No. 20-1230

In the

# United States Court of Appeals

## For the Tenth Circuit

FAITH BIBLE CHAPEL INTERNATIONAL,

*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. 19-cv-1652-RBJ-STV

**BRIEF OF RELIGIOUS LIBERTY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## STATEMENT OF IDENTITY AND INTEREST[1]

This brief focuses on the propriety of hearing ministerial exception appeals as a collateral order. The *amici* are law professors whose scholarship, teaching, and practice focus on the Religion Clauses of the First Amendment. For decades, these professors have closely studied constitutional law and religious liberty and collectively have published numerous books and scores of scholarly articles on the topic and addressed it in litigation. The *amici* bring to this case a deep theoretical and practical understanding of the Supreme Court's First Amendment jurisprudence that may help the Court resolve the parties' competing claims. In particular, *amici* share an interest in advancing the understanding of how courts should handle ministerial exception arguments as a matter of civil and appellate procedure.

Mark E. Chopko is an Adjunct Professor of Law at Georgetown University Law Center. For more than 20 years, he was the General Counsel to the United States Conference of Catholic Bishops. He now chairs his firm's practice group which serves religious and nonprofit institutions.

Carl H. Esbeck is the R.B. Price Emeritus Professor and Isabelle Wade & Paul C. Lyda Emeritus Professor of Law at the University of Missouri.

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[1] Both parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no other person other than *amici* and their counsel have contributed money to the preparation of this brief.

He has published widely in the area of religious liberty, church-state relations, and federal civil rights litigation, including authoring articles discussing the ministerial exception and the principles of church autonomy. Within the year he has published DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776 – 1833 (U. of Mo. Press 2019).

Robert W. Tuttle is the David R. and Sherry Kirschner Berz Research Professor of Law and Religion at the George Washington University Law School, a Professor of Religion (by courtesy) at the George Washington University's Columbian College of Arts & Sciences. He is the author or co-author of numerous articles and reports in the fields of church-state law and legal ethics, along with the book SECULAR GOVERNMENT, RELIGIOUS PEOPLE (Eerdmans, 2014).

The ministerial exception raises many challenging issues for courts, including who qualifies for the exception, which claims are subject to the exception, and how fact-finding should occur. The *amici* law professors have a range of views, including some disagreements, on these and other questions going to the merits of the ministerial exception. Crucially, however, *amici* all agree that the First Amendment supports early resolution of the ministerial exception as a threshold legal issue, subject to interlocutory appeal.

## ARGUMENT

### I. The ministerial exception should be resolved early in litigation and subject to interlocutory appeal as a collateral order.

This Circuit has repeatedly recognized the core constitutional protections underlying the ministerial exception. In *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648, 654 (10th Cir. 2002), although not directly at issue, this Court recognized that the ministerial exception "prevents adjudication" of certain cases because the First Amendment "protects the fundamental right of churches to decide for themselves matters of church government, faith, and doctrine." *Id.* at 654, 656. This court subsequently applied the lessons of *Bryce* to a ministerial exception dispute. *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243 (10th Cir. 2010) (crucial employment decisions must be "free from the interference of civil employment laws.") In this case the Court should affirm the protections of the ministerial exception by recognizing this as an appropriately lodged interlocutory appeal.

The ministerial exception protects interests of the highest order for religious institutions, namely the freedom to select and retain leaders according to their own governance and polity. As the Supreme Court put it just last term, "[t]he First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Our*

*Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). In *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), the unanimous Supreme Court located a robust ministerial exception in both Religion Clauses. It also decided an issue that was not briefed and argued, namely whether the exception operated as a jurisdictional bar or some form of an affirmative defense. In a short footnote, the Court announced, "We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Id.* at 195 n.4. The Court's sparse explanation referenced the district court's general "power to consider ADA claims" and "whether the claim can proceed or is instead barred by the ministerial exception." *Ibid.* After *Hosanna-Tabor,* lower courts should treat the ministerial exception as something other than a pure jurisdictional bar. However, allowing litigation to continue apace when the lower court should have recognized the constitutional import of the defense, will compound the very injury the Supreme Court in *Hosanna-Tabor* found must not occur in litigation in full, including discovery and trial.

