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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Courts of appeals have jurisdiction to review "final decisions of the district courts." 28 U.S.C. § 1291. Typically, a decision is "final" only if it ends the case. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). In *Cohen v. Beneficial Industry Loan Corp.*, 337 U.S. 541 (1949), however, this Court adopted a "practical construction" of the term "final decision" to include so-called collateral orders: "a narrow class of decisions that do not terminate the litigation" but are nonetheless "treated as 'final.'" *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). An order that falls into that limited class is immediately appealable, even though litigation continues in the district court.

The Court has long "criticized and struggled to limit" the "judicial policy" of the collateral-order doctrine. *Mohawk*, 558 U.S. at 115 (Thomas, J., concurring in part and concurring in the judgment). As a result, in the last 30 years the Court has expanded the collateral-order doctrine just three times, favoring discretionary appeals under 28 U.S.C. § 1292(b) and writs of mandamus instead.

Against that background, the Tenth Circuit decided a "single jurisdictional issue." App.4a. It declined to expand the collateral-order doctrine to a new category of orders: those denying "summary judgment on the 'ministerial exception' defense because there exist genuinely disputed issues of fact." App.28a.

The question presented is:

1. Did the Tenth Circuit correctly decline to expand *Cohen* to give a right to immediate appeal *every* time a court denies summary judgment on a ministerial-exception defense?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Constitution, Statutes, and Legislative Reports

Miscellaneous

INTRODUCTION

This case presents a "single jurisdictional issue." App.4a. The question is whether this Court should expand the collateral-order doctrine to an entirely new category of orders: those denying "summary judgment on the 'ministerial exception' defense because there exist genuinely disputed issues of fact.'" App.28a.

Gregg Tucker was a teacher and Director of Student Life at Faith Bible Academy who witnessed widespread bigotry at the School, including when he was called "n**ger lover" for having adopted a daughter who is Black. He organized a school event and invited guest speakers to educate students about racism. Although the School initially applauded the event, after a handful of parents threatened to pull their students, the School fired Tucker.

When Tucker sued under Title VII, the School insisted that it could not be held liable because it labeled Tucker a minister. The district court denied the School's motion for summary judgment under the ministerial exception because "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 . . . could rationally support" the conclusion that he was not a minister. App.111a.

Unhappy with that case-specific decision, the School sought interlocutory review under 28 U.S.C. § 1291, which gives courts of appeals jurisdiction over "final decisions." Because a denial of summary judgment is not a "final decision," the School argued that the denial fell under the collateral-order doctrine: a judicial creation that treats entire categories of decisions as final even though they don't end the case. And

it tried to expand its appeal to include a church-autonomy defense, which the district court rejected when the School raised it for the first time in a motion for reconsideration.

The Tenth Circuit held that it lacked jurisdiction. Following "well-established lines" of this Court's precedent that caution against expanding the collateral-order doctrine, App.7a, the Tenth Circuit refused to hold that *every* denial of a ministerial-exception defense was immediately appealable. The Tenth Circuit did not resolve the factual disputes or address the merits of the School's ministerial-exception defense. And it did not entertain the church-autonomy defense—the School never properly raised it below, so there was nothing to review on appeal.

The decision is not worthy of review. On the actual question answered by the Tenth Circuit, no federal court has ever held that denial of the ministerial exception is immediately appealable under the collateral-order doctrine—even when the facts are undisputed. As to the church-autonomy defense that the Tenth Circuit explicitly did not decide, no federal court has found a right to immediate appeal in a case that's remotely similar. If that weren't enough, factual disputes that the School ignores make this case a poor vehicle to address any question the petition poses.

The Tenth Circuit followed this Court's repeated insistence that the collateral-order doctrine remain narrow. Instead of asking the panel to ignore three decades of jurisprudence under *Cohen*, the School could have sought a case-specific appeal through 28 U.S.C. § 1292(b) or a writ of mandamus. It chose not to. It is not this Court's job to fix those strategic missteps.

STATEMENT

A. Legal Background

1. The historical and textual grounding of the final-judgment rule

"From the very foundation of our judicial system," beginning with the Judiciary Act of 1789, Congress has limited appellate jurisdiction to review of only final judgments. *McLish v. Roff*, 141 U.S. 661, 665-66 (1891); *see* 1 State. 73 § 22 (1789). Final judgments are those "by which a district court disassociates itself from a case," *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995), ending the litigation on the merits and leaving "nothing for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945).

This "historic federal policy against piecemeal appeals" preserves judicial and party resources and ensures the orderly, efficient administration of justice. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). It "save[s] the expense and delays of repeated appeals in the same suit" by "hav[ing] the whole case and every matter in controversy in it decided in a single appeal." *McLish*, 141 U.S. at 665-66 (citing *Forgay v. Conrad*, 47 U.S. 201, 204 (1848)). And it respects "district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

2. *Cohen* gives the word final a "practical" definition.

The Judiciary Act's successor, Section 1291, limits the jurisdiction of the courts of appeals to "final decisions." 28 U.S.C. § 1291.

In 1949, the Court gave Section 1291's finality requirement a "practical rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As a result, a certain "small class" of nonfinal orders were deemed final under Section 1291, and thus grounds for an immediate appeal. *Id.* An order falls within that class only if it "(1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment." *Mohawk*, 558 U.S. at 105.

If a category of orders is appealable under *Cohen*, every order in that category is immediately appealable, regardless of an individual order's strengths or weaknesses. *See Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). In other words, *Cohen* does not allow case-by-case analysis; the Court looks to the "entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustice' averted." *Id.* (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)) (cleaned up).

The system of interlocutory appeals "has been subject to much criticism: 'hopelessly complicated,' 'legal gymnastics,' 'dazzling in its complexity,' 'unconscionable intricacy' with 'overlapping exceptions, each less lucid than the next,' 'an unacceptable morass,' 'dizzying,' 'tortured,' 'a jurisprudence of unbelievable

impenetrability,' 'helter-skelter,' 'a crazy quilt,' 'a near-chaotic state of affairs,' [and] a 'Serbonian Bog.'"[1]

3. Congress intervenes and the Court corrects course.

In 1988, after years of patchwork collateral-order decisions, Justice Scalia diagnosed that "our finality jurisprudence is sorely in need of further limiting principles." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring).

