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

DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

Christopher J. Conant
Robert W. Hatch
HATCH RAY OLSEN CONANT LLC
730 17th Street, Suite 200
Denver, Colorado 80202
Phone Number: (303) 298-1800
Fax Number: (303) 298-1804
cconant@hatchlawyers.com
rhatch@hatchlawyers.com

Daniel H. Blomberg
Daniel D. Benson
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20036
Phone Number: (202) 349-7209
Fax Number: (202) 955-0090
dblomberg@becketlaw.org
dbenson@becketlaw.org

Attorneys for Appellant Faith Bible Chapel International

CORPORATE DISCLOSURE STATEMENT

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

Respectfully submitted,

/s/ *Daniel H. Blomberg*
Daniel H. Blomberg
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20036
Phone Number: (202) 349-7209
Fax Number: (202) 955-0090
dblomberg@becketlaw.org

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

FRAP 35(b) STATEMENT AND INTRODUCTION 1

STATEMENT 3

A. Factual Background 3

B. Procedural Background 4

C. Panel Opinion 5

ARGUMENT 6

I. The panel creates a 5-1 split and conflicts with the Supreme Court in holding that the ministerial exception is a question of fact for a jury to decide. 6

II. The panel conflicts with this Court's precedent, creates an 11-1 split, and conflicts with the Supreme Court in holding that the ministerial exception protects only against liability. 8

III. The panel creates a 6-1 split and conflicts with the Supreme Court by categorically barring ministerial exception decisions from interlocutory appeal. 14

IV. Exceptionally important First Amendment rights are at stake. 17

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Alcazar v. Catholic Archbishop,
627 F.3d 1288 (9th Cir. 2010) 17

Bryce v. Episcopal Church in the Diocese of Colorado,
289 F.3d 648 (10th Cir. 2002) 1-2, 10

Colo. Christian Univ. v. Weaver,
534 F.3d 1245 (10th Cir. 2008) 9

Combs v. Cent. Tex. Conf. of United Methodist Church,
173 F.3d 343 (5th Cir. 1999) 11

Conlon v. InterVarsity Christian Fellowship,
777 F.3d 829 (6th Cir. 2015) 7, 12

Dayner v. Archdiocese of Hartford,
23 A.3d 1192 (Conn. 2011) 11, 15

Demkovich v. St. Andrew the Apostle Parish,
3 F.4th 968 (7th Cir. 2021) 7, 10, 17

EEOC v. Catholic Univ. of Am.,
83 F.3d 455 (D.C. Cir. 1996) 11

Fitzgerald v. Roncalli High Sch.,
2021 WL 4539199 (S.D. Ind. 2021) 14

Fort Wayne Books, Inc. v. Indiana,
489 U.S. 46 (1989) 14-15

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

Harris v. Matthews,
643 S.E.2d 566 (N.C. 2007) 16

Heard v. Johnson,
810 A.2d 871 (D.C. 2002) 7

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) ..... *passim*

Kirby v. Lexington Theological Seminary,
426 S.W.3d 597 (Ky. 2014) 7, 16

Lee v. Sixth Mount Zion Baptist Church,
903 F.3d 113 (3rd Cir. 2018) 12, 16

McCarthy v. Fuller,
714 F.3d 971 (7th Cir. 2013) 10, 15

McClure v. Salvation Army,
460 F.2d 553 (5th Cir. 1972) 9

Natal v. Christian & Missionary All.,
878 F.2d 1575 (1st Cir. 1989) 10, 16

NLRB v. Catholic Bishop,
440 U.S. 490 (1979) 2, 9, 13

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
140 S.Ct. 2049 (2020) 2, 8, 13, 14

Presbyterian Church (U.S.A.) v. Edwards,
566 S.W.3d 175 (Ky. 2018) 11

Rayburn v. Gen. Conf. of Seventh-Day Adventists,
772 F.2d 1164 (4th Cir. 1985) 10-11

Roman Catholic Archdiocese of San Juan v. Feliciano,
140 S.Ct. 696 (2020) 15

Scharon v. St. Luke's Episcopal Presbyterian Hosps.,
929 F.2d 360 (8th Cir. 1991) 11

