No. 20-1230

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GREGORY TUCKER,

Plaintiff - Appellee,

v.

FAITH BIBLE CHAPEL INTERNATIONAL,
D/B/A FAITH CHRISTIAN ACADEMIC, INC.,

Defendant - Appellant.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:19-cv-01652
Honorable R. Brooke Jackson

BRIEF OF *AMICI CURIAE* JEWISH COALITION FOR RELIGIOUS LIBERTY AND PROFESSOR ASMA UDDIN IN SUPPORT OF DEFENDANT-APPELLANT AND REHEARING EN BANC

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* Jewish Coalition for Religious Liberty states that it has no parent corporation and that no publicly held corporation owns any part of it.

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INTEREST OF *AMICI*[1]

The Jewish Coalition for Religious Liberty is an association of American Jews that aims to protect religious freedom and foster interfaith cooperation as one means of achieving this goal. Its founders have filed briefs in the Supreme Court and federal appeals courts, published op-eds in prominent news outlets, and established a volunteer network to promote religious liberty.

Professor Asma Uddin is a Religion and Society Program Fellow at the Aspen Institute, where she leads a project on Muslim-Christian polarization. She was formerly counsel at the Becket Fund, has held fellowships at Georgetown, UCLA, and BYU, serves as an advisor on religious freedom to the Organization for Security and Cooperation in Europe, and is a term member of the Council on Foreign Relations.

[1] All parties have consented to *amici*'s participation. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no other person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

INTRODUCTION

The panel opinion conflicts with Supreme Court authority, circuit precedent, and the decisions of other circuits in several respects. Pet.2. Each of those conflicts warrants rehearing en banc. *Amici* write specifically to underscore that two features of the panel opinion will undermine the ministerial exception's protections, rendering those protection meaningless as a practical matter in many cases and especially in cases involving minority faiths and smaller religious communities.

By holding that whether an employee is a "minister" is "quintessentially a factual determination for the jury," Op.24 n.8, the panel opinion deprives the ministerial exception of its power to significantly shorten litigation that challenges core ecclesiastical decision-making. Worse, the panel opinion then insulates even the most egregious misapplication of the ministerial exception from effective appellate review by holding that the ministerial exception protects houses of worship only from ultimate liability, rather than the burdens of litigation, and thus an adverse ruling on this threshold issue is not immediately appealable. These two, related holdings mean that creative litigants often may plead around the ministerial exception and, in effect,

nothing will stand between a house of worship and potentially ruinous litigation expense. In addition, subjecting religious decision-making to discovery and trial will entangle civil authority in matters of faith, risking irreparable harm to religious autonomy.

This panel opinion should be reheard en banc because it is wrong and needlessly creates multiple circuit splits. And in particular, the panel's holdings on when, how, and who decides the threshold ministerial question raises substantial First Amendment concerns that will have especially harmful impacts on smaller congregations, minority faiths, and unpopular religions. An unfamiliar religion will naturally have more difficulty convincing the fact-finder that a leader is undisputedly a "minister" than a Catholic archdiocese or evangelical Christian church would. This is especially true of religions that, for doctrinal and cultural reasons, eschew titles and formal training for ministers. Further, without the ability to obtain interlocutory appeal to correct erroneous lower-court decisions, minority religious organizations will find themselves stuck in drawn-out litigation and, because they are small, often with far fewer resources, they might find it impossible to pay for litigation without sacrificing core religious ministry or acquiescing to the entanglement with civil authority on religious matters.

For these reasons, this case "involves a question of exceptional importance" justifying en banc rehearing. Fed. R. App. P. 35(a)(2). The ministerial exception should be interpreted so that First Amendment protections extend equally to "small, new, or unpopular denominations." *Larson v. Valente*, 456 U.S. 228, 245 (1982).

REASONS FOR GRANTING REHEARING

I. Early—and Correct—Application of the Ministerial Exception Is Necessary To Protect Religious Autonomy Especially for Religious Minorities.

The First Amendment "protect[s] the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Under the ministerial exception, "courts are bound to *stay out* of employment disputes involving those holding certain important positions with churches and other religious institutions." *Id.* (emphasis added). This is because "a church's independence on matters 'of faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister *without interference* by secular authorities." *Id.* (emphasis added). To "avoid excessive entanglement in church matters," religious-autonomy defenses should be heard and resolved "early in litigation." *Bryce v. Episcopal Church*, 289 F.3d 648, 654 n.1 (10th Cir. 2002).