Congress responded by amending the Rules Enabling Act to empower the Court to issue rules defining which orders should be considered final and appealable under Section 1291. *See* 28 U.S.C. § 2072(c) (1990). It sought to address the "continuing spate of procedural litigation" that had resulted from the "[c]onsiderable uncertainty" wrought by the Court's previous decisions. H.R. Rep. No. 101-734, at 18 (1990). And two years later, Congress again addressed the ways that the collateral-order doctrine had "blur[red] the edges of the finality principle, requir[ing] repeated attention from the Supreme Court." S. Rep. No. 102-342, at 24 (1992). It gave the Court the power to specify through rulemaking which categories of nonfinal, interlocutory orders should be immediately appealable under Section 1292. *See* 28 U.S.C. § 1292(e) (1992).

Put plainly, Congress determined that finality is to be decided by the rulemaking process, not by common-law reasoning. *Swint*, 514 U.S. at 48. Rulemaking "draws on the collective experience of bench and

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[1] Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. Rev. 1237, 1238-39 (2007) (collecting sources) (cleaned up).

bar, and it facilitates the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 114 (citation omitted).

Since insisting that Congress's determination of jurisdictional rules "warrants the Judiciary's full respect," *Swint*, 514 U.S. at 48, the Court has been extremely hesitant to expand *Cohen*. In the last 30 years, it has done so only three times—and each case involved the government. *See Sell v. United States*, 539 U.S. 166, 176 (2003); *Osborn v. Haley*, 549 U.S. 225, 238 (2007); *Shoop v. Twyford*, 142 S.Ct. 2037, 2043 n.1 (2022).

B. Factual Background

Petitioner's school, Faith Christian Academy, fired Respondent Gregg Tucker for standing up to rampant, extreme racism. The School now tries to frame the firing as a religious dispute. But it told Tucker that it was firing him because a group of parents threatened to withdraw their students (and their tuition) unless the School got rid of Tucker. The School chose the tuition dollars.

1. Faith Christian is a nondenominational Christian school that serves students and families of all faiths, including Lutherans, Catholics, Baptists, Presbyterians, Mormons, Buddhists, Hindus, and atheists. App.205a ¶ 9. Like the students, many teachers and staff at Faith Bible attend churches with differing beliefs. App.205a ¶ 10. Some openly disagree with Faith Bible Chapel's doctrine. App.205a ¶ 11.

2. Tucker was hired in 2000 as a high-school science teacher—a subject he taught until he was fired. App.203a ¶ 2; 106 ¶ 8. He taught from the same science textbooks as those used in the public schools. App.106a.

From 2006 to 2010, Tucker took leave. CA10 App.II 347:10-12. When he returned, his courseload included classes entitled "Leadership" and "Worldviews and World Religions," as well as science. App.106a. The leadership course covered leadership principles from a general Christian perspective. CA10 App.II 373:1-3. And the worldviews class surveyed world religions and their apologetics, CA10 App.II 370:6-17—in other words, a comparative-religion course, App.204a ¶ 7. Tucker presented Christianity as a "credible worldview" alongside other credible worldviews, both religious and nonreligious. App.204a ¶ 7. None of Tucker's classes involved teaching the Bible or specific theology. App.204a-205a ¶¶ 6-8.

To the extent that the School gave any religious guidance to non-theology teachers like Tucker, it was generic: Set a moral example and "'integrate' a Christian worldview" into their teaching. CA10 App.I 207 ¶ 14. But the School neither trained nor instructed Tucker on what that worldview should be, other than saying that it was "Bible-oriented." App.206a ¶ 14; App.207a ¶ 18.

In fact, Tucker was "encouraged to avoid delivering messages on church doctrine or theology." App.207a ¶ 18. The School instructed him not to preach to students. App.206a ¶¶ 12, 15. And if students had specific theological questions, the School told Tucker not to answer those questions but instead to encourage students to ask their parents or pastors. App.206a-207a ¶¶ 15-16.

The School expressly told Tucker that he was *not* a minister. When he asked whether he was eligible to claim a tax deduction for ministers' housing costs, the superintendent told him no, "because [he] was not a minister." App.209a-210a ¶ 29.

Starting in 2014, the School supplemented Tucker's classroom-teaching duties by making him the Director of Student Life. App.203a ¶ 2; App.207a ¶ 19. Tucker was offered a choice of title: "Director of Student Life," "Chaplain," or "Dean of Student Life." He chose Director of Student Life because he thought that Chaplain would be "disingenuous." App.207a-208a ¶¶ 21-22.

His duties as Director of Student Life consisted of organizing community-service and mentoring opportunities, answering parents' questions, addressing student discipline issues, and promoting a positive student climate. App.208a ¶ 23. He was not responsible for counseling or disciplining students with respect to religious doctrine and did not do so. App.209a ¶ 24.

Five months before he was fired, and three years after becoming the Director of Student Life, Tucker began helping to organize weekly "chapel meetings." App.208a-209a ¶ 25. These assemblies included school announcements, homecoming rallies, speeches for student-council elections, and other commonplace topics for student assemblies. App.209a ¶ 26. They featured speakers from a variety of religious and non-religious backgrounds. App.209a ¶ 26; CA10 App.II 377:5-9.

To the extent the chapel meetings contained religious content, that was out of Tucker's hands: Students and others chose music and prayers. CA10 App.II 378:1-8. Tucker did not lead breakout groups himself, nor did he teach, lead, or plan any devotions. CA10 App.II 378:6-8, 383:23-25.

3. Throughout his employment, Tucker observed frequent and overt racism among the student body,

which the administration ignored. For example, students called Black classmates "n**ger" and "slave," and openly promoted neo-Nazism in class. CA10 App.I 15 ¶ 23 (alteration added). In one particularly disturbing incident, several students wore KKK hoods and mock-executed minority students in the hallways. CA10 App.I 15 ¶ 23.