Skrzypczak v. Roman Catholic Diocese of Tulsa,
611 F.3d 1238 (10th Cir. 2010) 1, 9, 10, 16

Starkman v. Evans,
198 F.3d 173 (5th Cir. 1999) 6-7

Tomic v. Catholic Diocese of Peoria,
442 F.3d 1036 (7th Cir. 2006) 12

United Methodist Church v. White,
571 A.2d 790 (D.C. 1990) 11-12, 15-16

Whole Woman's Health v. Smith,
896 F.3d 362 (5th Cir. 2018) 12, 15

Statutes

28 U.S.C. §1258 15

Other Authorities

EEOC Compl. Man. §12 12

FRAP 35(b) STATEMENT AND INTRODUCTION

The First Amendment's Religion Clauses protect both church and state from judicial entanglement in matters of faith and church polity. One application of this protection, often called the "ministerial exception," bars judicial review of disputes over religious leadership. The Free Exercise Clause gives religious groups autonomy in selecting representatives of their faith. And the Establishment Clause bars courts from entertaining lawsuits that dispute those choices.

But these protections have just narrowed drastically under the panel's published opinion. Juries will now "often" be required to decide the legal question of who qualifies as a "minister" for purposes of the First Amendment. Courts will likewise be required to fully adjudicate the merits of ministerial employment disputes, allowing disgruntled clergy to employ the power of the federal judiciary to probe the mind of the church. And churches will be without appellate recourse until after final judgment on the merits. As courts have long warned, that litigation burden will be too heavy for many churches to bear, forcing them to make ministerial choices with an eye toward litigation instead of their flock.

No other circuit has ever reached those sweeping results, and the panel's novel approach creates multiple conflicts of authority. Its opinion effectively overrules key parts of this Circuit's leading Religion Clauses precedent, *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010), and *Bryce v. Episcopal Church in the Diocese of*

Colorado, 289 F.3d 648 (10th Cir. 2002). It conflicts with Supreme Court precedent in *Hosanna-Tabor v. EEOC*, 565 U.S. 171 (2012), *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020), and *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). And it creates three first-time circuit splits, each of which warrants review: a 5-1 split on whether ministerial status is a fact question for the jury, an 11-1 split on whether the Religion Clauses protect religious leadership decisions only against liability, and a 6-1 split on whether erroneous denials of Religion Clauses defenses can be appealed only after final judgment on the merits.

The facts of this case illustrate the panel's errors. The plaintiff was a chaplain entrusted with the spiritual wellbeing of children at a religious school. He seeks to entangle federal courts in an employment dispute arising from his leadership of a chapel service. And he tries to dodge the ministerial exception through subterfuges like labeling his "chapel services" as "pep rallies." Reply.11-12. But instead of following the First Amendment's command to avoid entanglement, the panel's ruling worsens it. Now, a jury will determine whether a chaplain held the status of "minister," and potentially also the merits of his chapel-related Title VII claim. That process alone, separate from any liability determination, will irreparably harm Faith Bible Chapel's rights to church autonomy and the judiciary's duties to avoid interfering in religious leadership disputes.

STATEMENT

A. Factual Background

In 2010, Faith Christian Academy, a Christian K-12 school run by Defendant-Appellant Faith Bible Chapel, hired Plaintiff-Appellee Gregory Tucker as a teacher. Aplt.App.269-71, 345-47. Tucker understood the school's "clear expectation" that he "endorse Christianity" and "allow the Christian worldview to influence [his] teaching." Aplt.App.208 ¶18. He testified his "main goal in educating students" was "to help them become more like Jesus Christ." Aplt.App.319. Tucker's courses included classes in the Bible Department such as "Worldviews and Apologetics," where he taught that "Christianity reflected a credible worldview," and "Christian Leadership," where he taught "leadership principles … from a Christian perspective." Aplt.App.206 ¶7, 373; *see also* Reply.12 n.2.