Yet, two of the panel opinion's holdings here operate in tandem to hollow out the ministerial exception. First, the panel holds that whether an employee "was or was not a 'minister'" is "quintessentially a factual determination for the jury," not a "legal determination." Op.24 n.8. Second, the panel states that the ministerial exception merely "protect[s] a religious employer from *liability* on claims asserted by a '*minister*,'" but "does not immunize religious employers from the burdens of litigation itself." Op.48. Not only do these holdings contradict previously unanimous precedent from other federal and state courts, Pet.6, 8, but they are also untenable on their own terms. Together, they mean that what should be an outcome-determinative threshold question (ministerial status) will usually be resolved late in the case, at summary judgment or trial—or perhaps only much later, following final judgment and appeal, and after hundreds of thousands of dollars in litigation expense have been expended and the religious community placed in the crucible of civil litigation. *See Watson v. Jones*, 80 U.S. 679, 728-29 (1871) (warning of the "total subversion of [voluntarily organized] religious bodies[] if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed").

Discounting the First Amendment interests at stake this way is inconsistent with the Court's precedent on qualified immunity and anti-SLAPP defenses. As the panel opinion recognizes, "[b]ecause qualified immunity is predicated on 'an *immunity from suit* rather than a mere defense to liability," the protection "is effectively lost if a case is erroneously permitted to go to trial." Op.31. Without immediate appeal, the reasoning goes, public officers (who, unlike religious leaders, are almost always indemnified) will make decisions based on the threat of liability. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). For this reason, the collateral-order doctrine permits immediate appeal when a court rejects a qualified-immunity defense—to buttress the broad "public[] interest in a functioning government." Op.32 (emphasis omitted); *see also Bryce*, 289 F.3d at 654 ("[T]he assertion that the First Amendment precludes [a lawsuit challenging church decision-making] is similar to a government official's defense of qualified immunity.").

For similar reasons, this Court recently held that denials of motions to dismiss under state anti-SLAPP laws are immediately appealable because delaying an appeal would chill important speech protected by those laws. Like the ministerial exception, anti-SLAPP laws create immunity against

"claims aimed at chilling First Amendment expression." *Los Lobos Renewable Power, LLC v. AmeriCulture, Inc.*, 885 F.3d 659, 662 (10th Cir. 2018). *Los Lobos* held that interlocutory appeal is proper when a district court denies dismissal because anti-SLAPP laws aim to "protect[] potential victims from the effort and expense of carrying on a frivolous lawsuit." *Id.* at 667. Therefore, courts "could not secure th[e] statute's protections after final judgment on the merits because ... burdensome legal process has already been brought to bear at that point." *Id.*

The same is true here. Just as the harm of a "strike suit" targeting protected speech cannot be remedied on appeal, the panel was wrong that the harm of a misapplying the ministerial exception "can be effectively reviewed and corrected through an appeal after final judgment." Op.48. Rather, as in the qualified-immunity and anti-SLAPP contexts, the *process of litigation itself* brings about the harm that justifies protection in the first place. *See* Op.74 (Bacharach, J., dissenting) (church will "suffer judicial meddling in religious doctrine, expensive and time-consuming litigation over the content and importance of religious tenets, and blurring of the line between church and state"). Invasive scrutiny by courts and lawyers, to say nothing of cost, would coerce rational actors within religious organizations to alter

behavior to avoid lawsuits, raising "the concern of chilling religious-based speech in the religious workplace." *Demkovich v. St. Andrew*, 3 F.4th 968, 981 (7th Cir. 2021) (en banc). Religious leaders would necessarily at least consider (and perhaps act upon) litigation exposure when deciding church governance and doctrine—or even retain a minister not exemplifying or effectively imparting the faith's teachings because the risk of getting sued is too great.

Worse still, many congregations (especially smaller ones and minority religions without national organizations) simply lack the resources to defend against frivolous or malicious lawsuits, and so victory following trial, judgment, and appeal would be Pyrrhic at best. Some may be forced to settle or dissolve; others will decide the risk is too great and make core religious decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments." *Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). And those who stand on principle will have to devote resources to litigation that would otherwise go towards fulfilling their religious mission.

In short, categorically denying interlocutory appeal in ministerial-exception cases will put many religious groups to a Hobson's choice between

making personnel decisions based on litigation risk on the one hand and "betting the synagogue" on a doctrinal matter on the other. This Court "can reverse the rulings of a subordinate court," but "cannot order away proceedings and legal fees that have already passed into history." *Los Lobos*, 885 F.3d at 666. Because the panel opinion interprets the exception solely as a defense to liability that is not immediately appealable, the Court should vacate it and rehear the case en banc.