Tucker, who is White, became the target of racial slurs after he adopted his daughter, who is Black. CA10 App.I 32 ¶ 48. For example students called Tucker "n**ger lover" and "n**ger father." CA10 App.I 15 ¶ 22 (alteration added).

After speaking with students and alumni about their experiences, Tucker organized a symposium in January 2018 entitled "Race and Faith." CA10 App.I 34 ¶ 67; CA10 App.II 378:20-25, 379:1-6. The administration approved. App.142a ¶ 68. At the event, outside speakers discussed racism and "possible ways for students to be more respectful of one another." App.142a ¶ 70.

The administration praised Tucker and the event. CA10 App.I 35 ¶¶ 72-74. But when some students and parents complained, the administration's position changed: As one administrator told Tucker, "this is a business, and if we lose a dozen students, teachers start losing their jobs." App.144a ¶ 103.

The next month, the School fired him. App.141a.

C. Procedural Background

1. Tucker filed a complaint under Title VII and Colorado state law challenging the school's termination as unlawful retaliation for opposing racial harassment. CA10 App.I 25-48. The School moved to dismiss, arguing that Tucker was a minister under the

ministerial exception. CA10 App.I 83-98. The district court converted the School's motion into a motion for summary judgment and, at the School's urging, limited discovery to the applicability of the ministerial exception. App.99a-114a.

Denying summary judgment, the court held that "the facts and circumstances of [Tucker's] employment"—both his title and the "substance of [his] position"—were in dispute. App.99a; App.111a. For example, Tucker's evidence showed that the School prohibited him from advancing "one Christian perspective over another," and instead required him to portray Christianity as one "credible worldview" among many. App.106a. It expected him to teach science free from any theology or "distinct or unique Christian principle." App.106a. "He relied on the same textbooks that were used in public schools." App.106a.

Unlike teachers with explicitly religious duties at the School, Tucker "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." App.106a.

As Director of Student Life, Tucker "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." App.108a. He "did not counsel or discipline students concerning theological principles or principles of faith." App.108a.

As for the inaptly named "Chapel Meetings" that Tucker began helping to organize in his last few months, they were not religious services. They were "assemblies or symposiums" where people who held a

variety of religious and nonreligious perspectives "would speak on matters of interest to the school." App.108a. "The school administration explicitly communicated that these meetings were not regarded as church." App.108a.

Attempting to counter Tucker's evidence, the School pointed to formal employment documents labeling *all* teachers at the School "ministers." App.102a. It called him by the label that he refused—"Chaplain," App.101a—as it continues to do here. And despite Tucker's evidence that he was not referred to as a chaplain, the School introduced a single PowerPoint slide that Tucker *once* presented to his classes in which he described himself as the "Director of Student Life/Chaplain." App.104a.

When the district court concluded that it could not grant summary judgment, the School did not seek appellate review under 28 U.S.C. § 1292(b) or seek a writ of mandamus under 28 U.S.C. § 1651(a). Instead, it filed a notice of appeal under Section 1291. At the same time, the School moved for reconsideration, rearguing the ministerial exception and "perfunctorily" raising—for the first time—the church-autonomy doctrine as a separate ground for granting summary judgment. App.20a. The district court denied the motion for reconsideration and the School tacked that denial onto its appeal.

2. The Tenth Circuit held that it lacked jurisdiction to hear the interlocutory appeal. App.55a.

Making clear the scope of its review, the panel majority held that because the School "did not adequately assert or develop a defense under the church-autonomy doctrine in the district court," there was nothing

to be appealed. App.19a-22a. The majority then explained that the focus of the appeal was whether "orders denying a religious employer summary judgment on its affirmative 'ministerial exception' defense because there remain material factual disputes that a jury must decide, should *always* be immediately appealable." App.28a n.9 (emphasis added). Because the School sought to create an entirely new category of collateral-order appeals, it had to satisfy the high bar of *Cohen*'s three-part test. It could not.

First, in a cursory paragraph, the majority held that the School had satisfied the second requirement of *Cohen*, concluding without explanation that application of the ministerial exception "presents an important First Amendment issue, and that issue is separate from the merits of an employee's discrimination claims." App.29a.

Next, the majority held that the appeal did not satisfy *Cohen*'s third requirement—that the challenged order would be effectively unreviewable on appeal from a final judgment. App.30a. An order is effectively unreviewable if it involves a right to not stand trial at all, not just a right to avoid liability. App.35a. Because the ministerial exception does not affect a court's power to hear a claim, App.51a (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195 n.4 (2012)), it "does not immunize religious employers from the burdens of litigation itself," App.52a.

The majority also rejected the School's comparison to qualified immunity, noting, in part, that the purpose of qualified immunity "is to protect, not individual government officials, but rather the public's interest in a functioning government. That public interest is not present when a private religious employer seeks

to avoid liability under Title VII from employment discrimination claims." App.7a.

As to the first *Cohen* consideration, the Tenth Circuit concluded that the issue was not conclusively decided. App.53a. In fact, the district court did not decide the issue at all; it found that material factual disputes precluded summary judgment. App.53a.

The disputes of material fact provided an additional, independent reason there was no jurisdiction. Even if the School were right that the ministerial exception is akin to qualified immunity, an order denying qualified immunity is not appealable when there are disputes of material fact. App.26a-27a (citing *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). So no matter what, appeal would have been inappropriate here.

3. Judge Bacharach dissented, arguing that the ministerial exception should be treated like qualified, absolute, or Eleventh Amendment immunity and should justify immediate appeals under *Cohen*. App.59a-60a.

According to Judge Bacharach, the district court did not identify factual disputes between Tucker and the School, so *Johnson* did not preclude review. App.74a. Instead of encouraging remand, the dissent jumped to the merits of the summary-judgment motion, weighing the record for itself. Favoring the language in formal employment documents over Tucker's evidence, Judge Bacharach argued that the court should have reversed the district court and granted summary judgment to the School. App.80a-95a.