In 2014, Tucker also began serving as Faith Christian's Chaplain. Aplt.App.99, 208-09 ¶20. Tucker affirmed in his contract accepting the Chaplain role that "God ha[d] called [him] to minister." Aplt.App.218, 99. Tucker introduced himself to students as the "Director of Student Life/Chaplain," telling them he was responsible for their "spiritual wellbeing" and for providing "opportunities for student spiritual growth." Aplt.App.271, 373. Tucker testified he actually performed these religious duties, Aplt.App.373, and confirmed to this Court that he "provide[d] spiritual guidance and counseling" to students. Jdx.Opp.3.

In 2017, Tucker was entrusted with planning Faith Christian's weekly chapel services. Aplt.App.209 ¶25, 138. In Tucker's words, he planned these "religiously oriented" chapel services "on matters of spiritual importance" to "point [the] students back to the gospel." Jdx.Opp.3; Stay Resp.4, Aplt.App.163. Most included worship, Aplt.App.391-92, and prayer, which Tucker sometimes personally led. Aplt.App.377.

With the school's support, Tucker planned a chapel service in January 2018 on issues of race and faith. Aplt.App.34 ¶66, 480 ¶66; 35 ¶72, 481 ¶72. After a dispute over the "supposedly flawed message" of this chapel service, Aplt.App.36 ¶80, Tucker alleges he was retaliated against by being "banned from speaking in front of students at future Chapel Meetings," having his "Chapel planning responsibilities" removed, and ultimately being fired. Aplt.App.67-76 ¶¶92, 100, 131.

B. Procedural Background

Tucker sued under Title VII and state wrongful-discharge law. Faith Bible moved to dismiss, arguing the First Amendment's Religion Clauses barred Tucker's claims. Aplt.App.85, 93. The district court converted the motion into one for summary judgment and allowed discovery limited to resolving the Religion Clauses defenses. Aplt.App.274. It then denied summary judgment, concluding Tucker's ministerial status was disputed and must be resolved by a jury. Aplt.App.284. The court did not, however, specify which material facts were disputed other than to vaguely suggest there was a dispute over whether Tucker held himself out as "Director of

Student Life or Chaplain." Aplt.App.273. The court ordered the parties to promptly conclude merits discovery and set a date for trial. Dkt.72 at 12; Dkt.80.

Faith Bible timely appealed to this Court and moved for a stay pending appeal, arguing that merits discovery and trial would irreparably harm the church's First Amendment rights. On November 24, 2020, a two-judge motions panel comprised of Chief Judge Tymkovich and Judge Eid granted the motion, finding Faith Bible was likely to succeed on the merits and would be irreparably injured absent a stay.

C. Panel Opinion

On June 7, 2022, a divided merits panel dismissed the appeal. Judges Ebel and McHugh held the denial of summary judgment on a religious employer's ministerial exception defense is never appealable under the collateral order doctrine. Op.50. To reach this conclusion, the majority held the ministerial exception is "quintessentially a factual determination for the jury." Op.6, 24 n.8. Further, the majority held the exception protects *only* against "liability," and not against "the burdens of litigation itself," such as merits discovery and jury trial. Op.48. Thus, "any error the district court makes in failing to apply" the exception must be remedied by an appeal after final judgment on the merits. *Id.*

Judge Bacharach dissented. He concluded the "ministerial exception serves as a structural safeguard against judicial meddling in religious disputes" and therefore "protects religious bodies from the suit itself."

Dissent.3. He explained *Hosanna-Tabor* "unmistakabl[y] … characterized the ministerial exception as a defense that would prevent the proceeding itself." Dissent.15. Thus, an order denying summary judgment on the exception conclusively rejects the church's "claim to immunity from suit," and can be immediately appealed to avoid "litigation over the content and importance of religious tenets, and blurring of the line between church and state." Dissent.24-27.

Judge Bacharach also determined Tucker "would qualify as a minister even under his version of the facts," and thus, Faith Bible should have received summary judgment. Dissent.43-44.

ARGUMENT

I. The panel creates a 5-1 split and conflicts with the Supreme Court in holding that the ministerial exception is a question of fact for a jury to decide.

The panel holds that whether an employee "was or was not a 'minister'" is not "a legal determination" but instead "quintessentially a factual determination for the jury." Op.6, 24 n.8; *id.* at 6, 14-15, 17 n.4, 25 n.9, 44-45, 47, 49. Indeed, the majority lays out a procedure for "the jury to decide" this "binary factual question." *Id.* at 45. In so holding, the panel creates a 5-1 split and conflicts with Supreme Court precedent.