II. The Panel Opinion Will Harm Minority Faiths because Factfinders' Unfamiliarity Makes Erroneous Denials More Likely.

The panel's holdings will fall particularly hard on minority faiths. Categorizing the threshold ministerial issue as a fact question means that small, minority religious groups may disproportionately find themselves on the losing end of an erroneous denial in district court. And foreclosing interlocutory appeal of those determinations across the board means that they risk finding themselves mired in expensive, drawn-out litigation more than larger faiths. That is because, if treated as a fact question—which it is not—the ministerial exception will often be resolved by a jury focusing on standardized factors, titles, and credentials derived from the most common religions. Where a litigant has a familiar title (priest, reverend, etc.) or a vocational marker (*e.g.*, seminary degree or ordination), a jury is more likely to correctly identify a

minister. By contrast, ministers with no titles, whose role is confirmed by their role in the community or an unfamiliar cultural context, will not be as easily identifiable and are more likely to be seen as creating a fact dispute. As a result, "religious practices that conform to this culture w[ill] be protected more often than practices that don't." Asma T. Uddin, *When Islam Is Not a Religion: Inside America's Fight for Religious Freedom* 132 (2019); *cf.* Gregory Sisk & Michael Heise, *Muslims and Religious Liberty in the Era of 9/11*, 98 Iowa L. Rev. 231, 234 (2012).

The ministerial exception must account for the reality that the "religious diversity of the United States" means that factfinders "cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." *Our Lady*, 140 S. Ct. at 2066. Juries are more likely to get this determination wrong in cases dealing with minority religions because of analytical overemphasis on titles and formal training stemming from majority-culture biases.

For example, ordination—the process by which individuals in certain faiths become ministers—"has no clear counterpart in ... other religions." *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171, 198

(2012) (Alito, J., concurring). Within religions like Judaism, different denominations vary in ordination requirements and methods, and may not recognize other denominations' ordinations. Judaism in general confers ecclesiastical titles like *rabbi* on only some, but not at all, individuals performing ministerial functions. *See Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657 (7th Cir. 2018) (per curiam). And the term *minister* itself "is rarely if ever used ... by Catholics, Jews, Muslims, Hindus, or Buddhists." *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring).

Islam, on the other hand, rejects wholesale the concept of priesthood as understood by some Christians and Jews. "[E]very Muslim can perform the religious rites, so there is no class or profession of ordained clergy." *Id.* at 202 n.3. This equality among believers means multiple individuals (*imams*, *shaykhs*, *muftis*) in Sunni Islam perform ministerial functions. A religious group's autonomy rights should not depend on whether jurors can, without substituting their own judgment for the religious groups', correctly determine whether an Orthodox Jewish *mikvah* attendant or a Muslim *faqīh* is a "minister."

Smaller congregations and minority faiths thus may face greater litigation risk in connection with personnel decisions than majority-faith

churches. *Contra* Op.29 n.12 (stating there is "no evidence" religious institutions will be any more burdened by civil litigation than "all other institutions"). That is particularly concerning because mosques, synagogues, and affiliated schools are often not connected to any central organization and therefore may lack the resources of a large denomination. The panel opinion would require smaller congregations to decide whether to divert donations to legal-defense funds or forsake the religious autonomy guaranteed by the First Amendment.

Institutions like mosques, synagogues, and Jewish day schools may be more likely than majority religions to be on the losing end of an erroneous ministerial-exception decision in district court and thus more likely to be required to endure months or years of unnecessary litigation and discovery. And so the predictable end result of this precedent is that "religious practices that conform to [majority] culture w[ill] be protected more often than practices that don't." Uddin, *supra*, at 132.

Finally, the panel's holding is unworkable. If ministerial status is a factual question for the jury, will the parties put on dueling experts expositing contradictory doctrinal interpretations? Will the judge instruct the jury on how to apply *ecclesiastical* law to the facts before it? This would work a

remarkable entanglement of the courts in decisions that, by law, are reserved to religious authorities. If there is any role for a jury, it is merely to resolve truly contested matters of historical fact—like whether Appellee led chapel services (which he undisputedly did, Op.7), and not whether being a chaplain is a ministerial function in Appellant's faith.

The proper approach is instead to resolve First Amendment-based immunity "early," to "avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. This includes prompt error correction through interlocutory appeal, and by limiting factual questions capable of defeating immediate appeal to those properly submitted to a jury. In particular, the question of whether an employee is a minister should be treated as a legal question, with substantial deference shown to religious organizations' good-faith determinations that duties are "ministerial." This substantive and procedural deference ensures *all* religious organizations, including minority faiths, enjoy the same robust constitutional protections enjoyed by larger groups. Failing to so defer, on the other hand, substantially multiplies the risk of "judicial entanglement in religious issues." *Our Lady*, 140 S. Ct. at 2069.

CONCLUSION

For these reasons and those in Appellees' petition, the Court should vacate the opinion and rehear the appeal en banc.

Dated: June 28, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This *amicus* brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and Circuit Rule 29 because this brief contains 2,592 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. I certify that all privacy redactions have been made.

3. I certify that all paper copies submitted to this Court are exact copies of this version, which is being submitted electronically via the Court's CM/ECF system.

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/s/ Paul J. Zidlicky
Paul J. Zidlicky

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2022, I caused the foregoing to be electronically filed with the U.S. Court of Appeals for the Tenth Circuit via the CM/ECF system, which will automatically send email notifications of such filing to all attorneys of record.

/s/ Paul J. Zidlicky
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