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

BRIEF FOR THE LUTHERAN CHURCH—MISSOURI SYNOD, ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, ASSEMBLY OF CANONICAL ORTHODOX BISHOPS OF THE USA, GENERAL COUNCIL OF THE ASSEMBLIES OF GOD (USA), INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, AND NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Lutheran Church—Missouri Synod has some 6,000 member congregations with nearly 2 million baptized members throughout the United States. In addition to numerous Synod-wide related entities, it has six universities and the largest Protestant parochial school system in America. Hosanna-Tabor Evangelical Lutheran Church and School, which is a member congregation of the Synod, was the prevailing party in the first ministerial exception case before the Supreme Court, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012).

The Roman Catholic Archdiocese of New York is the second-largest Catholic diocese in the United States, with more than 2.8 million Catholics and nearly 300 parishes within the Archdiocese's ten counties. Erected in 1808, the Archdiocese is led by His Eminence Timothy Cardinal Dolan, the auxiliary bishops of the Archdiocese, and nearly 1,000 priests.

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 50,000 churches and congregations and nearly 14 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties received timely notice at least 10 days prior to the filing of this brief.

religious liberty, marriage and family, the sanctity of human life, and ethics.

Amicus the Assembly of Canonical Orthodox Bishops of the United States of America ("ACOB") is made up of all the active, canonical Orthodox Christian bishops in the United States of America, of every jurisdiction. ACOB preserves and contributes to the unity of the Orthodox Church in the United States by furthering her spiritual, theological, ecclesiological, canonical, educational, missionary, and philanthropic aims. While Amicus supports efforts to safeguard religious education from unwarranted judicial intervention, the specific actions, teachings, values, and traditions of the Petitioner or co-amici do not necessarily reflect those of the Amicus.

The General Council of the Assemblies of God (USA), together with Assemblies of God congregations around the world, is the world's largest Pentecostal denomination. It has approximately 69 million members and adherents worldwide with nearly 13,000 affiliated churches voluntarily affiliated with the cooperative fellowship in the United States. Seventeen colleges and universities are endorsed by the Assemblies of God in the United States. The Assemblies of God seeks to foster a society in which religious adherents of all faiths may peaceably live out the dictates of their conscience.

The International Society for Krishna Consciousness, Inc. ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 800 ISKCON temples worldwide, including 50 in the

United States. ISKCON has primary schools in several states where the Vaishnava Hindu faith is taught alongside secular topics. Because ISKCON is a religious minority in the United States, it often relies on courts to protect its rights, and supports the rights of religious schools to manage their affairs based on their religious faith.

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, churches, charitable organizations, mission societies, and individuals that includes more than 50,000 local churches from 74 different denominations. NAE serves a constituency of over 20 million people. Religious liberty is recognized by government but given by God, and is vital to the limited government which is our American constitutional republic.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici represent religious denominations with houses of worship and schools nationwide. Religious education is at the very heart of these denominations' missions, as religious education is the means by which their faiths are transmitted to future generations and disseminated to those who wish to learn more. But religious education is valuable only to the extent it accurately reflects a religious group's beliefs. To ensure the right message is delivered, amici and those they represent must be able to select their messengers—they must be able to choose for themselves who can speak on behalf of their religion.

Fear of litigation has no proper place in choosing such messengers. Fortunately, this Court's decisions have long recognized that the First Amendment places religious questions outside the reach of the government, in part by imposing structural limits on courts' authority to intervene in religious disputes. In one such structural limit that has become known as the "ministerial exception," this Court has confirmed that religious groups are not subject to suit for their decisions about who will serve important religious roles, including who they select to lead them, to conduct worship services, and to transmit the faith. This ensures that religious groups are able to follow their beliefs, rather than government dictates, in selecting individuals for these roles.

Or at least amici *thought* they were free to select religious educators without first weighing litigation risk, until the Tenth Circuit's decision below cast doubt on that understanding. That court concluded

not only that the ministerial exception offers no protection from the litigation process—and thus that denial of the ministerial exception at the motion to dismiss and summary judgment stage cannot be immediately appealed. It also concluded that application of the ministerial exception is a question of fact that would often be decided by juries. If that were not enough, the Tenth Circuit then further weighted the scales against early application of the ministerial exception, suggesting that a religious group's *pre-litigation* documents describing the religious significance of the position at issue should be discounted relative to a plaintiff's own description—*for the purpose of litigation*—of the position. Taken together, the decision all but ensures that no matter how clearly religious the plaintiff's position was, religious groups will be required to litigate employment claims through trial—or more likely, through settlement.