First, the panel creates a new split with three circuits and two state high courts, which hold the ministerial exception's application is a question of law. The Fifth Circuit holds that determining the "status of employees as ministers" is "a legal conclusion for this court." *Starkman*

v. Evans, 198 F.3d 173, 176 (5th Cir. 1999). So does the Sixth Circuit: "whether the [ministerial] exception attaches at all is a pure question of law which this court must determine for itself." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833 (6th Cir. 2015).[1] Similarly, the Seventh Circuit treats "minister" as a "legal status" for First Amendment purposes, *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 978-79 (7th Cir. 2021) (en banc); it accordingly rejected expert testimony on "whether the ministerial exception applied" because it "conveyed a legal opinion," and "Courts do not consult legal experts; they are legal experts." *Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 655, 662 (7th Cir. 2018). The Kentucky and D.C. high courts agree that whether a plaintiff "is a ministerial employee is a question of law … to be handled as a threshold matter." *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 608-09 (Ky. 2014); *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002) ("purely a question of law").[2]

Second, the panel decision cannot be squared with the Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady*. Both resolved the

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[1] That *Conlon* addressed a motion to dismiss rather than summary judgment is irrelevant. Op.14. Both motions *involve* facts—either alleged or undisputed—but ultimately ask whether the movant is entitled to judgment as a matter of law.

[2] The panel (at 16) discounts *Kirby* because a state court issued it. But the ministerial exception is a question of federal constitutional law, and state courts must follow federal law in applying it. *Kirby*, 426 S.W.3d at 601 ("align[ing] … with the United States Supreme Court").

ministerial exception issue at summary judgment. *Hosanna-Tabor*, 565 U.S. at 180-81, 196; *Our Lady*, 140 S.Ct. at 2056 n.1. And *Our Lady* granted summary judgment despite "differences of opinion on certain facts" because no "*material* fact [was] genuinely in dispute." 140 S.Ct. at 2056 n.1. No one disputes that applying the doctrine requires assessing "all relevant circumstances." *Id.* at 2067. But the Supreme Court explicitly "called on courts"—not juries—"to determine whether each particular position implicate[s] the fundamental purpose of the exception." *Id.*

Faith Bible is unaware of any court in the Tenth Circuit that has ever required ministerial status to be determined by a jury, nor any federal court anywhere doing so at least since *Hosanna-Tabor*. The panel does not cite any. Yet it remands this case for "the jury to decide first whether Tucker is a minister" under the First Amendment. Op.45. And the panel predicts there will now "*often* be cases" where "the jury will have to … decide whether an employee qualifies as a 'minister.'" Op.17 n.4 (emphasis added). This Circuit should not require entangling church-state litigation to become the norm in its courts.

II. The panel conflicts with this Court's precedent, creates an 11-1 split, and conflicts with the Supreme Court in holding that the ministerial exception protects only against liability.

The panel also concluded the ministerial exception protects *only* against "liability," and not against "the burdens of litigation itself," such

as "being haled into court" for merits discovery and jury trial. Op.35, 48. In the panel's view, "*any* error the district court makes in failing to apply [the exception] can be effectively reviewed and corrected through an appeal *after* final judgment is entered in the case." Op.48 (emphasis added); Op.28 n.12. This ruling contradicts this Court's precedent, splits with eleven circuits and state high courts, and conflicts with Supreme Court precedent.

First, this Court has repeatedly recognized the ministerial exception not only bars liability, but "prevents *adjudication*" of the merits of lawsuits by ministers against their churches, *Skrzypczak*, 611 F.3d at 1242 n.4 (emphasis added). This is because "*the types of investigations* a court would be required to conduct *in deciding Title VII claims brought by a minister* 'could only produce by [their] coercive effect the very opposite of that separation of church and state contemplated by the First Amendment.'" *Id.* at 1245 (quoting *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972)) (emphasis added).

