Oral Argument Not Requested
No. 20-1230

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GREGORY TUCKER,

Plaintiff-Appellee,

v.

FAITH BIBLE CHAPEL INTERNATIONAL,

Defendant-Appellant.

On Interlocutory Appeal from the
United States District Court for the District of Colorado
Case No. 1:19-cv-01652-RBJ-STV, Hon. R. Brooke Jackson

CORRECTED BRIEF FOR APPELLEE GREGORY TUCKER

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STATEMENT OF PRIOR OR RELATED APPEALS

Under 10th Cir. Rule 28.2(C)(3), counsel is unaware of any prior or related appeals.

INTRODUCTION

Having witnessed virulent racism among the students at Faith Christian Academy, Gregory Tucker did what a good teacher should: He worked with community members and the School's administration to put together a symposium to address the problem through education. And the administration viewed the program as a success—until parents of the children most responsible for the racist incidents aggressively complained. At that point, the School changed tack, stripped Tucker of some responsibilities, and then fired him.

When Tucker sued for retaliation under Title VII and common-law wrongful termination, the School asserted the affirmative defense that Tucker was a "minister" and therefore that his claims are barred by the ministerial exception. The parties conducted discovery limited to that issue. And after considering the evidence, the district court found genuine issues as to "the totality of the facts and circumstances of [Tucker's] employment" that required denial of summary judgment on that issue, so the case should be moving forward in due course.

But despite denial of summary judgment being a quintessential nonfinal, unappealable order, the School appealed anyway. It then also moved for reconsideration in the district court, raising an issue—church-autonomy concerns—that it did not raise in its motion and thus the district

court never considered. When the district court denied reconsideration without opinion, the School appealed that decision too.

The School argues that the district court's order falls into the narrow class of immediately appealable collateral orders. But no circuit has ever recognized a right to immediate appeal of the issues presented here. And the School bears the heavy burden to show why this Court has jurisdiction over issues that are still very much live in the district court. The School fails to meet its burden for three independent reasons.

What is more, if the Court were to find jurisdiction, it could not even decide the questions posed by the School. That is because the School ignores factual disputes and draws inferences in its own favor. And for the merits issues on which there has yet to be *any* discovery, the School simply treats the assertions in its Answer as factual statements. But when the facts are viewed in Tucker's favor, as they must be, the School cannot prevail as a matter of law.

Once the district court has decided these and other disputed issues and rendered its final judgment, there will be ample opportunity for appellate review. This preemptive appeal should be rejected as jurisdictionally barred, or else the denial of summary judgment should be affirmed and the litigation should proceed apace.

JURISDICTIONAL STATEMENT

As explained in Part I of the Argument, this Court lacks appellate jurisdiction. Interlocutory appeals from denials of summary judgment on ministerial-exception or church-autonomy grounds are not appealable collateral orders under 28 U.S.C. § 1291. And deciding this appeal would require the Court to engage in impermissible factfinding. *See Johnson v. Jones*, 515 U.S. 304, 307 (1995).

ISSUES PRESENTED

I. The primary (and dispositive) question is whether this Court has jurisdiction to review the district court's interlocutory finding of genuine disputes of material fact as to the ministerial exemption and to apply the church-autonomy doctrine in the first instance when it was not properly raised and hence also not decided in the district court.

II. If the Court has jurisdiction, the second question is whether, viewing all facts in the light most favorable to Tucker, the district court erred in declining to find as a matter of law that Tucker was a minister.

III. The final question, if the Court has jurisdiction, is whether the district court committed plain error by declining to decide as a matter of law, before any discovery on the issue and despite Tucker's contrary allegations, both that the School had the legal right to fire Tucker for religious reasons and that it actually did so.

STANDARDS OF REVIEW

If the Court finds jurisdiction, review of the district court's denial of summary judgment on the ministerial exception is de novo, but all facts must be viewed in the light most favorable to Tucker, the nonmovant. Because the church-autonomy arguments were not properly raised below, they are forfeited for the sake of this appeal and thus reviewed, if at all, solely for plain error. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011) (Gorsuch, J.).

