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 OF NOTRE DAME LAW SCHOOL RELIGIOUS LIBERTY CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Rules

Secondary Authorities

INTEREST OF AMICUS CURIAE

The Notre Dame Law School Religious Liberty Clinic promotes and defends religious freedom for all people.[1] It advocates for the right of all people to exercise, express, and live according to their religious beliefs. And it defends individuals and organizations of all faith traditions against interference with these fundamental liberties. It has represented groups from an array of faith traditions to defend the right to religious exercise, to preserve sacred lands from destruction, to promote the freedom to select religious ministers and shape religious doctrine, and to prevent discrimination against religious schools and families.

In addition to defending religious exercise wherever it is curtailed, the Religious Liberty Clinic advocates for religious organizations' freedom to select their own religious leaders free from government interference. It therefore seeks to ensure that this critical freedom is meaningfully protected in cases like this.

[1] No party or counsel for a party wrote any part of this brief. No person other than *amici* and their counsel made any financial contribution to the preparation of this brief. Counsel for all parties were notified ten days in advance pursuant to Supreme Court Rule 37.2.

SUMMARY OF ARGUMENT

The First Amendment demands that courts refrain from intruding into disputes over a religious organization's selection of important leaders. The ministerial exception[2] enforces that demand. And thus, nearly every court to consider the issue has agreed: the ministerial exception promises something akin to an immunity from suit, which must be resolved early in litigation to be effective.

The Tenth Circuit's decision in this case does not merely split with the overwhelming weight of authority favoring early resolution of the ministerial exception. It all but ensures that the opposite will result. In denying interlocutory review of the ministerial exception, the opinion below does not just allow that *some* ministerial-exception cases will be subjected to a full trial on the merits. Rather, it requires that *nearly all* will.

The Tenth Circuit misunderstood the nature of the exception and badly misinterpreted the scope of its protections. And the Circuit grounded its decision in another startling assertion: that application of the exception is fundamentally a factual question that "often" will need a jury to decide. Pet. App. 19 n.4. Really, the Tenth Circuit understated its point. By concluding that this case must go to trial, the opinion below seems to mean that essentially all ministerial exception cases must go to trial.

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[2] *Amicus curiae* refers to this doctrine as the "ministerial exception," even though that label may be inapt or even misleading in various contexts. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171,198–204 (2012) (Alito, J., concurring).

This is an easy case for the ministerial exception. Gregory Tucker was the *chaplain* of a Christian school, who was entrusted with the core ministerial responsibility of guiding and counseling students in the faith. But Tucker managed to avoid summary judgment because he says that, despite his ministerial responsibilities, he preferred to go about his business in a more secular way. If the Tenth Circuit is correct that Tucker's litigation strategy requires a trial on the merits, it is difficult to conceive of any ministerial-exception case that would not. Left unchecked, the decision below provides an easy path for virtually any employee to force a trial against his religious employer, no matter how clear his ministerial role.

The Tenth Circuit's push toward a full trial in all ministerial-exception cases also flouts the law. Courts around the country routinely apply the ministerial exception despite the same kind of "factual dispute" represented in this case. The upshot of the Tenth Circuit's opinion is that all of these cases—including every one of this Court's own ministerial-exception cases—were wrongly decided.

The Tenth Circuit was wrong in its insistence that the ministerial exception presents a "factual question" best left for a jury in this case and doubly wrong in its confidence that any error in denying that exception "can be effectively reviewed and corrected through an appeal after final judgment." Pet. App. 52–53.

First, delaying resolution of the ministerial exception would undermine the central purpose of the doctrine and invite the very harms that it is designed to prevent. The "mere adjudication" of claims like these "would pose grave problems for religious

autonomy," and allowing judicial scrutiny of the reasons for selecting a minister would impermissibly entangle the court in religious matters in a way that can never be undone. *Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring).

