But, as Judges Bacharach, Tymkovich, and Eid recognized, "Tucker's own characterization of his job" confirms he was a minister. App.135a; App.80a-93a. He admitted providing "spiritual guidance and counseling." App.282a. He taught Bible department courses like "Christian Leadership." App.232a. His standard introduction in "multiple classes" told students he was their "Director of Student Life and also Chaplain," App.231a-233a, primarily focused on things like "student spiritual growth" and "spiritual wellbeing," App.218a; App.216a ("20-25 hours per week"). He testified this "was indeed what [he] w[as] doing" at Faith Christian. App.233a. If anything, there is more evidence of ministerial status here than in *Hosanna-Tabor* or *Our Lady*. BYU Br.12-17.

Trying to muddy the water, Tucker's briefing contradicts his own statements in the record. He says "Worldviews and Apologetics" was "a comparative-religion course" that "presented Christianity as a 'credible worldview' alongside other credible worldviews." BIO.7. But his declaration says he "taught that Christianity"—not other religions—"reflected a credible worldview." App.204a. Nor could it be otherwise in a Bible department course at a Christian school preparing students to "defend the Christian Worldview, while understanding opposing worldviews." App.160a.

Tucker's opposition brief also asserts that the chapel services he planned "were not religious services" and that "religious content" was "out of [his] hands." BIO.8, 10. But he admitted below that the "undisputed character" of his role was "organiz[ing]" chapels on "matters of spiritual importance," App.289a, that the chapels were "religiously oriented," App.282a, and that they often included worship and prayer, App.234a. When Tucker "took over the primary role as chapel coordinator," *he* decided to feature speakers sharing "how their faith informs their lives," and *his* goal was "point[ing] students back to the gospel"—which *he* believed was "successful." App.192a; accord App.237a, App.252a.

Regardless, even if Tucker identified some genuine disputes (he didn't), the panel should still have decided whether they were *material* to ministerial status. See *Behrens*, 516 U.S. at 312-313 (even where district court sees "controverted issues of material fact," appellate court still assesses "'abstract issu[es] of law' relating to [the] immunity"); *Our Lady*, 140 S.Ct. at 2056 n.1. The panel failed this duty.

To distract from his ministerial status, Tucker broadly paints his former students as racists. That's as inaccurate as it is irrelevant, which he acknowledged before suing. App.191a ("I love Faith Christian Academy. I have spent the better part of my adult life working here and I love the mission, the students, the faculty(!), the parents"; "it has impacted the lives of countless students through the years."); App.195a-196a (would not "EVER want to communicate" any "broad accusations of racism" against students). The parties agree Faith Christian authorized the chapel service expressing its beliefs against racism. App.141a. This conflict arose over *how* Tucker presented those beliefs. App.146a. Even Tucker acknowledged his "misjudgment" in the "way [he] enter[ed] the subject of racism" and "the hurt that has come as a result of the chapel." 197a. Yet once Tucker lost his job, this was all replaced with accusations of "widespread bigotry," BIO.1, and he pulled courts into a dispute over the "message" of a chapel service. App.143a. The ministerial exception exists to keep courts from such entanglement.

III. This appeal is an excellent vehicle to resolve these important questions.

This case presents an excellent opportunity to resolve sharp divisions over "important structural issues at the heart of the Religion Clauses." App.137a. Tucker's counterarguments only highlight the need to stem a "troubling" trend in lower courts that undermines this Court's precedent. See *Gordon Coll.* v. *DeWeese-Boyd*, 142 S.Ct. 952, 954 (2022) (Alito, J., statement respecting denial of certiorari).

For example, Tucker's (false) claim that fact disputes make this case a poor vehicle, BIO.22, is largely fabricated from his post-deposition declaration purporting to, *inter alia*, parse "endors[ing] * * * Christian principles" from "teaching a specific theology." App.204a-206a; *cf. Our Lady*, 140 S.Ct. at 2069 & n.2.[2] If such semantics can force ministerial disputes to a jury, "*nearly all*" such cases "will be subjected to a full trial," Notre Dame Br.2, plunging courts into "incredibly difficult" "religious line-drawing," *Grussgott*, 882 F.3d at 660, and causing the "very evil" that the exception exists to prevent, App.134a-135a. It will also invite intrusive inquiries by enforcement agencies. Former EEOC Officials Br.15-18; States Br.14-17.

Similarly, Tucker embraces the panel's rule requiring courts to adjudicate ministerial disputes under "the same standards as all other institutions[.]" App.32a; BIO.32 (no "special status" distinct from "other First Amendment guarantees"). But *Hosanna-Tabor* rejected that false equivalency since "the text of the First Amendment itself" gives "special solicitude to the rights of religious organizations." 565 U.S. at 189. And treating a synagogue like a social club, *ibid.*, threatens the methods lower courts have developed to resolve ministerial cases without entanglement. Pet.34-35; EPPC Br.17-18 & n.3. Thus, letting the panel's "fundamental misconception[s]" spread, App.126a, will stoke church-state conflict this Court has put out for over 150 years. Denominations Br.11-26; CCCU Br.16-18; JCRL Br.11-17.

---

[2] See BIO.6-8, 23 (citing App.203a-210a (declaration), C.A.App.207 (same declaration), and App.105a-109a (district court citing same declaration)).

CONCLUSION

The petition should be granted.

Respectfully submitted.

MICHAEL W. MCCONNELL
559 Nathan Abbott Way
Stanford, CA 94305

ROBERT W. HATCH II
CHRISTOPHER J. CONANT
HATCH RAY OLSEN
CONANT LLC
730 17th Street,
Suite 200
Denver, CO 80202

DANIEL H. BLOMBERG
Counsel of Record
LUKE W. GOODRICH
DANIEL D. BENSON
REBEKAH P. RICKETTS*
DANIEL L. CHEN
COLTEN L. STANBERRY*
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave.
NW, Suite 400
Washington, DC 20006
(202) 955-0095
dblomberg@becketlaw.org

* Not admitted to the DC Bar; admitted to the Texas Bar; supervised by licensed DC Bar members.

Counsel for Petitioner

MAY 2023