4. In a 6-4 vote, the Tenth Circuit denied en banc review. Judge Bacharach dissented, restating his ar-

guments that the ministerial exception is a "structural" defense and should be treated like an immunity from trial. App.130a. Meanwhile, Judge Ebel explained that the panel decision was "consistent with well-established lines of Supreme Court precedent and does not create any circuit split." App.121a. And he noted that four justices recently recognized that the ministerial exception "can be effectively reviewed following the entry of final judgment." App.123a (citing *Gordon Coll. v. DeWeese-Boyd*, 142 S.Ct. 952, 955 (2022) (Alito, J., statement respecting denial of certiorari)).

REASONS FOR DENYING THE PETITION

The petition frames the case as broadly presenting questions about the scope of the Religion Clauses, including "church autonomy defenses." *See, e.g.*, Pet. i, 3, 25. But the case is much narrower.

The *sole* question the panel answered was "whether a religious employer is entitled to an immediate appeal under *Cohen* from a district court's interlocutory ruling denying the employer summary judgment on its affirmative ministerial exception defense because there are genuinely disputed issues of material fact." App.123a (Ebel, J., statement supporting denial of en banc review). The petition fails to acknowledge that the School "waited until its motion for reconsideration to refer, only perfunctorily, to the church autonomy doctrine." App.21a. Because the School never "adequately asserted or developed a defense under that doctrine" for the Tenth Circuit to consider, App.21a, church-autonomy questions cannot be before this Court now.

The "single jurisdictional issue" actually presented here, App.4a, is not worthy of this Court's review. There are no splits in authority. Factual disputes make this case an exceedingly poor vehicle. And the Tenth Circuit was correct in refusing to open the floodgate to ceaseless collateral-order appeals. The petition should be denied.

I. There is no split in authority—either on the question presented here or the questions the School wishes were presented.

A. There is no split on the one question the Tenth Circuit decided.

1. As the panel recognized, "no other circuit has addressed" whether *Cohen* applies to an order denying summary judgment on the ministerial exception because of a dispute of fact. App.123a. So there can be no split in authority.

In the one case to come close to considering the question presented here, the Seventh Circuit aligned with the panel below. *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 20-3265, 2021 WL 9181051 (7th Cir. July 22, 2021). In an order by Judges Easterbrook, Kanne, and Wood, the Seventh Circuit dismissed an appeal of an order declining to grant defendants judgment on the pleadings on their ministerial-exception defense. The order concluded that the appeal was premature because, just like here, there remained disputes of fact. *See id.* at *1 (citing *Johnson*, 515 U.S. 304). And it recognized that it's an open question whether the ministerial exception is appealable as a collateral order when there are *no* disputes of fact. *Id.* Though the School's counsel here represented the defendant in *Starkey*, the petition ignores the denial of collateral-order review and instead

insists that the Seventh Circuit is hopelessly at odds with the Tenth.

It is not surprising that more circuits haven't decided this narrow procedural issue. In the eleven years since *Hosanna-Tabor*, district courts have denied ministerial-exception defenses at summary judgment because of disputes of material fact just *five* times.[2]

2. With no circuit split, the School relies on a handful of state cases. But as those cases recognize, the jurisdiction of state courts is governed by *state* law.[3] So there cannot be a split between state interpretation of state appellate procedure and federal interpretation of federal appellate procedure.

The School argues that states look to this Court for the substance of the underlying rights. Pet. 28. But that does not matter. States aren't bound by Congress's definition of finality or this Court's interpretation of *Cohen*. So if review were granted here, the states could simply ignore whatever the Court might conclude. *See Johnson v. Fankell*, 520 U.S. 911, 917 n.7 (1997) (collecting state court cases that "reject the

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[2] *See Clark v. Newman Univ.*, No. 19-1033, 2022 WL 4130828, at *13 (D. Kan. Sept. 12, 2022); *Tucker v. Faith Bible Chapel Int'l*, No. 19-01652, 2020 WL 2526798, at *7 (D. Colo. May 18, 2020); *Bohnert v. Roman Catholic Archbishop of S.F.*, 136 F.Supp.3d 1094, 1114-15 (N.D. Cal. 2015); *Preece v. Covenant Presbyterian Church*, No. 13-188, 2015 WL 12564170, at *3 (D. Neb. Mar. 6, 2015); *Hough v. Roman Catholic Diocese of Erie*, No. 12-253, 2014 WL 834473, at *5 (W.D. Pa. Mar. 4, 2014).

[3] *See Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1198 (Conn. 2011); *United Methodist Church, Balt. Ann. Conf. v. White*, 571 A.2d 790, 791-92 (D.C. 1990); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609 n.45 (Ky. 2014); *Harris v. Matthews*, 643 S.E.2d 566, 568-69 (N.C. 2007).

limitations this Court has placed on § 1291"); *Commonwealth v. Harris*, 32 A.3d 243, 248 (Pa. 2011).

B. There are no splits on the questions that the petition raises but that aren't presented here.

Unable to identify any splits on the immediate appealability of the ministerial exception, the School expands the scope of its argument to the appealability of the (improperly raised) church-autonomy doctrine. Pet. 26-27. It goes further yet to include broad pronouncements under the Religion Clauses of the First Amendment generally. *See* Pet. 17. But the Tenth Circuit did not address church autonomy and it certainly did not issue a sweeping ruling about the Religion Clauses. No matter. Even if the Tenth Circuit's opinion could be read so broadly, there are no disagreements worthy of review.

1. Contrary to the School's framing (at 26-27), no circuit has held that denials of church-autonomy defenses broadly are collateral orders. Instead, church-autonomy orders have been found to satisfy *Cohen* only in rare circumstances that don't exist here.

The Seventh Circuit has made explicit that it has *not* expanded *Cohen* to include every denial of a church-autonomy defense. *See Herx v. Diocese of Fort Wayne-S. Bend*, *Inc.*,772 F.3d 1085, 1091 (7th Cir. 2014). Instead, it has limited interlocutory review to the unusual case when a district court submits an explicitly religious question to the jury. *Id.* (citing *McCarthy v. Fuller*, 714 F.3d 971, 976 (7th Cir. 2013)).