STATEMENT OF THE CASE

A. Factual Background

Gregory Tucker taught at Faith Christian Academy from 2000 to 2006 and then again from 2010 through 2018, when he was fired. App. Vol. I 205 ¶ 2.[1] He taught high-school biology, chemistry, and physics. *Id.* at 206 ¶ 6. Later, he also taught courses entitled "Leadership" and "Worldviews and Apologetics." *Id.* at 206 ¶ 7. The latter was a survey of world religions and perspectives—in other words, a comparative-religion course. *Id.* In it, Tucker presented Christianity as a "credible worldview" alongside other credible worldviews, both religious and nonreligious. *Id.* The leadership course covered leadership principles from a general Christian perspective.

[1] App. I and App. II are volumes I and II of the School's appendix. Supp. App. is Tucker's supplemental appendix.

App. II 373:1-3. None of Tucker's classes involved teaching the Bible or specific theology. App. I 206 ¶¶ 6-8.

The students and their families belonged to many different churches and faith traditions, including conservative evangelical, liberal evangelical, Lutheran, Catholic, Baptist, Presbyterian, Mormon, Buddhist, Hindu, and atheist. *Id.* at 206-07 ¶ 9. Most of Tucker's students did not attend Faith Bible Chapel, the church with which the School is affiliated. *Id.* Nor did Tucker or many his colleagues—some of whom attended churches with different beliefs, *id.* at 207 ¶ 10, and some of whom openly disagreed with Faith Bible Chapel's doctrine, *id.* at 207 ¶ 11.

Because of the wide array of denominations and belief systems among the students, the School required Tucker in all his teaching to avoid preferring one Christian belief system over others. *Id.* at 206 ¶ 7. And the administration instructed Tucker and the other teachers to accommodate diverse religious perspectives and to avoid preaching to students. *Id.* at 207 ¶ 12, 208 ¶ 15. If students had specific theological questions, Tucker was not to answer but instead was supposed to encourage them to direct those questions to their parents or pastors and to reflect on the questions for themselves. *Id.* at 208 ¶¶ 15-16. And although teachers were told to set a moral example and to "integrate a Christian worldview" into their teaching, the School neither trained nor instructed Tucker on what that worldview

should be, other than saying that it was "Bible-oriented." *Id.* at 207 ¶¶ 14, 18.

The School expressly affirmed that Tucker was not a minister: When he asked whether he was eligible to claim a tax deduction for ministers' housing costs, the superintendent informed him that he "did not qualify because [he] was not a minister." *Id.* at 210 ¶ 29.

Starting in 2014, the School supplemented Tucker's classroom-teaching duties by making him the high school's Director of Student Life. *Id.* at 205 ¶ 2; 208 ¶ 19. His additional duties included organizing community-service and mentoring opportunities for students, answering parents' questions about their children's progress, addressing student discipline issues, and promoting a positive student climate. *Id.* at 209 ¶ 23. He was not responsible for counseling or disciplining students with respect to religious doctrine and did not do so. *Id.* at 209 ¶¶ 24-25. When Tucker took on the additional duties, the superintendent had him choose his title from the following options: "Director of Student Life," "Dean of Student Life," and "Chaplain." Tucker chose Director of Student Life because he was not ordained clergy and because he thought that Chaplain would be a "disingenuous" label. *Id.* at 209 ¶¶ 21-22.

During the 2017-18 school year, Tucker helped with organizing weekly "chapel" meetings, which had previously been the responsibility of the high-

school principal, Andrew Hasz, until Hasz was promoted to superintendent. *Id.* at 209 ¶ 25. Though some of these assemblies included religious music and prayer, App. II 377:15-17, 391:24-25, 392:1-6, 15-22, they were simply opportunities to gather all the high-school students together. Despite the label "chapel," they often had little to do with religion and instead included school announcements, homecoming rallies, speeches for student-council elections, and other commonplace student assemblies. App. I 210 ¶ 26. They featured speakers of interest to the students, from a variety of religious and nonreligious backgrounds. *Id.*; App. II 377:5-13.