Second, as a practical matter, delaying this question until after trial will often prevent it from being resolved by a court *at all*. Civil litigation is not typically a pleasant experience, and many religious organizations find themselves simply unable to bear the intense burdens, stress, and cost of a protracted lawsuit. Many religious groups cannot afford to wait until the end of a full trial process to learn whether their First Amendment rights will be vindicated. They are pushed instead to settle—a phenomenon we have seen recently in prominent ways.

In combination, requiring religious organizations to litigate every employment dispute to a full trial would effectively nullify the ministerial exception itself. Without any ability to avoid the intense burdens of trial—even in the clearest of ministerial contexts—religious organizations will have little ability to vindicate these core First Amendment rights. To correct the Tenth Circuit's egregious misstep and to ensure the continuing vitality of the ministerial exception's protections, this Court should grant the petition for certiorari and reverse.

ARGUMENT

I. The decision below threatens to send nearly every ministerial-exception question to trial.

The Tenth Circuit's opinion distorts an unremarkable feature of the ministerial exception—that it depends on the facts of an employee's job responsibilities—to require a trial to decide nearly every application of that doctrine. That consequence is laid bare by the record here, where there is no genuine factual dispute relevant to the exception. Tucker's role as chaplain for the school is both undisputed and plainly ministerial. Yet, litigation marches forward.

The Tenth Circuit's suggestion that this is simply a close case on the facts thus obscures the real menace of its decision: if the record in *this* case raises a factual question for trial, then the record in virtually *every* ministerial-exception case would too. As the experience of this Court and other circuits around the country shows, that certainly is not the law.

A. The record leaves no doubt about Tucker's ministerial role.

The undisputed facts of this case make pretrial resolution of the ministerial exception straightforward. The exception bars claims brought by any employee "who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020). Here, that plainly applies. It is uncontested that Tucker worked under contract as Faith Bible's chaplain and that he was responsible for planning weekly "Chapel

Meetings" and more generally for providing "spiritual guidance and counseling," "endors[ing] Christianity," "integrat[ing] 'a Christian worldview' in his teaching," demonstrating "a passionate relationship with Jesus Christ," and helping students "develop[] their relationship with Jesus Christ." Pet. App. 85, 135. In other words, Faith Bible "entrust[ed] [Tucker] with the responsibility of educating and forming students in the faith"—i.e., a core ministerial role. *Our Lady*, 140 S. Ct. at 2069.

Yet the Tenth Circuit has allowed this case to go to a full trial on the bizarre notion that a jury must decide still lingering "factual disputes" about the ministerial exception. Pet. App. 7, 19 & n.4, 24–26. The problem is that none of those disputes have anything to do with the role Tucker was hired to perform. At most, Tucker has suggested a dispute about whether he *agreed with* or perhaps *chose to fulfill* his ministerial duties—but not that he was given such duties. Tucker insists that, despite his formal role as chaplain, he preferred to hold himself out as Faith Bible's "Director of Student Life" and that he chose not to discuss "principles of faith" when counseling students. *Id.* at 107–08.

The decisions below seem to confuse how an employee personally portrayed or behaved in his role for what that role was. It is the latter question which matters. In *Hosanna-Tabor*, this Court recognized that the First Amendment guarantees that the government will not meddle with religious organizations' selection of those individuals who are to teach and minister their faith. 565 U.S. at 188–89. Accordingly, "the Religion Clauses foreclose certain employment discrimination claims brought against religious organizations" by employees "holding

certain important positions." *Our Lady*, 140 S. Ct. at 2060–61. What matters are those responsibilities the religious employer has "*entrust[ed]*" to the employee—and whether they include certain religious responsibilities like "educating and forming students in the faith." *Id.* (emphasis added); *see also id.* at 2066 (emphasizing importance of religious organization's "definition and explanation" of an employee's role).