And although the Fifth Circuit allowed a collateral-order appeal when a nonparty raised a First Amendment challenge to a discovery order, the court did not hold that the First Amendment categorically

allows appeals under *Cohen*. *See Whole Woman's Health v. Smith*, 896 F.3d 362, 367-68 (5th Cir. 2018). Instead, the Fifth Circuit considered the First Amendment rights of third parties who are subject to discovery orders and who "cannot benefit directly" from post-final-judgment relief. *Id*. That is "a very different situation than the one presented here." App.50a-51a.

2. Undeterred, the School argues that thirteen courts have held that the Religion Clauses "provide protection—similar to an immunity—against the burdens of litigation." Pet. 17. In the School's telling, those courts conflict with the Tenth Circuit's limited ministerial-exception holding. Not so.

a. The School relies on stray language about burdens of litigation, immunities, and "structural" rights to conclude that courts have held that the ministerial exception is an immunity. For example, the School points to language from the Seventh Circuit that adjudicating a minister's claim might allow "impermissible intrusion" into a church's inner workings. Pet. 18 (quoting *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 980-82 (7th Cir. 2021) (en banc)). But again the School ignores the circuit's recent order—joined by two members of the *Demkovich* majority—explaining that it's an open question whether the ministerial exception is an immunity from trial "or only a right to prevail," *Starkey*, 2021 WL 9181051, at *2. As *Starkey* shows, quotes plucked from context are not holdings. *Compare* Pet. 17 (citing *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985)) *with Goldfarb v. Mayor and City Council of Baltimore*, 791 F.3d 500, 508 (4th Cir. 2015) (quoting *Hosanna-Tabor*, 565 U.S. at 195 n.4) (describing the exception as an entitlement to relief, but saying nothing about an immunity from trial).

As if to forecast the School's argument, the Seventh Circuit warned against reading too much into imprecise and errant uses of words like "immunity," which may not mean "immunity from trial." *Herx*, 772 F.3d at 1091. Instead, "words like 'immunity,' sometimes conjoined with 'absolute' are often used interchangeably with 'privilege'" or "affirmative defense." *Id.* (quoting *Segni v. Com. Off. of Spain*, 816 F.2d 344, 346 (7th Cir. 1987)). That explains why the Third Circuit's passing reference to qualified immunity is not a holding in conflict with the panel decision here. *See Petruska v. Gannon Univ.*, 462 F.3d 294, 302-03 (3d Cir. 2006). The Third Circuit's analysis focused on remedies and "the success of a plaintiff's claims" and was silent about whether the exception is an immunity from trial. *See id.* at 303, 305 n.8. The School's additional reliance on vague uses of "immunity" does not and cannot show that the courts treat the ministerial exception as an immunity *from trial*.[4]

Likewise, and as the Tenth Circuit addressed, descriptions of rights as "structural" or questions about waiver simply are "not the same" as whether a right is "an immunity from suit." *See* App.43a-45a. So the decisions from the Third and Sixth Circuits present no split with the panel's holding. *See* Pet. 19 (citing *Lee*

[4] *Compare Presbyterian Church v. Edwards*, 566 S.W.3d 175 (Ky. 2018) (describing the ministerial exception as an immunity) *with Kirby*, 426 S.W.3d at 619 (precluding liability on certain claims but allowing others to continue). *See also Nation Ford Baptist Church Inc. v. Davis*, 876 S.E.2d 742, 754 (N.C. 2022) (precluding a pastor's claims that required answering religious questions, but allowing others to continue in the trial court); *Gregorio v. Hoover*, 238 F.Supp.3d 37, 48-49 (D.D.C. 2017) (citing *Minker v. Baltimore Ann. Conf. of United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990)) (explaining the D.C. Circuit's rule that some claims by a minister can proceed).

v. Sixth Mount Zion Baptist Church, 903 F.3d 113, 118 n.4 (3d Cir. 2018) and *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015)).

b. The School argues that decades-old cases like *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991), or *United Methodist Church v. White*, 571 A.2d 790 (D.C. 1990), should be interpreted to imply that the First Amendment grants immunity from litigation. *See* Pet. 17, 19. But those cases were decided before *Hosanna-Tabor*. And beyond holding that the ministerial exception is not a jurisdictional bar, *Hosanna-Tabor* clarified that the question under the ministerial exception is "'whether the allegations the plaintiff makes entitle him to relief,' not whether the court has 'power to hear the case.'" *Hosanna-Tabor*, 565 U.S. at 195 n.4 (quoting *Morrison v. Nat'l Austl. Bank*, 561 U.S. 247, 254 (2010)).

That is why the Connecticut Supreme Court revisited *Dayner*, 23 A.3d 1192, a case on which the School relies, and concluded that *Dayner*'s holding was "short-lived in light of the United States Supreme Court's holding in *Hosanna-Tabor* that the exception operates as an affirmative defense to an otherwise cognizable employment discrimination claim." *Trinity Christian Sch. v. Comm'n on Hum. Rts. and Opportunities*, 189 A.3d 79, 82 n.4 (Conn. 2018).

c. The School's reliance on church-autonomy cases is even less convincing.

Again citing to *Whole Woman's Health*, 896 F.3d at 367-68, and *McCarthy*, 714 F.3d at 975, the School argues that the Fifth and Seventh Circuits broadly treat the church-autonomy doctrine as an immunity.

See Pet. 18-19. But the Fifth Circuit recently refused to interpret the church-autonomy doctrine in a way that would "effectively immunize" religious defendants and remanded for continuing litigation. *See McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 349-50 (5th Cir. 2020), *cert. denied*, 141 S.Ct. 2852 (2021). And the Seventh Circuit explicitly declined to conclude that "the First Amendment more generally provides an immunity *from trial* as opposed to an ordinary defense to liability." *Herx*, 772 F.3d at 1090.