As a teacher, Tucker observed much overt racism among the student body. For example, students called Black classmates "n**ger" and "slave," "mock-execut[ed] minority students," and openly promoted neo-Nazism in class. App. I 32-33 ¶¶ 48-55 (alteration added).[2] In one particularly disturbing incident, several students wore KKK robes. *Id.* at 32-33 ¶ 54. Tucker, though white, was a target of students' racial slurs in connection with his adopted daughter, who is Black. *Id.* at 32 ¶ 48. For example, in student feedback following an assembly, comments referenced Tucker's

[2] In describing this racism and the events leading up to his termination, Tucker cites to the Complaint because discovery on the merits has not started.

daughter (who was not a student), and some called Tucker "n**ger father." *Id.* (alteration added).

For years, Tucker worked thoughtfully to change this toxic environment through dialogue with students, administrators, and alumni. To address the "egregious instances of racism," Tucker organized a symposium in January 2018 entitled "Race and Faith." App. I 34 ¶ 67; App. II 378:20-25, 379: 1-6. Working with the school's administrators, App. II 378:15-17, 379:14-17, Tucker carefully planned the symposium over the course of a year, including speaking with students and alumni of color, who shared with him their "struggles with social and cultural stigmas" in their interactions with students and teachers and "an overall insensitivity, ignorance, and apathy when it came to issues of race, culture, and ethnicity." App. I 164.

The administrators approved of the event beforehand. *Id.* at 35 ¶ 68. And they expressed their satisfaction with it afterwards: Superintendent Hasz e-mailed Tucker to praise him for the successful event, *id.* at 35 ¶¶ 72-74, and Principal Cook told Tucker via text that he "thought the panel was great!" and that Tucker was "incredibly valued at FCHS!," *id.*

But some students and parents were upset. The students who had been responsible for some of the racist behavior and their parents complained to the administration. *Id.* 26 ¶ 3, 36 ¶¶ 76-77. One parent, for example, complained that if she wanted her child exposed to anti-racism she would

send him to a public school in a historically Black neighborhood in Denver (which was nowhere near the School here). *Id.* at 37 ¶¶ 85-86.

As these parents continued to complain, the administration's position changed: Having praised the program, the School now relieved Tucker of his planning duties for the weekly assemblies. *Id.* at 211 ¶ 31. It also stripped his title and other duties as Director of Student Life, leaving only his function as a regular classroom teacher. *Id.* When Tucker met with Hasz, Cook, and a member of the school board to express his frustration at the loss of the additional duties, the board member told him, "Sorry if this sounds harsh, Gregg, but this is a business, and if we lose a dozen students, teachers start losing their jobs." *Id.* at 40 ¶ 103. The next month, the School fired him. App. II 398:16-25.

The School's explanations for the termination were inconsistent. Despite Tucker's refusal to sign an agreement stating that the separation was mutual, the superintendent e-mailed all the School's parents, stating that Tucker had agreed to resign and that the decision had "nothing to do" with "race or equality." App. I 42-43 ¶¶ 120-21, 124. The next day, the superintendent told the faculty that Tucker resigned because he had been "guilty of insubordination." *Id.* at 43 ¶ 122. At other times, however, the superintendent acknowledged that the School had fired Tucker, and that it did so because of the backlash from some parents over the symposium. *Id.*

at 42 ¶ 117. At no point before this litigation did any member of the administration say that Tucker was fired because of a theological disagreement.

B. Procedural Background

Tucker filed suit in June 2019, claiming common-law wrongful termination and also retaliation in violation of Title VII. *Id.* at 43-45 ¶¶ 126-34, 46-47, ¶¶ 141-151.[3]

Before any discovery, the School filed a Rule 12(b)(6) motion to dismiss, arguing that Tucker was a minister and therefore the ministerial exception barred his claims. *Id.* at 83. Relying almost exclusively on Tucker's employment contract and the School's teacher handbook, it contended that Tucker's duties "required him to teach and share Faith Bible's religious message to Faith Bible's students." *See id.* at 90. Because the School included and relied on exhibits, the district court converted the motion to dismiss to a motion for summary judgment, *id.* at 6, at which point the parties conducted limited discovery solely on the applicability of the ministerial exception, *see* Supp. App. 12-13, 15.