That decision poses grave risks to religious communities in this country, most of which are small and ill-equipped to withstand expensive and intrusive employment litigation. Allowing such litigation to proceed thus threatens to distort religious decision-making and divert religious groups' limited resources into litigating and settling ultimately meritless claims. To avoid this outcome, this Court should reaffirm the protections of the First Amendment by granting certiorari and reversing the Tenth Circuit's decision.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF RELIGIOUS GROUPS TO CHOOSE, WITHOUT GOVERNMENTAL INTERFERENCE, WHO WILL TEACH THEIR FAITH.

A. Religious Education Plays A Critical Role In Transmitting Each Amicus's Religion.

"Religious education is vital to many faiths practiced in the United States," and there is a corresponding "close connection" between many religion institutions' "central purpose and educating the young in the faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064, 2066 (2020). While the exact form religious education takes varies across groups, this theme remains consistent—religious education is foundational.

In Judaism, for example, "the Torah is understood to require Jewish parents to ensure that their children are instructed in the faith." *Id.* at 2065 (citing Deuteronomy 6:7 ("And thou shalt teach them diligently unto thy children, and shalt talk of them when thou sittest in thine house, and when thou walkest by the way, and when thou liest down, and when thou risest up.")). And religious education cannot be entrusted to just anyone—religious instruction "is an obligation of the highest order, entrusted only to a schoolteacher possessing 'fear of Heaven.'" Maimonides, Mishne Torah, Hilkhot Talmud Torah 1:2; 2:1, 3.

For Roman Catholics, too, religious education is "intimately bound up with the whole of the Church's

life." *Our Lady of Guadalupe*. 140 S. Ct. at 2065 (quoting Catechism of the Catholic Church 8 (2d ed. 2016)). Church doctrine thus outlines how religious educators should be selected: By canon law, bishops must ensure that "those who are designated teachers of religious instruction in schools . . . are outstanding in correct doctrine, the witness of a Christian life, and teaching skill." *Id*. (quoting Code of Canon Law, Canon 804, § 2 (Eng. Transl. 1998)).

Similarly, within its canon law, the Orthodox Christian Church maintains that bishops have the exclusive authority to teach the faithful and, by extension of the bishop's apostolic ministry, priests possess this same authority (Canon 58 of the Holy Apostles, Canon 40 of Laodicaea, Canon 19 of Penthekte). Subsequent canonical legislation permits laypersons who are well-instructed in the faith to exercise educational functions provided they have received permission from the bishop of the diocese or the presiding priest of the parish.

"Protestant churches, from the earliest settlements in this country, viewed education as a religious obligation." *Id*. "A core belief of the Puritans was that education was essential to thwart the 'chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures.'" *Id*.

Modern Protestant groups continue this tradition. The Southern Baptist Convention's Baptist Faith and Message 2000, for example, explains that, "In Jesus Christ abide all the treasures of wisdom and knowledge. All sound learning is, therefore, a part of

our Christian heritage."[2] Thus, "[a]n adequate system of Christian education is necessary to a complete spiritual program for Christ's people."[3] In a proper system, "[t]he freedom of a teacher in a Christian school, college, or seminary is limited by the pre-eminence of Jesus Christ, by the authoritative nature of the Scriptures, and by the distinct purpose for which the school exists."[4]

The Lutheran Church—Missouri Synod sees the religious education of children as one of the most fundamental ministries of the church. This is in line with the teachings of Martin Luther, who said schools must be second in importance only to the church, for in them young preachers and pastors are trained, and from them emerge those who replace the ones who die. The philosophy of Lutheran education includes the demand that the faith of the church be evident in all activities at the school. Law and Gospel, sin and grace are operative in the curriculum and methodology of a Lutheran school. In sum, the Synod firmly believes in the role of the schoolteacher as one who promotes the faith.

ISKCON, meanwhile, requires that teachers who provide religious education must be qualified professionally, as well as by their knowledge of, and commitment to, the Vaishnava tradition. For example, Vaishnavas are strict vegetarians who avoid all forms of intoxication and gambling. Thus, it is essential that ISKCON teachers model these

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[2] https://bfm.sbc.net/bfm2000/

[3] *Id.*

[4] *Id.*

behaviors for their students. This standard was first established in the ancient Sanskrit religious text, the Bhagavad-Gita, the principle scripture of the Vaishnava faith: "Whatever action is performed by a great man, common men follow in his footsteps. And whatever standards he sets by exemplary acts, all the world pursues."