To be sure, answering that question requires a contextual inquiry. *See id.* at 2063. To know whether the doctrine applies, a court needs to know what an employee's role is—in this Court's words, "what [the] employee does." *Id.* at 2064. But that does not permit courts to turn every ministerial-exception question into a dispute of fact for the jury merely because the parties disagree over how to characterize the employee's responsibilities. Indeed, once it is clear what an employee was hired to do, the only question left is one of law: whether those duties are the kind (like "educating and forming students in the faith") that render one a "minister." *See id.* at 2069; *see also, e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 657 (7th Cir. 2018) (application of exception to a "given factual scenario is a question of law"); Pet. 23–24 (citing cases). The type of "dispute" here—between what an employee's role is and how the employee personally feels about that—is beside the point.

B. Nearly every plaintiff can manufacture at least this degree of "factual dispute" over his ministerial role.

If Tucker's personal resistance to the religious responsibilities given to him were enough to require a full trial on the merits, then virtually *every* case

involving the ministerial exception would need a trial. It is difficult to conceive of any case that would not involve at least some attempt by the employee to redefine his job duties in a similar way. But outside of the Tenth Circuit, that has not been a valid reason to send the case to a jury. Indeed, Tucker's case looks no different than a myriad of disputes in which this and other courts have not hesitated to apply the ministerial exception before trial.

This Court's own ministerial-exception cases reflect a sound rejection of the Tenth Circuit's approach. In *Our Lady*, this Court considered whether the ministerial exception applied to two Catholic-school teachers, each of whom raised arguments akin to Tucker's. 140 S. Ct. at 2055. Agnes Morrissey-Berru was a fifth- and sixth-grade teacher in the Archdiocese of Los Angeles who taught all subjects, including religion. *Id.* at 2056. She was "expected to 'model and promote' Catholic 'faith and morals'" and to "participate in '[s]chool liturgical activities,'" was "'responsible for the faith formation of the students in [her] charge each day,'" "prepared her students for participation in the Mass and for communion and confession," and "prayed with her students" at least at the beginning or ending of each class day. *Id.* at 2056–57. Likewise, Kristen Biel taught at a Catholic primary school in Los Angeles, with an "employment agreement [that] was in pertinent part nearly identical to Morrissey-Berru's." *Id.* at 2058. Among other things, she was also required to "model the faith life" and to "integrate Catholic thought and principles into secular subjects." *Id.* at 2059 (alterations omitted). And she "was required to teach religion for 200 minutes each week," "prepar[e] [her] students to be active participants at

Mass," and "to pray with [her] students every day." *Id.*

Unsurprisingly, the two teachers disputed that they understood or performed their roles in a way they considered "ministerial." Morrissey-Berru asserted that "'[a]t no time' during her employment did [she] 'feel God was leading [her] to serve in the ministry.'" *Our Lady*, 140 S. Ct. at 2078 (Sotomayor, J., dissenting). She also claimed that she "[wa]s not a practicing Catholic," and "there [wa]s a factual dispute whether the school insisted" that its teachers be Catholic. *Id.* And "[t]he record d[id] not disclose whether [she] ever completed the full catechism-certification program" in which the school requested she participate. *Id.* Similarly, Biel noted that teachers at the school were not required to be Catholic and that she had no "experience, training, or schooling in religious pedagogy" when she was hired. Brief for Respondents at 8–9, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19-267 (Mar. 4, 2020). And, she contended, her "duties did not include any spiritual leadership"; instead, her job during Mass "was to keep her class settled and quiet." *Id.* at 9; *see also Our Lady*, 140 S. Ct. at 2077 (Sotomayor, J., dissenting). But none of these disputes precluded pretrial resolution of the ministerial exception. Rather, reviewing the case on summary judgment, this Court held that the exception applied in both cases—despite "differences of opinions on certain facts" and without requiring a trial to assess whether the teachers actually lived up to their ministerial expectations. *Id.* at 2056 n.1 (maj. op.).