In his opposition, Tucker argued and presented evidence that he was not a minister. He explained that his duties were those of a secular teacher and

[3] He raised a Title VI retaliation claim as well, but did not oppose its dismissal. App. I 273 n.1.

that the School had instructed him *not* to preach to his students and not to teach any specific religious doctrine, whether of Faith Bible Chapel or otherwise. App. I 179, 182-83. And he argued that he had neither the experience nor the qualifications to be a ministerial employee. *Id.* at 180.

The district court denied summary judgment. *Id.* at 273, 285. Laying out the evidence presented by both sides, the court found that there were genuine, material disputes as to "the facts and circumstances of [Tucker's] employment." *Id.* at 284. For example, the evidence was that Tucker was not required to teach any theology or "distinct or unique Christian principle" in his science classes. *Id.* at 279. Tucker's evidence also showed that while his Leadership and Worldviews courses included portraying Christianity as one "credible worldview" among many, the School required him to "avoid the advancement of one Christian perspective over another." *Id.* On the School's side, the district court noted that the teacher handbook described School employees as ministers and described its faculty as "committed to the integration of biblical truth within each academic and extra-curricular discipline." *Id.* at 276. Though the School provided an extension agreement describing Tucker's position as "Chaplain," *id.* at 275, the weight of the evidence was that his title and position were "Director of Student Life," and that is how he, the students, the faculty, and the administration all referred to him, *id.* at 280.

Because of the numerous factual disputes about Tucker's job responsibilities and circumstances the court found summary judgment inappropriate. *Id.* at 284.

Rather than moving for certified appeal under 28 U.S.C. § 1292(b), the School instead immediately filed a notice of appeal in this Court.

The School also filed with the district court a motion to reconsider the summary-judgment denial. That motion reargued the School's position on the ministerial exception and also—and for the first time—asserted the distinct legal issue that church-autonomy concerns beyond the ministerial exception justified granting summary judgment as well. The district court denied the reconsideration motion without issuing a further written opinion. App. II 516. The School added that denial to this appeal. *Id.* at 518.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to hear this appeal. Courts of appeals generally have jurisdiction to hear appeals only from final decisions. *See* 28 U.S.C. § 1291. Under the collateral-order doctrine, the courts can hear appeals of a narrow group of nonfinal, interlocutory decisions. A class of orders can be collateral only if they are conclusively decided, important questions completely separate from the merits of the claims, and are otherwise effectively unreviewable on appeal.

The collateral-order doctrine has always been interpreted narrowly. And in recent years the Supreme Court and this Court have cautioned against expanding it, instead strongly preferring the rulemaking power granted to the courts by Congress. The School offers no explanation why this Court should expand the doctrine to cover two new classes of collateral orders—denials of summary judgment under the ministerial exception, and an improperly-raised church-autonomy argument. This Court should reject the School's request for such a radical departure from precedent and procedure.

Nor does the district court's order satisfy any of the three requirements for a collateral order. The district court did not conclusively determine the applicability of the ministerial exception; rather, it *refused to decide* whether that defense applies here because of disputes of material fact. And because application of the ministerial exception is intertwined with the merits of employment claims, it would be reviewable on appeal from a final judgment. As for church autonomy, because the district court never addressed this argument, it could not have been conclusively decided. Plus, even more than the ministerial exception, church autonomy is intertwined with the merits because it raises disputed questions about why Tucker was fired; and it will be reviewable on appeal after judgment.

Finally, this Court's interlocutory jurisdiction is limited to purely legal issues; it cannot resolve factual disputes. *See Johnson*, 515 U.S. at 307.

Because this case presents myriad disputes of fact as to Tucker's job responsibilities and circumstances—disputes that the School either ignores or resolves in its own favor—the Court has no jurisdiction.