The ministerial exception should be resolved promptly. Many scholars agree that the ministerial exception, when it applies, bars courts from evaluating the qualification or performance of "ministerial employees." For example, courts may not say who should be the minister of a church.

The protection afforded by the ministerial exception arises from the broader and older principle that civil courts lack the competence to decide essentially religious issues. *See Watson v. Jones*, 80 U.S. 679, 729 (1872) (referring to the lack of competence of civil courts on matters of "ecclesiastical law and religious faith"). That the ministerial exception is defensive does not preclude the threshold determination, when needed, including by interlocutory appeal when a trial court declines to apply the defense at the summary judgment phase of litigation.

As an affirmative defense, the ministerial exception is *sui generis*. The defense derives from a constitutional imperative grounded in the Religion Clauses of the First Amendment. The same cannot be said of the statute of limitations, improper venue, insufficient service of process, or other common affirmative defenses. As required by the Constitution, the ministerial exception "imposes a disability on civil government with respect to specific religious questions." Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1867 (2018); *see also* Carl H. Esbeck, *After Espinoza, What's Left of the Establishment Clause?*, 21 FED. SOC. REV. 186, 202 (2020) ("[T]he defense operates like an immunity from suit as to certain discrete subject matters that go to a religious organization's control over the doctrine, polity, and personnel that execute its present vision or determine its future destiny."). Courts should treat the resolution of the ministerial exception, as an affirmative defense, in light of the

constitutional basis of the rule. In other words, "it is important that these questions be framed as legal questions and resolved expeditiously at the beginning of litigation to minimize the possibility of constitutional injury…" Mark E. Chopko, Marissa Parker, *Still A Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMEND. L. Rev. 233, 292 (2012). In this way, the robust constitutional backing for the ministerial exception distinguishes it from how courts treat other affirmative defenses.

## II. Analogy to qualified immunity supports collateral order appeals for the ministerial exception.

The early resolution of the ministerial exception should include immediate appeal in cases like this one where the defense was rejected at the summary judgment phase. In that regard the ministerial exception should be treated like qualified immunity for purposes of interlocutory appeals. Many of the same jurisprudential reasons for hearing qualified immunity appeals prior to final judgment apply with equal or greater force to the ministerial exception.

### A. Qualified immunity has been subject to interlocutory appeal for decades.

Interlocutory appeals are not normally permitted under the finality requirement of the general appellate jurisdiction statute. 28 U.S.C. § 1291. There are exceptions where the courts have recognized interlocutory appeal is available. Most relevant here, the collateral order

doctrine permits interlocutory appeal before final judgment when "district court decisions … are conclusive, … resolve important questions completely separate from the merits, and … would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). The Supreme Court has long held that denials of summary judgment based on qualified immunity are immediately appealable under the collateral-order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) ("[Q]ualified immunity questions should be resolved at the earliest possible stage of a litigation[.]"). The overwhelming bulk of all collateral-order appeals are from qualified immunity cases. *See McCarthy v. Fuller*, 714 F.3d 971, 975 (7th Cir. 2013) ("[T]he principal current application of the [collateral-order] doctrine is to appeals from denials of official immunity…").

Qualified immunity shields government officials from the threat of lawsuits based on good faith performance of their duties, so long as those acts do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If a trial court denies qualified immunity at the summary judgment phase the officer must go through the burdensome discovery and trial process before a final, appealable judgment could enter. Interlocutory appeal allows the "immunity from suit" to protect

offers from the harms of continuing through litigation to final judgment when immunity should have been granted. *Mitchell*, 472 U.S. at 526.

### B. The ministerial exception warrants interlocutory appeal for substantially similar reasons.

The ministerial exception closely resembles qualified immunity for purposes of interlocutory appeals. The doctrines are substantially similar in their prudential goals and reasons for needing resolution as a threshold determination.