Across these faiths, and in many more of the diverse faiths practiced in this country, religious education fulfills important religious purposes—and proper religious education requires teachers qualified by the standards of the religion itself.

B. Religious Education Is Protected By The First Amendment.

The First Amendment places religious decisions outside the sphere of secular authorities, imposing structural limits on the scope of government authority. As this Court explained as early as 1871, "[a]ny other than [ecclesiastical authorities] must be incompetent judges of matters of faith, discipline, and doctrine." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 732 (1871). Such matters include "whether [a religious leader's] conduct was or was not in accordance with the duty he owed . . . to his denomination." *Id.* at 730-31. Thus, long before this Court expressly recognized a "ministerial exception," it acknowledged that "it is the function of the church authorities," not a secular court, "to determine what the essential qualifications of a chaplain are and whether the candidate possesses them." *Serbian E. Orthodox Diocese for U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 711 (1976) (quoting *Gonzalez v. Roman Cath. Archbishop of Manila*, 280 U.S. 1, 16 (1929)).

The Court has not shied away from applying these principles in the context of religious education. To the contrary, the Court has "recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979).

Indeed, the Court's first decision expressly adopting the ministerial exception involved a "called teacher" at a religious school. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 178 (2012). Noting the "undoubtedly important . . . interest of religious groups in choosing who will . . . teach their faith," the Court explained that, "[a]s a source of religious instruction, [the plaintiff] performed an important role in transmitting the Lutheran faith to the next generation," placing the plaintiff's employment relationship with the church outside the reach of the courts. *Id.* at 192, 196. After all, "both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers." *Id.* at 201 (Alito, J., concurring).

When the Court addressed the ministerial exception again in *Our Lady of Guadalupe*, it again considered a teacher at a religious school—and again emphasized the First Amendment's protection of religious education. The Court noted "educating young people in their faith, inculcating its teachings, and training them to live their faith and responsibilities lie at the very core of the mission of a private religious school," meaning that "the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission." *Id.* at 2055, 2064.

In reaching these conclusions, the Court considered not only modern conceptions of religious education, but also the origins of the First Amendment. Key aspects of the Established Church in England that the Founders sought to avoid reflect entanglement of church, state, and education. Pursuant to the 1662 Act of Uniformity, for example, "all schoolmasters, private tutors, and university professors were required to 'conforme to the Liturgy of the Church of England' and not 'to endeavour any change or alteration' of the church." *Id.* at 2061 (quoting Act of Uniformity, 1662, 14 Car. 2, ch. 4). Similarly, "[t]he Schism or Established Church Act of 1714, 13 Ann., ch. 7, required that schoolmasters and tutors be licensed by a bishop." *Id.* As Blackstone explained, "[p]ersons professing the popish religion [could] not keep or teach any school under pain of perpetual imprisonment." *Id.* (quoting 4 W. Blackstone, Commentaries on the Laws of England 55 (8th ed. 1778) (brackets in original)). Such intrusion into religious education is at the core of what the First Amendment forbids.

In short, "[t]he concept of a teacher of religion is loaded with religious significance," *id.* at 2067, and religious educators necessarily fall within the scope of the ministerial exception. *Cf.* Oral Argument Tr. at 62:12-15, *Espinoza v. Montana Dep't of Rev.*, No. 18-1195 (Jan. 22, 2020) (Breyer, J.) ("[T]here is nothing more religious except perhaps for the service in the church itself than religious education. That's how we create a future for our religion.").

II. THE TENTH CIRCUIT'S DECISION THREATENS RELIGIOUS ORGANIZATIONS' VITAL INTEREST IN

CHOOSING THEIR OWN RELIGIOUS EDUCATORS.

Although the Tenth Circuit purported to respect this Court's precedents regarding the ministerial exception, its decision below renders the guarantees of the ministerial exception hollow.

A. Requiring Trial to Resolve Ministerial Exception Questions Undermines the Exception's Purposes.

1. The ministerial exception protects against merits litigation.

Contrary to the decision below, the ministerial exception, and the church autonomy doctrine on which it is based, have never been concerned solely with potential liability following trial, but instead have always reflected structural limits on government authority and the fact that the process of litigation itself can improperly intrude on religious affairs.