Indeed, it is well established that "not only the conclusions that may be reached" by civil adjudication, but "also *the very process of inquiry* leading to findings and conclusions" can "impinge on rights guaranteed by the Religion Clauses." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008) (emphasis added) (quoting *NLRB*, 440 U.S. at 502; citing ministerial exception cases as examples). Thus, far from waiting to reach church autonomy defenses until after final judgment on the merits,

"*resolving* the question of the doctrine's applicability" must come "at the *earliest possible stage* of litigation" to avoid "excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1 (emphasis added). This role as a dispositive-but-nonjurisdictional threshold defense is why "the ministerial exception, like the broader church autonomy doctrine, can be likened to … qualified immunity." *Skrzypczak*, 611 F.3d at 1242.

Second, the panel likewise split with the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits and the Connecticut, D.C., and Kentucky high courts, which have held that the Religion Clauses can protect against the burdens of merits discovery and trial. For instance, the Seventh Circuit explained, citing *Hosanna-Tabor*, that the Religion Clauses defenses protect "from the travails of a trial and not just from an adverse judgment." *McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013). And just last year, the en banc court reaffirmed that even "[a]djudicating" the merits of claims subject to the exception causes "impermissible intrusion into, and excessive entanglement with" a religious group's autonomy through the "prejudicial effects of incremental litigation." *Demkovich*, 3 F.4th at 980-82. *See also Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1577-78 (1st Cir. 1989) (civil court cannot "probe into religious body's selection and retention of clergymen"; the "inquiry" itself is barred); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171-72 (4th Cir. 1985) ("very process of inquiry" into the merits of a minister's claims can violate ministerial exception, since using the "full

panoply of legal process … to probe the mind of the church" pressures churches to select ministers "with an eye to avoiding litigation"); *Combs v. Cent. Tex. Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999) (harm from "investigating employment discrimination claims by ministers against their church" is "alone … enough to bar the involvement of the civil courts"); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (8th Cir. 1991) (chaplaincy decisions are "*per se* religious matters and cannot be reviewed by civil courts" because "the very process of inquiry" would violate Religion Clauses); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 466-67 (D.C. Cir. 1996) (requiring churches to be "deposed, interrogated, and haled into court" on the merits of a minister's Title VII action is itself "forbidden by the First Amendment").

Three states likewise agree that the ministerial exception "includes protection against the cost of trial and the burdens of broad-reaching discovery." *Presbyterian Church (U.S.A.) v. Edwards*, 566 S.W.3d 175, 179 (Ky. 2018) (allowing merits litigation before resolving exception is "substantial miscarriage of justice"); *Dayner v. Archdiocese of Hartford,* 23 A.3d 1192, 1199-1200 (Conn. 2011) (because exception provides "immunity from suit," the constitution bars "litigating a dispute that is subject to the ministerial exception"); *United Methodist Church v. White*, 571 A.2d 790, 793 (D.C. 1990) ("once exposed to discovery and trial, the

constitutional rights of the church to operate free of judicial scrutiny" in its ministerial choices "would be irreparably violated").

Four circuits have particularly emphasized this point, holding that the exception is not merely a "personal" defense to liability, but "a structural limitation imposed on the government by the Religion Clauses" which "categorically prohibits" judicial "involve[ment] in religious leadership disputes." *Conlon*, 777 F.3d at 836. Under this structural limitation, "even if a religious organization wants" adjudication of ministerial disputes, a federal court has an independent duty "not [to] allow itself to get dragged in[.]" *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006). The Third and Fifth Circuits agree. *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3rd Cir. 2018) ("structural" "limits on judicial authority"); *Whole Woman's Health v. Smith*, 896 F.3d 362, 367, 373-74 (5th Cir. 2018) ("structural protection afforded to religious organizations" by the Religion Clauses protected against "judicial discovery procedures").[3] The panel acknowledged its liability-only approach "contradicts" such "structural" holdings. Op.42.