First, the ministerial exception closely resembles qualified immunity by protecting from burdens of litigation when the trial court should have granted the immunity or defense early in the case. Consider, if a trial court denies summary judgment based on the ministerial exception, and that decision was erroneous, the "absence of an avenue for immediate appeal will require the court not only to permit discovery about, but to resolve, quintessentially religious questions. But the Establishment Clause limits the power of the government not only to issue and enforce a binding judgment on such matters but also merely to entertain such questions." Tuttle, *supra*, at 1881. Civil courts are prohibited from ruling on the validity, meaning, or importance of a religious question or dispute.

By way of example, consider how courts could be compelled to decide religious questions if a case proceeds beyond the initial stage of litigation. A terminated minister could have a written contract requiring, among other things, fidelity to church doctrine. If that minister sued for breach

of contract, the church would raise the ministerial exception as a defense. If a trial court (wrongly) rejected the ministerial exception early in litigation, and proceeded to decide whether the minister was faithful to church doctrine, the court would become entangled in religious questions, perhaps even to the point of deciding whether any departure from doctrine was meaningful enough to justify the termination. This is just the sort of governmental interference with church doctrine that the ministerial exception is intended to prevent.

Even if ministerial exception does not share a 1:1 correlation with qualified immunity, the need to make a threshold determination remains fully justified. The ministerial exception requires courts to carefully guard against Religion Clause violations and church-state entanglements that would be far better protected by early appellate resolution. As the Supreme Court reiterated just this past June, with the ministerial exception, "courts must take care to avoid resolving underlying controversies over religious doctrine." *Our Lady of Guadalupe School*, 140 S. Ct. at 2063 n.10 (quotation and citation omitted).

Second, both doctrines aim to protect an institution outside the immediate context of the disputed liability between the parties. With the ministerial exception, the courts protect the relationship of church and state in general. By its very nature the ministerial exception imposes a disability on courts deciding religious questions, similar to how qualified

immunity works to prevent courts from deciding certain cases involving government officials.

Justice Brennan long ago noted how government entanglement with religious questions risk chilling religious activity and even incentivize religious groups to change which activities it will "characterize as religious." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring); *see also Skrzypczak*, 611 F.3d at 1245 ("[I]nvestigations a court would be required to conduct" in employment litigation 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.'" (quoting *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972)). Protecting the broader church-state relationship further justifies interlocutory review.

Finally, this Circuit's precedent strongly favors recognition of interlocutory appeals for the ministerial exception. Consistent with the analogy to qualified immunity, this Circuit in *Bryce* noted how a related First Amendment Religious Clause protection raised a defense that was "similar" to qualified immunity, and "[b]y resolving the question of the doctrine's applicability early in litigation, the courts avoid excessive entanglement in church matters." *Bryce*, 289 F.3d at 654 n.1. In the context of a ministerial exception appeal, this Court went so far as to say "the ministerial exception … can be likened to" qualified immunity. *Skrzypczak*, 611 F.3d at 1242. The same reasoning supports the

availability of collateral-order review, similar to qualified immunity appeals.

### III. Collateral order appeal is appropriate in this case.

*Amici* contend this Court should consider this appeal as a properly raised collateral order. Such threshold determination of the legal question properly respects the constitutional rights and immunities underlying the ministerial exception. While *amici* do not take a position on the ultimate merits of whether the ministerial exception applies to this particular employee, *amici* are in agreement that this Court should decide the question as raised in this appeal.

## CONCLUSION

The judgment of the district court should be reversed.

Dated: October 20, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) because it is proportionally spaced, has a typeface of 14-point Century font, and contains 2,360 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I also 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 submitted to the Clerk's Office are exact copies of the ECF filing; and

c) the ECF submission was scanned for viruses using FireEye Endpoint Protection, version 32.30.0, and no viruses were detected.

*/s/ Michael Francisco*
Michael Francisco

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## CERTIFICATE OF SERVICE

I, hereby certify that on October 20, 2020, the foregoing was electronically filed with the Clerk for the United States Court Of Appeals for the Tenth Circuit, using the CM/ECF system. CM/ECF will serve all counsel of record.

*/s/ Michael Francisco*
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