The same was true in *Hosanna-Tabor*. There, this Court unanimously held that "the exception covers [Cheryl] Perich," a "called teacher" at Hosanna-Tabor

Evangelical Lutheran School. *Hosanna-Tabor*, 565 U.S. at 178, 190. Among her other responsibilities, Perich "taught religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service," which she "led . . . herself about twice a year." *Id.* at 178. In light of Perich's "formal title," "the substance reflected in [her] title," "her own use of that title," and "the important religious functions she performed for the Church," this Court held that she was a minister for purposes of the exception. *Id.* at 192. In doing so, the Court rejected a view of Perich's role that "placed too much emphasis on [her] performance of secular duties." *Id.* at 193. Despite the employee's disagreement over the ministerial significance of her role, this Court reversed the Sixth Circuit's decision that the exception did not apply and held that the ministerial exception barred her claims—all before any trial or proceedings on the merits. *Id.* at 196.

And just last year, four members of this Court criticized the Massachusetts Supreme Judicial Court for failing to apply the ministerial exception in the face of similar contentions. *Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 955 (2022) (Alito, J., statement respecting denial of certiorari). The Massachusetts court concluded that Margaret DeWeese-Boyd, a professor at a Christian college, was not a "minister," discounting evidence that the college required her to "'integrate the Christian faith into her teaching, scholarship, and advising.'" *Id.* at 954. Instead, the court accepted DeWeese-Boyd's assertion that "she did not view herself as a minister, either formally or informally" and explained that "she did [not] understand her job to include responsibility for encouraging students to participate in religious life or

leading them in spiritual exercises." *DeWeese-Boyd v. Gordon Coll.*, 163 N.E. 3d 1000, 1008, 1015 (Mass. 2021). Although this Court declined to grant certiorari given the particular posture of that case, four Justices wrote separately to criticize the "troubling and narrow view" of the ministerial exception embodied in the state court's opinion. 142 S. Ct. at 954–55.

Other federal courts have likewise rejected plaintiffs' attempts to force a trial by expressing disagreement with the ministerial functions they were hired to perform. Take the Seventh Circuit, which just last year rejected a line of argument much like Tucker's. There, the court considered whether the ministerial exception applied to Lynn Starkey's position as a guidance counselor at a Catholic high school. *See Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. 2022). Like Tucker, Starkey held a contract that required her to perform certain manifestly religious functions. *Id.* at 937–38. Yet, like Tucker, she argued "that even if she were entrusted with religious responsibilities, she should not be considered a minister because she never engaged in religious matters or held a formal religious title." *Id.* at 941. And, she asserted, her job description and contract "do not describe either her or the school's actual conduct." *Id.* at 938. The Seventh Circuit rejected those assertions and affirmed summary judgment in the school's favor, concluding that Starkey's formal role was clearly ministerial despite any misgivings she might have about that fact. *Id.* at 941, 945. In another case only a few years earlier, the Seventh Circuit explained the matter more succinctly: "[I]t is sufficient that the school clearly intended for her role to be connected to the school's

[religious] mission." *Grussgott*, 882 F.3d at 660 (affirming summary judgment in favor of employer). An array of other circuits have reached these same conclusions. *See, e.g.*, *Fratello v. Archdiocese of New York*, 863 F.3d 190, 209 & n.34 (2d Cir. 2017) (rejecting argument that presence of secular duties precludes application of the ministerial exception where employee "performed . . . important religious functions"); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) ("[T]he performance of secular duties . . . may not be overemphasized in the context of the ministerial exception" where "there is no genuine dispute that [the employee] played an integral role in the celebration of Mass."); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 802 (4th Cir. 2000) (affirming dismissal under the ministerial exception despite EEOC's "attempt[] . . . to downplay [employee's] role in the liturgy").

By the logic of the Tenth Circuit, however, each of these cases should have gone to trial because each left open the possibility that the employee had resisted those duties that made his role ministerial. In *Starkey*, the Seventh Circuit identified the absurdity in that conclusion. If an employee could defeat the application of the ministerial exception simply by objecting to the role that he had been given, then he could nullify the doctrine "by failing to perform [his] job duties and responsibilities. Religious institutions would then have less autonomy to remove an underperforming minister than a high-performing one." *Starkey*, 41 F.4th at 941. That, of course, is not how the First Amendment works.