Third, the panel's decision conflicts with Supreme Court precedent. As noted above, the Court has long held that the "very process" of

[3] The EEOC agrees the exception "is not just a legal defense," but a constitutional "obligat[ion]" that must be "resolved at the earliest possible stage before reaching the underlying discrimination claim." EEOC Compl. Man. §12.

litigation can violate the Religion Clauses. *NLRB*, 440 U.S. at 502. *Our Lady* held it "obviously" violates the Religion Clauses for the government "even to influence" matters "of faith and doctrine," which includes interference in "the selection of the individuals who play certain key roles" in a religious ministry. 140 S.Ct. at 2060. To prevent such influence, courts are not merely barred from finding liability, but are "bound to stay out of [ministerial] employment disputes" altogether. *Id*. "Judicial review" alone in such cases "would undermine the independence of religious institutions in a way that the First Amendment does not tolerate." *Id.* at 2055. Likewise, *Hosanna-Tabor* "barred" not just *punishing* a ministerial decision, but also "interfering" in it; even just "inquiring into" a church's leadership decisions was "unconstitutional[]." 565 U.S. at 187. As Justices Alito and Kagan explained in their concurrence, "the *mere adjudication*" of standard Title VII litigation in the context of a minister's claim against his church "would pose grave problems for religious autonomy." *Id*. at 205-06 (emphasis added). That's why the Religion Clauses bar "judicial intervention into disputes between [a] religious school and [a] teacher" entrusted with "forming students in the faith." *Our Lady*, 140 S.Ct. at 2069.

But under the panel's rule, such judicial intervention into ministerial disputes will "often" occur in the Tenth Circuit. Op.17. n.4. Any plaintiff with a self-serving affidavit can dodge his own sworn testimony, contracts, employee handbooks, job expectations, and work history

sufficiently to force a costly and entangling jury trial, with no recourse for a religious defendant until after final adjudication of the merits. *Contra Our Lady*, 140 S.Ct. at 2060 (relying on such evidence to confirm ministerial status).[4] The majority reasons "the church is simply being held properly to the same standards as all other institutions and employers in America." Op.29 n.12. But *Hosanna-Tabor* unanimously rejected treating "religious and secular groups alike" regarding leadership selection because "the text of the First Amendment itself … gives special solicitude to the rights of religious organizations." 565 U.S. at 189.

III. The panel creates a 6-1 split and conflicts with the Supreme Court by categorically barring ministerial exception decisions from interlocutory appeal.

By ruling that ministerial exception defenses are categorically ineligible for interlocutory appeal, the panel split from every circuit or state high court to consider the issue, and every scholar to publish on it.

The Supreme Court, two circuits, and four state high courts have found Religion Clauses defenses are eligible for interlocutory resolution. The Supreme Court has "often" permitted interlocutory appeals to

[4] The panel's liability-only rationale also undermines its suggestion of bifurcation below, or anywhere. Courts "regularly bifurcate discovery in ministerial cases" to "avoid judicial entanglement in the internal organization of religious institutions" via "discovery" and "jury trial." *Fitzgerald v. Roncalli High Sch.*, 2021 WL 4539199, at *1 (S.D. Ind. 2021) (collecting cases). But the panel undermines that protection in this Circuit.

determine "the proper scope of First Amendment protections" that would face irreparable harm through trial, *Fort Wayne Books v. Indiana*, 489 U.S. 46, 55 (1989), and it recently considered an interlocutory appeal of a state-court determination foreclosing Religion Clauses defenses. *Roman Catholic Archdiocese of San Juan v. Feliciano*, 140 S.Ct. 696 (2020) (interlocutory appeal of church autonomy defense arising under 28 U.S.C. §1258).

The Seventh Circuit concluded that a denied Religion Clauses defense can be immediately appealed to avoid "irreparable" harm, "just as in the other types of cases in which the collateral order doctrine allows interlocutory appeals." *McCarthy*, 714 F.3d at 975-76 (citing *Hosanna-Tabor*). The Fifth Circuit likewise permitted interlocutory appeal of a Religion Clauses defense because "the consequence of forced discovery here is 'effectively unreviewable' on appeal from the final judgment." *Whole Woman's Health*, 896 F.3d at 367, 373-74 (noting *Hosanna-Tabor*'s protection from "judicial discovery procedures").