For example, in *NLRB v. Catholic Bishop of Chicago*, the Court held that the NLRB lacked jurisdiction over teachers in religious schools, concluding that such jurisdiction would raise "serious First Amendment questions." 440 U.S. at 504. The Court was clear that it was "not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also *the very process of inquiry* leading to findings and conclusions." *Id.* at 502 (emphasis added). It was impermissible, the Court suggested, for the Board to even "inquir[e] into the good faith of the position asserted by the clergy-administrators" regarding the rationale for employment decisions "and its relationship to the school's religious mission." *Id.*

Recent decisions have strengthened this conclusion, highlighting that what is forbidden is not merely liability but any "judicial intervention into disputes between the school and the teacher" in cases where "a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith." *Our Lady of Guadalupe*, 140 S. Ct. at 2069; *see also Hosanna-Tabor*, 565 U.S. at 189 ("[T]he Establishment Clause . . . prohibits government *involvement* in . . . ecclesiastical decisions.") (emphasis added). Indeed, the process of "scrutinizing whether and how a religious school pursues its educational mission would . . . raise serious concerns about state entanglement with religion and denominational favoritism." *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022).

Other courts have reached the same conclusion. For example, the Fifth Circuit rejected employment discrimination claims brought by ministers in part because "in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive." *Combs v. Cent. Texas Ann. Conf. of United Methodist Church*, 173 F.3d 343, 350 (5th Cir. 1999). Similarly, the Seventh Circuit reasoned that such claims are forbidden because litigation processes are "*in themselves* . . . 'extensive inquir[ies]' into religious law and practice, and hence forbidden by the First Amendment." *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 187 (7th Cir. 1994) (quoting *Milivojevich*, 426 U.S. at 709); *see also Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (finding ministerial

claims forbidden because otherwise "[c]hurch personnel and records would inevitably become subject to subpoena, discovery, cross-examination, the full panoply of legal process designed to probe the mind of the church in the selection of its ministers"); *E.E.O.C. v. Cath. Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (finding that " "the EEOC's two-year investigation of [a religious employee's] claim, together with the extensive pre-trial inquiries and the trial itself, constituted an impermissible entanglement with judgments that fell within the exclusive province of" religious organizations); *Belya v. Kapral*, 59 F.4th 570, 577 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc) ("[S]ubjecting Defendants to further litigation would itself burden their First Amendment rights.").

That the ministerial exception offers protection from litigation is a necessary result of the First Amendment's structural limits on governmental authority. In other words, the ministerial exception is not a mere personal right, but instead "is rooted in constitutional limits on judicial authority." *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *see also Conlon v. InterVarsity Christian Fellowship/USA*, 777 F.3d 829, 836 (6th Cir. 2015). Courts *cannot* resolve religious disputes, even if the parties invite them to. Thus, the ministerial exception is not waivable. *See, e.g., Lee*, 903 F.3d at 118 n.4; *Conlon*, 777 F.3d at 836; *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated in part on other grounds*, *Hosanna-Tabor*, 565 U.S. 171.

The clear conclusion from these cases is that while "most defenses protect only against liability, the

ministerial exception protects a religious body from the suit itself." Pet. App. 126a (Bacharach, J., dissenting from denial of rehearing en banc). That is, "the rule of *Hosanna-Tabor*" is designed "precisely to avoid" problems like "subjecting religious doctrine to discovery," and the ministerial exception must be applied at the threshold. *Sterlinski v. Catholic Bishop*, 934 F.3d 568, 569-72 (7th Cir. 2019).

2. Insisting that cases involving the ministerial exception should routinely proceed to trial flouts these principles.

For the ministerial exception to protect religious groups from the intrusion of suit, it must be addressed by the court as a legal issue early in the litigation process. The Tenth Circuit's holding below—that the ministerial exception is a question of fact to be resolved after trial—cannot be squared with this basic principle.

Unsurprisingly, then, prior to *Tucker*, courts uniformly treated application of the ministerial exception as a threshold issue of law. *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) ("The status of employees as ministers for purposes of *McClure* [*v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972)] remains a legal conclusion for this court."); *Conlon*, 777 F.3d at 833 (stating that "whether the [ministerial] exception attaches at all is a pure question of law"); *Kirby v. Lexington Theol. Seminary*, 426 S.W.3d 597, 608–09 (Kan. 2014) ("[W]e hold the determination of whether an employee of a religious institution is a ministerial employee is a question of law for the trial court, to be handled as a threshold matter."); *Weishuhn v. Lansing Catholic Diocese*, 787 N.W.2d 513, 517 (Mich.