Indeed, the ministerial exception simply could not work the way the Tenth Circuit envisions. No matter how clear one's job duties are, every employee can

choose to act in defiance of them or attempt to recast them in a self-serving light. *See, e.g.*, Pet. 32–33. If that is enough to create a "factual dispute" and deny pretrial resolution of the ministerial exception, then every plaintiff will do so. And there is essentially nothing a religious organization could do in response.

This conversion of the exception into a pure—and nearly unavoidable—"question of fact" for the jury defies this Court's cases and the prevailing approach around the country. This Court must grant certiorari to make clear that the ministerial exception and the core First Amendment values it safeguards cannot be so easily evaded.

II. Forcing every case to a full trial would destroy the ministerial exception.

The Tenth Circuit was wrong in its insistence that the ministerial exception presents a "factual question" best left for a jury in this case and doubly wrong in its confidence that any error in denying that exception "can be effectively reviewed and corrected through an appeal after final judgment." Pet. App. 52–53. Post-trial review promises neither to vindicate the First Amendment interests underlying the exception nor to ensure that the exception would eventually be adjudicated *at all*.

First, delaying resolution of the ministerial exception until after trial undermines the central purpose of the doctrine and invites the harms that it is designed to prevent. As Petitioner, the dissenting judges below, and leading scholars have all well explained in this case, the First Amendment's Religion Clauses "categorically bar judicial inquiry and interference in religious leadership disputes," including interference through litigation processes

that will "probe the mind of the church regarding a minister's Title VII claims." Pet. 1.; *see generally* Brief of *Amici Curiae* Constitutional Law Scholars in Support of Appellant's Argument for Reversal, *Faith Bible Chapel Int'l v. Tucker*, 36 F.4th 1021 (10th Cir. 2022). The very nature of litigation like this threatens the "judicial entanglement in religious issues" that the First Amendment commands courts to avoid. *Our Lady*, 140 S. Ct. at 2069; *see also Hosanna-Tabor*, 565 U.S. at 205-06 (Alito, J., concurring) ("mere adjudication" of claims like these "pose[s] grave problems for religious autonomy"). Thus, "[i]f a trial court (wrongly) rejected the ministerial exception early in litigation" and proceeded to evaluate the minister's claims, "the court would become entangled in religious questions" in a way it could never undo. Brief of Religious Liberty Scholars as *Amici Curiae* in Support of Petitioner at 9, *Faith Bible Chapel Int'l v. Tucker*, 36 F.4th 1021 (10th Cir. 2022). Such an intrusion of "judicial meddling in religious matters" represents "the very evil that underlays" the reason for the exception itself. Pet. App. 135. And that "failure to respect the ministerial exception would immediately produce the injuries the exception is intended to guard against and make the denial effectively unreviewable on appeal from a final judgment." Brief of *Amici Curiae* Professors Douglas Laycock and Thomas C. Berg in Support of Petition for Rehearing En Banc at 11, *Faith Bible Chapel Int'l v. Tucker*, 36 F.4th 1021 (10th Cir. 2022).

Second, as a practical matter, holding this question until after trial will often prevent it from being resolved by a court *at all*. Civil litigation is not typically a pleasant experience. It is stressful, time consuming, intrusive, distracting, and expensive. To

avoid "the burdens, stress, and time of litigation," parties settle—even "those who would prevail at trial." *Marek v. Chesny*, 473 U.S. 1, 10 (1985). Religious organizations are especially susceptible to these pressures, often with limited funding and few resources to devote to protracted litigation. *See, e.g.*, Amicus Brief in Support of Defendant-Appellant Faith Bible Chapel's Petition for Rehearing En Banc of ACSI et al. at 4, *Faith Bible Chapel Int'l v. Tucker*, 36 F.4th 1021 (10th Cir. 2022) (enduring full trial on the merits "is not merely onerous, but likely financially devastating to many schools and parishes"). And non-monetary pressures likewise weigh uniquely against religious organizations, which might find a much greater need to alleviate litigation's intense distractions from their religious missions or to soothe the strains it places on their close-knit communities. Thus, if they are not assured of the First Amendment's ministerial protections early in litigation, many such organizations cannot realistically hold out in hope of receiving a favorable answer in the end.