II. Even if there were jurisdiction, the district court correctly found that factual disputes prevented ruling as a matter of law on the ministerial exception. Application of the exception turns primarily on an employee's day-to-day functions. Viewing the facts in the light most favorable to Tucker, what Tucker did was overwhelmingly secular. Unlike the teachers whom the Supreme Court has deemed ministers, Tucker did not teach theology or lead prayer, and the School encouraged him not to convey messages about church doctrine. And although the School makes much of Tucker's organizing weekly "chapel" meetings, it glosses over the many secular aspects of these meetings and ignores that the more religious aspects of the assemblies were managed by others.

What is more, the School did not hold Tucker out as a minister and, in fact, told him he was *not* one. Neither did *Tucker* hold himself out as a minister, specifically declining the title "Chaplain" because of its religious connotations. And unlike the teachers who were responsible for teaching theology, Tucker was not required to have any training in the School's religious doctrine.

Under those facts, the district court correctly refused to decide that, as a matter of law, Tucker was a minister.

III. As for the School's argument that a "broader" church-autonomy doctrine bars Tucker's claims, the School forfeited that issue for purposes of this appeal by failing to raise it properly in the district court. Furthermore, whereas the church-autonomy doctrine prohibits courts from making religious doctrinal decisions, no such decision would be required here. The School asserts, without any factual support, that it fired Tucker because of disagreements over biblical interpretation about race. But Tucker has alleged, and plans to show, that his firing was instead discriminatory retaliation. Tucker alleges nothing about the School's beliefs on race, and the district court will not have to make any prohibited religious decisions about those beliefs.

ARGUMENT

I. The Court lacks jurisdiction to hear this appeal.

This Court's jurisdiction is generally limited to reviewing "final decisions" of the district courts. *See* 28 U.S.C. § 1291. A "final decision" fully resolves all claims, so all that remains is execution of the judgment. *See Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981). Denials of summary judgment, like the order here, are not final decisions. *See, e.g.*, *Ralston v. Cannon*, 884 F.3d 1060, 1066 (10th Cir. 2018).

Section 1291 permits immediate appeals of a "small class" of nonfinal, "collateral" orders. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Collateral orders "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*

The collateral-order doctrine is narrow and stringent, so as to preserve the general rule that only final orders may be appealed. *See, e.g.*, *Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994). And while the doctrine has always been narrowly interpreted, *see Will v. Hallock*, 546 U.S. 345, 350 (2006), the Supreme Court has recently gone yet further, strongly disfavoring expansion of the doctrine to new areas of law. *See, e.g.*, *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 113 (2009). So too has this Court. *See McClendon v. City of Albuquerque*, 630 F.3d 1288, 1296 n.2 (10th Cir. 2011) (Gorsuch, J.).

Yet the School asks this Court to ignore the strict jurisdictional bar and create an entirely new class of appealable collateral orders for two new substantive legal defenses—one of which the School did not even properly raise (hence the district court did not address). Even setting aside the audaciousness of that request, the School cannot show that these classes of appeals satisfy the collateral-order doctrine's stringent test. And in all

events, adjudicating the merits now would require this Court to resolve factual disputes, which it cannot do even for legitimate collateral orders. *See Johnson*, 515 U.S. at 307. The merits of the appeal should not be entertained.[4]

A. Exercising appellate jurisdiction here would considerably expand the collateral-order doctrine, contrary to the Supreme Court's directive.

1. In 1988, after years of patchwork collateral-order decisions, Justice Scalia diagnosed that the courts' "finality jurisprudence is sorely in need of further limiting principles." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 292 (1988) (Scalia, J., concurring). Congress responded by amending the Rules Enabling Act to empower the Supreme Court to issue rules defining which orders should be considered final and appealable under Section 1291. *See* 28 U.S.C. § 2072(c) (1990). And two years later, Congress gave the Supreme Court the power to specify through rulemaking which categories of nonfinal, interlocutory orders should be immediately appealable. *See* 28 U.S.C. § 1292(e) (1992).