Ct. App. 2010); *Turner v. Church of Jesus Christ of Latter-Day Saints*, 18 S.W.3d 877, 895 (Tex. App. 2000); *Heard v. Johnson*, 810 A.2d 871, 877 (D.C. 2002). It is not clear that the ministerial exception has *ever* been left to a jury.

Both *Hosanna-Tabor* and *Our Lady of Guadalupe* confirm that the ministerial exception is a legal issue for the court. *Hosanna-Tabor* noted that the issue was not jurisdictional, but nonetheless described it as requiring "[district] courts"—not juries—"to decide *whether the claim can proceed* or is instead barred." 565 U.S. at 195 n.4 (emphasis added). *Our Lady of Guadalupe*, too, treats application of the ministerial exception as a legal question. The case reached this Court at summary judgment, with the question whether the plaintiff qualified as a minister hotly disputed. Yet the Court did not hesitate to declare that "although there are differences of opinion on certain facts, neither party takes the position that any *material* fact is genuinely in dispute." *Our Lady of Guadalupe*, 140 S. Ct. at 2056 n.1. In other words, the central dispute in the case—whether the plaintiff was a minister—was not a factual question.

In straining to discover disputed facts to submit to the jury, the Tenth Circuit erred further by overlooking that the plaintiff's sole evidentiary submission, his declaration, did not actually contest his job duties, but only the *religious significance* of those duties. *See* App. 207a, 209a. For example, he acknowledges that he was instructed "to 'integrate' a Christian worldview into [his] teaching," but attempts to downplay the religious significance of this instruction by explaining that he was also "told not to preach, but to encourage students to think through

perceived versions of Christianity for themselves." App. 206a. Similarly, while he acknowledges the expectation that he would "endorse Christianity in general terms, set a good moral example, and allow the Christian worldview to influence [his] teaching," he suggests this was not a religious role because he was "encouraged to avoid delivering messages on church doctrine." App. 207a.

Letting a jury resolve disputes about the religious significance of these requirements contradicts the long line of cases maintaining that the First Amendment grants "religious organizations . . . power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Nor can it be reconciled with *Our Lady of Guadalupe's* admonition that "courts must take care to avoid 'resolving underlying controversies over religious doctrine'" when evaluating the application of the ministerial exception. 140 S. Ct. at 2063 n.10 (quoting *Presbyterian Church in U. S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969)). After all, any attempt to resolve disputes about the religious significance of a particular job duty would "unconstitutionally undertake[] the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals" of a religious group. *Milivojevich*, 426 U.S. at 720.

Beyond mistaking legal and religious questions for factual disputes, the *Tucker* decision places another thumb on the scale against pre-trial application of the

ministerial exception based on its view of which evidence is persuasive. Specifically, the decision frames objective pre-litigation documents like contracts, job descriptions, and employee handbooks as merely "self-serving" documents to be discounted relative to the plaintiff's litigation-driven description of his role. App.54a n.21.

This, too, cannot be squared with *Hosanna-Tabor* and *Our Lady of Guadalupe*. *Hosanna-Tabor* relied heavily on the church's pre-litigation documentation to identify the plaintiff's role, including the content of the "diploma of vocation" given to the plaintiff when the church "extended her a call," the eligibility requirements for the plaintiff's position, and the church's pre-litigation description of the plaintiff's job duties. 565 U.S. at 191.

Our Lady of Guadalupe addressed the importance of the religious organization's evidence even more directly, explaining that "[i]n a country with the religious diversity of the United States, judges 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." 140 S. Ct. at 2066. Therefore "[a] religious institution's explanation of the role of such employees in the life of the religion in question is important." *Id*. Applying this principle, the Court accorded substantial weight to the "schools' definition and explanation of [the plaintiffs'] roles" and the fact that "the[] schools expressly saw [the plaintiffs] as playing a vital part in carrying out the mission of the church." *Id*. And the Court placed particular emphasis on the plaintiffs' "employment agreements and faculty handbooks," which "specified in no uncertain terms

that they were expected to help the schools carry out this mission [of religious education and faith formation] and that their work would be evaluated to ensure that they were fulfilling that responsibility." *Id*. In other words, the Court emphasized and relied upon precisely the types of documents that the Tenth Circuit discounted below.