This Court saw a stark example of this phenomenon just last year in *Gordon College*. There, as described above, a Christian college lost its assertion of the ministerial exception before trial, and this Court declined to review the case in the particular posture presented. But four Justices (i.e., enough to grant certiorari) wrote separately to express the "troubling" nature of the decision below, and signaled that if it were not corrected, then they might find it appropriate to grant certiorari at a later stage. *See Gordon College*, 142 S. Ct. at 952, 955 (Alito, J., statement respecting denial of certiorari). In other words, Gordon College received a strong sign

that its rights under the ministerial exception would eventually be vindicated if it simply could endure trial. And *still* the college settled. In an email sent to the college community, the college explained it was "pleased to finally reach a resolution of . . . [the] protracted legal journey," which it "did not seek out but [was] compelled to pursue" and which had "been . . . uncomfortable for [the college] as a strongly relational community." Julie Manganis, *Gordon College Reports Settlement Reached in Long-Running Lawsuit by Former Professor*, The Salem News, Dec. 15, 2022, http://bit.ly/3F7WhLh. Even with the very real prospect of ultimate "victory" at the end of the litigation process, Gordon College elected to spare itself from the significant burdens that path would entail.

Though difficult to quantify in less public cases, many others are no doubt forced to the same result. *See, e.g.*, *Ostrander v. St. Columba Sch.*, 2021 WL 3054877, at *6 (S.D. Cal. July 20, 2021); Stipulation and Joint Motion to Dismiss Action With Prejudice, Case No. 3:21-cv-00175, Dkt. 28 (settlement between Catholic high school and former teacher following denial of motion to dismiss under the ministerial exception); *St. Lucy's, Rancho Cucamonga Teacher, Settle Lawsuit Alleging He Was Fired for Being Gay*, San Gabriel Valley Tribune, May 4, 2018, http://bit.ly/3Jvcrkc (same).

Forcing religious organizations to endure protracted litigation would be especially inappropriate in a case like this, where the application of the ministerial exception is obvious. Nothing uncovered in discovery or determined by a jury could alter the conclusion that Faith Bible's *chaplain* is a "ministerial" role. That is true

regardless whether Tucker personally agreed with his religious responsibilities or presents evidence that he preferred to prioritize other aspects of his work.

But, as explained above, the Tenth Circuit's approach all but guarantees that even a patently ministerial employee like Tucker can force a religious institution into protracted litigation. The Tenth Circuit's promise of "effective review" following trial and judgment offers little comfort to the many thousands of religious communities without the resources to endure a lengthy court battle in the meantime. Without early resolution of the ministerial exception, many such organizations will simply be forced to settle—nullifying the protection that the ministerial exception is supposed to provide. And even those groups that do not settle will be denied their First Amendment "right to shape [their] own faith and mission through [their] appointments" free from judicial meddling. *Hosanna-Tabor*, 565 U.S. at 188.

In the end, the Tenth Circuit's push toward a full trial in all ministerial exception cases threatens an even worse harm to religious exercise. As Justice Thomas warned in *Hosanna-Tabor*, when faced with "uncertainty about whether [their] ministerial designation will be rejected," religious organizations may be pressured "to conform [their] beliefs and practices regarding 'ministers' to the prevailing secular understanding." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring). Religious organizations will be pressured to make critical leadership decisions "with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members." *Rayburn*

v. Gen. Conference of Seventh Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985). And those "are certainly dangers that the First Amendment was designed to guard against." *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring).

To ensure that the First Amendment and the ministerial exception can continue to do just that, this Court must make clear that adjudication of the exception cannot be forced to wait until the very end of every case.

CONCLUSION

This Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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March 10, 2023