Likewise, despite its pre-*Hosanna-Tabor* statements, the D.C. Court of Appeals more recently concluded that discovery in a church-autonomy case was *necessary* to "ensure that the doors to the civil courthouse are not closed prematurely." *Family Fed'n for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 251 (D.C. 2015).

And whatever the Supreme Court of Texas said about whether a court can hear a church-autonomy argument doesn't matter here. That is because the court there explicitly distinguished its holding from *Hosanna-Tabor* and the ministerial exception. *See In re Diocese of Lubbock*, 624 S.W.3d 506, 512 n.1 (Tex. 2021). So the decision cannot conflict with the Tenth Circuit's ruling on the ministerial exception.

In all, courts know how to acknowledge actual immunities from trial and all the consequences that follow. *See Nero v. Mosby*, 890 F.3d 106, 117 (4th Cir. 2018); *see also id.* at 121 (listing immunities from trial without mentioning the Religion Clauses). The School does not point to any court that has created an immunity from trial under the Religion Clauses that could conflict with the Tenth Circuit. So there is no split to review.

C. There is no split on whether the ministerial exception presents factual questions for a jury.

Finally, the School challenges the Tenth Circuit's anodyne conclusion that disputes of material fact cannot be decided on summary judgment.

To give the impression of a split, the School points to cases describing the ministerial exception as a purely legal question. But in each of those cases the ministerial-exception question was purely legal *because* there were no disputes of fact. App.44a-47a. One case involved a motion to dismiss, when the question is always a purely legal one. *See Conlon*, 777 F.3d at 832. Other cases involved summary-judgment motions in which the facts weren't in dispute—thus raising a purely legal question. *See Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 655, 660 (7th Cir. 2018); *Kirby*, 426 S.W.3d at 604; *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999). And one case was remanded to "answer [the] open factual question" whether employees in the plaintiff's position "qualify as ministers." *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060, 1070 (Wash. 2021), *cert. denied*, 142 S.Ct. 1094 (2022).

II. Disputes of fact that the School ignores make this a poor vehicle.

The School asks the Court to make broad pronouncements on procedural and constitutional questions, and then to apply those rules to the facts of this case. But the School ignores the myriad factual disputes that precluded summary judgment in the first place. Those disputes make this case a poor vehicle for three reasons.

First, the School argues that the collateral-order doctrine should apply because the ministerial exception should be treated like qualified immunity. Pet. 15-16. But as the Tenth Circuit recognized, the collateral-order doctrine does not apply to appeals of qualified immunity when—like here—there are disputes of material fact. *See* App.25a (quoting *Johnson*, 515 U.S. at 311-13).

For just a taste of the factual disputes that the School ignores, consider what the district court described in its order denying summary judgment. The School explicitly told Tucker he wasn't a minister. App.109a. As a teacher, 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," nor was he qualified to do so. App.106a-107a. The School told him that he wasn't to promote any specific views of Christianity or deliver any "messages on church doctrine or theology," so as to respect the diverse religious beliefs of his students. App.107a. Instead, he was told to direct students to their parents and their own ministers. App.107a.

He rejected the label Chaplain, instead taking another title offered to him—Director of Student Life—because he thought being called Chaplain would be "disingenuous." App.107a-108a. In his years as Director of Student Life, he used "Director of Student Life/Chaplain" in the header of a *single* PowerPoint slide. App.104a.

And although the School doggedly insists this is a "religious dispute[]," *see* Pet. 32, Tucker was told before his firing, "this is a business, and if we lose a dozen students, teachers start losing their jobs." CA10 App.I. 43 ¶ 103; *see also id.* at 36-38 ¶¶ 76-92.

Instead of viewing the disputed facts in favor of Tucker, the nonmovant, the School omits from its appendix portions of the record that describe Tucker's job duties, highlight the racism he faced, and detail the School's positive response to his program. *See, e.g.*, App.141a-142a. For example, the School says that Tucker taught "Christian apologetics," Pet. 33, but scrubs the portion of Tucker's deposition in which he made clear that apologetics covered non-Christian religions, including Buddhism. *See* CA10 App.II 370:6-17. Worse yet, the School cites to its *own answer* to treat its proffered defenses as statements of fact. *See* Pet. 8-9 (citing App.275a, App.277a, App.280a).

Given the disputes of fact, and the School's refusal to resolve those disputes in Tucker's favor, even if qualified immunity were somehow an apt parallel, there would still be no jurisdiction here. *See Johnson*, 515 U.S. at 311.

Second, it is not this Court's role to wade through the record, resolve these disputes of fact, draw inferences, and apply the fact-intensive ministerial-exception test. But that is exactly what the School asks the Court to do—resolve, for the first time, "whether the ministerial exception applies here," Pet i. This Court is "a court of final review and not first view." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001)). So when there are factual disputes under the ministerial exception, the proper course is to "remand for a trial on that issue," *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049, 2056 n.1 (2020)—exactly what the Tenth Circuit did.

Third, as to the church-autonomy questions on which the petition relies, there is nothing for this Court or the Tenth Circuit to review.

As already explained (at 14), the district court and the Tenth Circuit refused to rule on the merits of the School's church-autonomy argument because the School "perfunctorily" raised it for the first time in a motion for reconsideration. App.20a. So there is no decision for the School to challenge—final or otherwise.

But more than that, at the School's urging, the district court limited discovery to the ministerial exception. App.5a. So "there has been no record development" on the church-autonomy defense's "necessary threshold question: whether the employment dispute between Tucker and Faith Christian is rooted in a difference in religious belief or doctrine." App.20a.

The absence of a lower-court decision and any record means that church-autonomy questions are purely hypothetical.

III. The Tenth Circuit followed this Court's decisions.

A. The panel followed this Court's repeat insistence that the collateral-order doctrine remain narrow "and never be allowed to swallow the general rule, that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digit. Equip.*, 511 U.S. at 868. After all, if the courts of appeals freely expanded the collateral-order doctrine, especially when tempted by an individual case, "'Congress['s] final decision rule would end up a pretty puny one.'" *Microsoft Corp. v. Baker*, 137 S.Ct. 1702, 1715 (2017) (quoting *Digit. Equip.*, 511 U.S. at 872).