The Seventh Circuit's contrary approach reveals the bankruptcy of the Tenth Circuit's reasoning. Allowing a plaintiff to avoid the ministerial exception by asserting that he did not actually perform a religious role, despite the religious groups' expectations, would be perverse, as it would give religious groups "less autonomy to remove an underperforming minister than a high-performing one." *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 940-41 (7th Cir. 2022); *see also Sterlinski*, 934 F.3d at 571 (holding that a plaintiff's refusal to perform assigned religious functions does not defeat the ministerial exception but instead suggests the plaintiff "*ought* to be fired"). Yet that is exactly the result the Tenth Circuit's decision below promotes: a full trial for every employee who refuses to fulfill a religious group's religious expectations.

B. The Threat Of Protracted Litigation Under *Tucker* Will Distort Religious Decisions And Force Settlement Of Even Meritless Claims.

The ministerial exception is intended to "protect the right of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at

186). Yet under *Tucker*, employees who serve important religious functions and whose performance these religious groups determine to be unsatisfactory can force prolonged litigation—meaning religious groups will face substantial government intrusion into matters that should be left to them alone.

This case is a clear illustration, since there can be little doubt that Faith Bible Chapel would prevail on its ministerial exception defense after trial. After all, it is undisputed that the plaintiff's duties included religious education and faith formation, such as "organization of 'religiously oriented' chapel services, spiritual guidance and counseling, endorsement of Christianity, integration of 'a Christian worldview' in his teaching, . . . and assistance to students in developing their relationships with Jesus Christ." Pet. App. 135a (Bacharach, J., dissenting from the denial of en banc consideration) (quoting *plaintiff's* description of his duties).[5] Yet despite all this, under the Tenth Circuit's decision, the plaintiff will be able to impose substantial burdens on Faith Bible Chapel by forcing it to litigate his claims through trial. That is a burden many religious organizations will be unable to withstand.

Even the most conscientious of religious employers are likely to eventually face litigation from a disgruntled current or former employee. According to one study, in 2016, over 10 percent of employers with

[5] Given the procedural posture and questions presented, this Court is not called upon to address the merits of Mr. Tucker's discrimination claim—nor should any court reach this issue, given the proper application of the ministerial exception here.

at least 10 employees faced at least one employment discrimination claim.[6]

Although many such claims are likely to be frivolous, the prospect of litigating even meritless claims is daunting, with the typical cost of defending and/or settling an employment discrimination case totaling $160,000.[7] Costs can balloon far higher if a case actually goes to trial. *See, e.g., Nichols v. Longo*, 22 F.4th 695, 697 (7th Cir. 2022) (affirming award of attorneys' fees of $774,645.50 following trial in employment discrimination case); *Vega v. Chicago Park Dist.*, 12 F.4th 696, 701 (7th Cir. 2021) (attorney's fee award of $1,006,592 in "single-plaintiff employment discrimination case").

These costs do not even begin to paint the full picture of how disruptive such suits can be. Given the liberal scope of civil discovery, plaintiffs can probe deeply into a religious organizations' confidential records and communications, threatening the privacy of both the organization and the individuals within it. Moreover, plaintiffs can significantly disrupt the organizations' operations by seeking to depose key leaders, distracting them from their religious mission. While district courts, of course, have the duty to control discovery, these tools can easily be weaponized for harassment, even for the most meritless claims.

Amici are no strangers to these burdens. One amicus, for example, has spent over $1.5 million

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[6] *See* The 2017 Hiscox Guide to Employee Lawsuits, *available at* https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf.

[7] *Id.*

litigating a single employment case, despite ultimately prevailing at summary judgment. And that victory came at the cost of significant disruption to the religious group and its leaders, with extensive document requests and depositions of numerous core religious figures. Gathering and reviewing the responsive documents, not to mention preparing for and attending depositions, necessarily took resources away from pursuing the organization's religious mission. Other amici report similar experiences.

Increasingly, such claims are artfully pleaded to avoid immediate application of the ministerial exception. For example, religious employees often seek to reframe their employment disputes as claims for defamation, tortious interference, or intentional infliction of emotional distress claims. *Cf. Belya*, 59 F.4th at 582 (Park, J., dissenting from denial of rehearing en banc) ("[A]lmost any ministerial dispute could be pled to avoid questions of religious doctrine."). Such tactics only increase the risk that claims which should be subject to the ministerial exception will nonetheless survive early motions to dismiss—and under *Tucker*, these tactics all but ensure such claims will survive all the way to trial.