In light of these statutory grants of authority, the Supreme Court recognized that the "procedure Congress ordered for such changes . . . is not

[4] The School insists, Br. 48, that Tucker has conceded a number of their jurisdictional arguments. That is not just incorrect but irrelevant: Jurisdiction cannot be waived. *See Digital Equip.*, 511 U.S. at 869 n.3.

expansion by court decision, but by rulemaking." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995). Rulemaking is the "preferred means for determining whether and when prejudgment orders should be immediately appealable," because it allows the judiciary to "draw[] on the collective experience of bench and bar" and to "facilitate[] the adoption of measured, practical solutions." *Mohawk*, 558 U.S. at 113-14.

That makes sense because application of the collateral-order doctrine was never meant to be an individualized, case-by-case inquiry anyway. *See Digital Equip.*, 511 U.S. at 868. Rather, the question is whether an *entire category* of orders should be immediately appealable before final judgment. *Id.* Hence, considered rulemaking allows for a measured, informed approach, unlike *ad hoc* "judicial decisions in particular controversies." *Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) (quoting *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017)).

Accordingly, the Supreme Court has refused time and again to expand the collateral-order doctrine. For if the courts could instead expand appellate jurisdiction over interlocutory orders willy-nilly, "Congress['s] final decision rule would end up a pretty puny one." *Baker*, 137 S. Ct. at 1715 (quoting *Digital Equip.,* 511 U.S. at 872). The Supreme Court has thus ensured, in keeping with logic and congressional intent, that the final-decision rule preserves the role of the district court, ensures efficiency by

requiring that all appealable issues be raised in a single appeal on a fully developed record, and preserves judicial and party resources by avoiding multiplicative, piecemeal appeals. *See Risjord*, 449 U.S. at 374; *Johnson*, 515 U.S. at 309.

Indeed, so compelling is this logic that Justice Thomas has argued that the courts should categorically cease relying on *Cohen* and the collateral-order doctrine as a basis for expanding appellate jurisdiction; instead, the rulemaking process should be the *only* source of new categories of interlocutory appeals. *Mohawk*, 558 U.S. at 115 (Thomas, J., concurring in part and in the judgment). Although *Mohawk* stopped short of fully abolishing the collateral-order doctrine, *see, e.g.*, *Los Lobos Renewable Power v. Americulture*, 885 F.3d 659, 667 (10th Cir. 2018), it clarified that the courts should at least be extraordinarily hesitant to expand the doctrine beyond the few situations for which it has already been applied. *Mohawk*, 558 U.S. at 113-14. The Supreme Court admonished that "any further avenue for immediate appeal of [interlocutory] rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides." *Id.* at 114.[5]

[5] The Supreme Court has used the rulemaking power when appropriate: Having previously ruled that denials of class certification did not satisfy the collateral-order doctrine's requirements, *see Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court later concluded through rulemaking that

This Court has taken that "admonition" to heart, "and out of deference to Congress' authority to define our appellate jurisdiction" has refused to find new jurisdiction over interlocutory orders "based on our own subjective balancing of the interests involved." *In re Motor Fuel Temperature Sales Pracs. Litig.*, 641 F.3d 470, 487 (10th Cir. 2011). The Court thus directed that "any pleas to expand appellate jurisdiction ought to be directed to the Rules Committee, not our doorstep." *McClendon*, 630 F.3d at 1296 n.2 (Gorsuch, J.).

2. Yet without even passing mention of the strong admonition against creating new areas of appellate jurisdiction in particular cases, the School asks this Court to do precisely that. Specifically, it asks this Court to create appellate jurisdiction (1) to review denials of summary judgment under the ministerial exception—when the denial was because of disputed facts, no less—and (2) to apply the church-autonomy doctrine in the first instance, when the defendant did not properly raise, and the district court therefore did not consider, that defense.

The School fails to identify even a single case in which any federal court has ever exercised appellate jurisdiction over an interlocutory appeal from a denial of summary judgment on a defendant's ministerial-exception

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immediate appeals of orders granting or denying class certification should be allowed, and Federal Rule of Civil Procedure 23(f) was born.

defense. The closest that the School comes is to point to some state-court decisions, *see* Juris. Mem. 20, without acknowledging that state courts have their own jurisdictional rules and are not bound by Section 1291 or federal precedent on the stringent application of the collateral-order doctrine. The School does not explain why state-court procedures should have any bearing on *federal* appellate jurisdiction, and we cannot fathom any.