In addition to the modern reluctance to expand *Cohen*, interlocutory appeals are appropriate only when the category of order "(1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of

the action; and (3) is effectively unreviewable on appeal from final judgment." *Mohawk*, 558 U.S. at 105 (internal quotation omitted). None are satisfied here.

First, this Court has insisted that "[t]o be appealable as a final collateral order, the challenged order must constitute a complete, formal, and in the trial court, final rejection of a claimed right." *Risjord*, 449 U.S. at 376 (quoting *Abney v. United States*, 431 U.S. 651, 659 (1977)). "Inherently tentative" orders cannot satisfy *Cohen*. *Gulfstream Aerospace Corp.*, 485 U.S. at 278.

It's hard to imagine an order more tentative than one refusing to decide an issue at all. But that's what happened here: "[T]he district court's decision clearly contemplates further factual proceedings," App.53a, to determine whether Tucker was a minister. Once remanded, the district court may again consider, and rule on, the School's ministerial-exception defense. App.49a.

Second, whether Tucker was a minister turns on many of the same factual determinations required at the merits stage. Although the Tenth Circuit came to the correct conclusion overall, its analysis on this point was wrong. It summarily concluded that the issue is an important one, but did not explain why. Nor did it explain how the issue is separate from the merits. It's not.

In deciding whether an employee was a minister, "[w]hat matters, at bottom, is what an employee does." *Morrissey-Berru*, 140 S.Ct. at 2064. That, along with the employee's title, training, and qualifications, allows the court to determine whether the employee served as an important teacher or preacher of the faith. *See id.*

Many of those same considerations—duties, qualifications, training—are central to the merits of a Title VII claim. *See, e.g.*, *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (plaintiff must show he was qualified for the job to which he applied). And a Title VII defendant likewise must show that its nondiscriminatory explanation bore "a demonstrable relationship to successful performance of the job[]." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). "[S]uccessful performance of the job[]," *id.*, is, of course, fundamentally intertwined with "what an employee does," *Morrissey-Berru*, 140 S.Ct. at 2064.

So even when a district court cannot decide in the preliminary stages of litigation whether an employee was a minister for purposes of the exception, "the issue may become clearer as trial progresses," *Risjord*, 449 U.S. at 381 (Rehnquist, J., concurring). But if interlocutory appeals as of right are allowed, appellate courts would be forced to prematurely review district-court decisions based on limited records. Then when the underdeveloped record makes a decision impossible—as it does here—the court will be required to consider the same issue again in later appeals as the record develops.

Third, the district court's denial of summary judgment on the ministerial exception is not unreviewable—it can be addressed on appeal "when the decision is actually final." *DeWeese-Boyd*, 142 S.Ct. at 955 (Alito, J., statement respecting denial of certiorari) (citation omitted).

The School relies on high-level descriptions of this Court's cases and selective quotations to describe the First Amendment as giving a right to be free from proceedings at all. *See* Pet. 28-29. But as the Tenth Circuit recognized, and the petition ignores, "the issue

presented by the exception is 'whether the allegations the plaintiff makes *entitle him to relief*,' not whether the court has 'power to hear [the] case.'" App.31a (quoting *Hosanna-Tabor*, 565 U.S. at 195 n.4). In other words, the ministerial exception proscribes *remedies* by protecting religious institutions from being required to "accept or retain an unwanted minister" or being "punish[ed]" for "failing to do so." *Hosanna-Tabor*, 565 U.S. at 188.

The Tenth Circuit's conclusion aligns with how the Court has long treated the Religion Clauses. Just last year, the Court denied interlocutory review in *DeWeese-Boyd*—where a state court conclusively decided that the respondent was not a minister. 142 S.Ct. at 952 (Alito, J., statement respecting denial of certiorari). Although four justices found the state court's decision "troubling," *id.*, the Court allowed the case to proceed to trial on the merits on the understanding that the petitioner could seek review "when the decision is actually final." *Id.* at 955 (citation omitted). Likewise, the Court has allowed state administrative investigations into a religious organization, holding that First Amendment rights are sufficiently vindicated if the organization can raise Religion-Clause-based challenges *after* the investigation is complete. *See Ohio Civ. Rts. Comm'n v. Dayton Christian Schs.*, 477 U.S. 619, 629 (1986). If organizations subject to official state investigations "receive an adequate opportunity to raise [their] constitutional

claims" on appeal after final judgment, so too here. *See id.* at 628.[5]

B. Holding otherwise and allowing immediate review every time a district court denies a defendant's motion for summary judgment on the ministerial exception would radically contradict thirty years of this Court's precedent and would create untold confusion for the lower courts.

Since Congress answered Justice Scalia's call to revamp the Court's finality jurisprudence, the Court has been extremely hesitant to create new categories under *Cohen*. *See Mohawk*, 558 U.S. at 106; *see also id.* at 115 (Thomas, J., concurring in part and in the judgment) (arguing against *any* new categories under *Cohen*). It has done so just three times in the last thirty years. None of those cases involved litigation between private parties. *See Shoop*, 142 S.Ct. at 2043; *Osborn*, 549 U.S. at 238; *Sell*, 539 U.S. at 175.

Instead, the Court has suggested that *Cohen* should be expanded in litigation between private parties only when there is an "*explicit* statutory or constitutional guarantee that trial will not occur." *See Digit. Equip.*, 511 U.S. at 874 (emphasis added) (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989)). For example, the Speech and Debate Clause ensures that members of Congress "shall not be questioned in any other place," U.S. Const. art. I, § 6, cl. 1. But that is "a rare form of protection." *Digit. Equip.*, 511 U.S. at 879.

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[5] Although part of the rationale for *Dayton*'s holding was comity concerns, *see* 477 U.S. at 625-28, if the Religion Clauses operated as a constitutional immunity from suit, surely that would have overcome any comity-based justification.

Nothing in the First Amendment is an explicit "guarantee that trial will not occur," *id.* at 874.