Few religious groups are equipped to withstand such burdens. Most houses of worship in the United States have fewer than 100 attendees at a typical worship service, and nearly 90 percent have fewer than 250.[8] Such small groups rarely have dedicated legal budgets, and incurring tens or hundreds of thousands of dollars to fight an employment lawsuit—

[8] https://research.lifeway.com/fast-facts/.

even a frivolous one—is likely well outside the means of most congregations.

In light of these realities, rational actors within religious organizations will be coerced into making religious decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments." *Rayburn*, 772 F.2d at 1171. As a result, a "prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity" and that "the community's process of self-definition would be shaped in part by the prospects of litigation." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring in the judgment). Absent strong protections from suit, "the prospect of . . . investigations and litigation would inevitably affect to some degree the criteria by which future vacancies in [religious employment] would be filled." *Cath. Univ. of Am.*, 83 F.3d at 467. Even "uncertainty" about how litigation will proceed "may cause a religious group to conform its beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Employers may also censor employment-related speech to avoid lawsuits, thus "chilling religious-based speech in the religious workplace." *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 981 (7th Cir. 2021) (en banc). In short, "[a] church is not truly free to manage its affairs, practice its faith, and publicly proclaim its doctrine if lawyers and judges lie in wait to pass human judgment." *In re Lubbock*, 624 S.W.3d 506, 521 (Tex. 2021) (Blacklock, J.,

concurring). Some amici acknowledge that their conduct has *already* been shaped by fear of being drawn into employment litigation. And because meritless claims cannot be avoided altogether, even an organization that has altered its conduct to avoid potential lawsuits may find itself involved in one. In that event, a rational religious group without the assurance of early dismissal will often find it prudent to settle—regardless of how frivolous the claim or how clearly religious the employee's position.

This is no mere hypothetical problem, but a concrete reality. Consider, for example, the claims against Gordon College, an "intentional Christian community" that, according to its mission statement, "retain[s] a commitment to integrating faith and learning."[9] Pursuant to this mission, Gordon "requires all of its faculty to sign a 'Christian Statement of Faith,' which affirms that the '66 canonical books of the Bible as originally written were inspired of God' and that there 'is one God, the Creator and Preserver of all things, infinite in being and perfection.'" *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 953 (2022) (Alito, J., statement respecting the denial of certiorari). When an assistant professor at Gordon was denied a promotion and her position eliminated, she sued, alleging employment discrimination. Although the plaintiff admittedly understood her work to require "pursuing scholarship that is faithful to the mandates of Scripture, the vocational call of Christ, and the dictates of conscience," *id.*, state courts rejected Gordon's

[9] https://www.gordon.edu/mission.

attempts to dismiss the case pursuant to the ministerial exception.

When Gordon sought review from this Court, it was turned away, but at least four Justices believed the state courts' failure to apply the ministerial exception reflected a "troubling and narrow view of religious education." *Id.* at 954 (Alito, J., statement respecting the denial of certiorari). Those Justices "concur[red] in the denial of certiorari" because unresolved jurisdictional questions regarding the "interlocutory posture" of the state courts' decisions would "complicate [the Court's] review" of the ministerial exception ruling. *Id.* at 955 (Alito, J., statement respecting the denial of certiorari). But they did so "[o]n th[e] understanding" that "there is nothing that would preclude Gordon [College] from appealing" later—a concession made by the plaintiff to avoid interlocutory review. *Id.*

But that understanding proved incorrect as a practical matter. Following years of costly litigation, Gordon opted to settle with the plaintiff rather than risking potentially onerous merits discovery and trial.[10] Denying interlocutory review thus effectively meant denying all review, and Gordon was forced to settle a claim that should have been dismissed at the outset—an experience that will surely inform Gordon's decisions regarding whom to hire, fire, and promote as religious educators in the future.

These consequences can be avoided, and the

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[10] https://www.salemnews.com/news/gordon-college-reports-settlement-reached-in-long-running-lawsuit-by-former-professor/article_91a51466-7bd9-11ed-a645-63028091d214.html.

purposes of the ministerial exception served, only by treating the ministerial exception as a threshold legal issue for resolution—including appeal, if necessary—prior to trial.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision below.

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Respectfully submitted,

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