And the Connecticut, D.C., Kentucky, and North Carolina high courts have repeatedly allowed interlocutory appeal of denied ministerial exception and church autonomy defenses. *Dayner*, 23 A.3d at 1200 (allowing "interlocutory appeal from the denial" of ministerial exception); *White*, 571 A.2d at 793 (denial of ministerial exception "is immediately appealable as a collateral order" because "once exposed to discovery and trial, the constitutional rights of the church to operate free of judicial

scrutiny would be irreparably violated"); *Kirby*, 426 S.W.3d at 609 n.45 ("denial of a religious institution's assertion of the ministerial exception … is appropriate for interlocutory appeal"); *Harris v. Matthews*, 643 S.E.2d 566, 569-70 (N.C. 2007) ("immediate appeal is appropriate"). Leading legal scholars agree.[5] And this and other courts have repeatedly allowed interlocutory appeal of orders that infringe First Amendment rights. Jdx.Mem.12; Dissent.18-19 (collecting cases).

The panel identified no countervailing precedent or scholarship. The sole case the panel cited is both inapplicable, Dissent.20, and unsupportive, Br.50-51, and the sole scholarly article the panel cited directly contradicts its position. *Compare* Op.28 *with* Amicus Br. of Religious Liberty Scholars 8-11. And while the panel acknowledged courts have favorably compared the ministerial exception to qualified immunity, which allows interlocutory appeal, the panel rejected those cases simply because the defenses are distinct, Op.33, failing to consider *Bryce*'s explanation that the interests here are far *stronger* because they derive from the First Amendment. 289 F.3d at 654 n.1.[6]

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[5] *See, e.g.,* Jdx.Mem.15-16, 20-21 and Br.47 (citing to briefing and scholarship by, *inter alia*, Professors McConnell, Tuttle, and Esbeck explaining the ministerial exception is immediately appealable).

[6] The panel states the ministerial exception "only precludes employment discrimination claims." Op.9, 11-12, 37. That conflicts with the law of this Circuit and every other to consider it. *See, e.g., Skrzypczak*, 611 F.3d at 1245; *Natal*, 878 F.2d at 1577 (torts); *Lee*, 903 F.3d at 122 (contract).

IV. Exceptionally important First Amendment rights are at stake.

The majority and dissent agreed there is "no doubt" this appeal "clearly" "presents an important First Amendment issue." Op.26; Dissent.26. Other circuits have found properly construing the ministerial exception justifies en banc rehearing. *Demkovich*, 3 F.4th at 974-75; *Alcazar v. Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010) (en banc).

That is doubly true here, where the panel misinterpreted the First Amendment in a way that will embroil judges and juries of this Circuit in the internal religious management of churches, synagogues, and mosques. That will ignite the very church-state conflicts that the Establishment Clause forbids as a structural matter and the Free Exercise Clause proscribes as a matter of civil right.

CONCLUSION

Faith Bible requests that the Court grant rehearing en banc.

June 21, 2022

Respectfully submitted,

/s/ *Daniel H. Blomberg*

Christopher J. Conant
Robert W. Hatch
HATCH RAY OLSEN CONANT LLC
730 17th Street, Suite 200
Denver, Colorado 80202
Phone Number: (303) 298-1800
Fax Number: (303) 298-1804

Daniel H. Blomberg
Daniel D. Benson
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave., N.W.
Suite 400
Washington, DC 20006
Phone Number: (202) 349-7209
Fax Number: (202) 955-0090
dblomberg@becketlaw.org

Attorneys for Appellant Faith Bible Chapel International

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. 35(b)(2)(A) because it contains 3,895 words, excluding the parts of the brief exempted under Rule 32(f) and 10th Cir. R. 32(B), according to the count of Microsoft Word.

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

a) all required privacy redactions have been made per 10th Cir. R. 25.5 and Fed. R. App. P. 25(a)(5);

b) the hard copies that will be or have been submitted to the Clerk's Office are *exact* copies of the ECF filing; and

c) the ECF submission was scanned for viruses with the most recent version of a commercial virus-scanning program (last updated June 21, 2022) and, according to the program, is free of viruses.

/s/ *Daniel H. Blomberg*
Daniel H. Blomberg

Dated: June 21, 2022

CERTIFICATE OF SERVICE

I certify that on June 21, 2022, I caused the foregoing to be served electronically via the Court's electronic filing system on all parties to this appeal.

/s/ *Daniel H. Blomberg*
Daniel H. Blomberg