The School doesn't say otherwise. Instead, it argues that because the First Amendment is important, it must be treated as an immunity. Pet. 22-23. But the Court has warned that attempts to categorize a right as an immunity from trial should be "viewed with skepticism, if not a jaundiced eye." *Digit. Equip.*, 511 U.S. at 873. "Virtually every right that could be enforced by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Id.* (quoting *Midland Asphalt*, 489 U.S. at 501). Yet "courts have almost always denied immediate appeals under the collateral order doctrine from the following: orders denying dismissal based on lack of subject matter jurisdiction, lack of personal jurisdiction, immunity from service of process, preclusion principles, an agency's primary jurisdiction, forum non conveniens, speedy trial rights (in a criminal case), almost all denials of summary judgment, and the district court's refusal to remand a civil case to state court, to name just a few." App.33a; *see also United States v. MacDonald*, 435 U.S. 850, 858-59 (1978). "That a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment," even when it comes to important rights, "has never sufficed." *Mohawk*, 558 U.S. at 107 (quoting *Digit. Equip.*, 511 U.S. at 872).

So to find that the ministerial exception is an immunity from suit, despite the utter lack of any textual support for that conclusion, the Court would have to abandon its text-based approach. That would invite countless other collateral appeals. For example, Judge Bacharach's dissent defined the Religion Clauses as a "structural" protection that functions as an immunity.

See App.63a (citing John Hart Ely, *Democracy & Distrust: A Theory of Judicial Review* 94 (1980)). But Judge Bacharach did not explain what "structural" means or why Ely's description of some rights as "structural" should determine appealability under *Cohen*. If this Court were to follow suit, it would leave the lower courts to sift through the rubble to determine when a judge or academic's use of vague modifiers like "structural," absent from the constitutional or statutory text, would require entire new categories of interlocutory appeals.

Even if the Court were to limit the petition's framing of immunities from trial to the First Amendment, that would still create a mess in the lower courts. That's because other First Amendment rights have widely been described as immunities. For example, this Court has described the Free Speech Clause as providing an "immunity." *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964). So too the right of free association. *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) ("immunity from state scrutiny of membership lists . . . .").

And the lower courts have consistently labeled the *Noerr-Pennington* doctrine, which is based in the Petition Clause, an "immunity." *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013); *Hinshaw v. Smith*, 436 F.3d 997, 1003 (8th Cir. 2006); *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 295-96 (5th Cir. 2000). Yet they have consistently held that *Noerr-Pennington* does not give a right to interlocutory appeal under *Cohen*. *See, e.g.*, *Nunag-Tanedo*, 711 F.3d at 1141.

There is no logical justification for treating the ministerial exception any differently. Like the Petition Clause, the ministerial exception "does not enjoy

a special status, or confer any greater immunity, than that provided by other First Amendment guarantees." *See id.* (citing *McDonald v. Smith,* 472 U.S. 479, 484-85 (1985)).

So if the Court finds that the Religion Clauses satisfy *Cohen*, by what logic would a court deny interlocutory review to a newspaper that didn't like a ruling under *New York Times v. Sullivan*, or any organization whose right-to-assemble argument was rejected (no matter how meritless the losing party's substantive arguments may be)? And how would a court engage in coherent line drawing when facing "doubly protect[ed] religious speech" covered by the "overlapping protection for expressive religious activities" granted by the Free Speech Clause and the Religion Clauses? *See Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022).

C. The Court does not need to answer these difficult, categorical questions. That is because the School could have sought one of the Court's preferred paths for appellate review: Section 1292(b) or a writ of mandamus. *See Mohawk*, 558 U.S. at 110-13. It chose not to.

Because Section 1292(b) and a writ of mandamus limit appellate review to individual cases, neither requires wholesale rewriting of appellate jurisdiction. *See Digit. Equip.*, 511 U.S. at 883. These more modest forms of review have allowed the courts of appeals to review interlocutory orders without expanding *Cohen* into an unworkable drain on court resources.[6]

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[6] *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (mandamus, rather than the

After failing to convince the Tenth Circuit to expand *Cohen*, the School now misstates the panel's decision as concluding that ministerial-exception defenses are "categorically ineligible for appellate review." Pet. 29. But that's flatly wrong. The issue can be appealed when the decision is actually final. *See, e.g.*, *DeWeese-Boyd*, 142 S.Ct. at 955 (Alito, J. statement respecting denial of certiorari). And denying a new category of interlocutory appeals does not mean categorically denying *every* interlocutory appeal. The Tenth Circuit's refusal to create a new categorical right just means that parties must seek "other avenues for immediate appeal in appropriate cases," App.125a, like Section 1292(b) and writs of mandamus.

CONCLUSION

This case presents one straightforward question: Is every denial of the ministerial-exception defense at summary judgment based on disputes of material fact immediately appealable under *Cohen*? Despite the School's best efforts, it cannot transform this case into

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collateral-order doctrine, is the proper method to appeal attorney-client-privilege orders); *McClendon v. City of Albuquerque*, 630 F.3d 1288, 1298 (10th Cir. 2011) (Gorsuch, J.) ("Congress has already provided a way for parties to challenge a district court's erroneous assertion of jurisdiction before the entry of a final judgment. That path is paved by 28 U.S.C. § 1651(a) and its approval of writs of mandamus."); *see also United States v. Acad. Mortg. Corp.*, 968 F.3d 996, 1009 (9th Cir. 2020); *Kell v. Benzon*, 925 F.3d 448, 465 n.17 (10th Cir. 2019); *United States v. Gorski*, 807 F.3d 451, 458 (1st Cir. 2015); *JPMorgan Chase Bank v. Asia Pulp & Paper Co.*, 707 F.3d 853, 869 (7th Cir. 2013); *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (6th Cir. 2011); *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 484 (10th Cir. 2011).

anything more. And if this issue were really as pressing as the School contends, it would not need to selectively recast the facts, gloss over the holdings below, or fabricate splits in authority.

The petition should be denied.

Respectfully submitted.

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