Nor does the School explain why the collateral-order doctrine either can or should be expanded to cover interlocutory refusals to rule as a matter of law in favor of defendants who assert a "broader," Br. 51, church-autonomy defense. Though the School points to a case in which the Seventh Circuit allowed an interlocutory appeal of a question of religious doctrine (namely, the judicial determination whether one of the parties was a Catholic nun), Juris. Mem. 19, that court allowed the appeal only after the district court had decided that a jury would answer that purely religious question, *see McCarthy v. Fuller*, 714 F.3d 971, 974, 976 (7th Cir. 2013). And the Seventh Circuit later clarified that a ruling respecting an assertion of religious autonomy is *not* immediately appealable if it does not *necessarily* require resolution of a question of religious doctrine. *Herx v. Diocese of Fort Wayne–S. Bend*, 772 F.3d 1085, 1091 (7th Cir. 2014).

Here, of course, the district court did not resolve—or even consider—any question of religious doctrine, nor was any properly raised. Rather, the

School simply shoehorned a vague invocation of church autonomy into a motion for reconsideration that was decided without opinion and now wishes to present to this Court what it thus far declined to present below. Whatever basis one might assert for expanding appellate jurisdiction over some subset of rulings deciding religious questions, it certainly should have no bearing when no such ruling was made and no church-autonomy defense was properly advanced.

B. The district court's orders do not satisfy the requirements for a collateral order under *Cohen*.

The novelty of this appeal alone is reason enough to reject it. But even if creating new categories of collateral orders were not so strongly disfavored, there still would be no jurisdiction here. An immediately appealable collateral order must: (a) conclusively determine a disputed question; (b) resolve an important issue completely separate from the merits; and (c) be effectively unreviewable on an appeal from a final judgment. *Mohawk*, 558 U.S. at 106. The appellant bears the burden of showing that each issue raised on interlocutory appeal satisfies all three requirements. *See, e.g.*, *In re Magic Circle Energy Corp.*, 889 F.2d 950, 954 (10th Cir. 1989). The School satisfies none of them.

1. There is no jurisdiction to decide the ministerial-exception arguments.

a. The School's ministerial-exception arguments fail on the first *Cohen* factor because the issue was never conclusively determined. Under *Cohen*, the appealed order must be a "complete, formal and, in the trial court, final rejection" of the issue. *Abney v. United States*, 431 U.S. 651, 659 (1977).

A denial of a motion for summary judgment based on disputes of material fact will rarely, if ever, satisfy this requirement.[6] That is because the district court explicitly does *not* decide the issue. Here, the district court did not decide whether Tucker was a minister but instead found that there was sufficient evidence supporting each party to preclude judgment in the School's favor as a matter of law. That ruling is "'inherently tentative' in this critical sense—because it is not 'made with the expectation that it will be the final word on the subject addressed.'" *See Gulfstream Aerospace*, 485 U.S. at 278. Under even the most expansive definition of "conclusive," that is not a conclusive decision.

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[6] The School points to *Scott v. Harris*, 550 U.S. 372 (2007), to conclude that courts can exercise jurisdiction even when a district court decides that there are issues of material fact. Br. 50. But the School neglects to mention that the supposed factual dispute in *Scott* was "so utterly discredited by the record"—there, a video of the incident—"that no reasonable jury could have believed" it. *Id.* at 380. The School does not point to a whit of evidence like that.

b. Turning to the second *Cohen* factor, the district court's order did not resolve issues separate from the merits. The most crucial inquiry in assessing the applicability of the ministerial exception is "what an employee does." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020). And the Supreme Court underscored that this inquiry is highly fact-bound, requiring a court to look closely at what the employee actually does day-to-day, while also considering details like titles, training, job description, job duties, and qualifications. *Id.* at 2062; *accord Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012). These same questions about qualifications and what an employee does are also at the heart of the merits determination for Title VII claims. *See, e.g.*, *Fischer v. Forestwood Co.*, 525 F.3d 972, 978-79, 982 (10th Cir. 2008). To second-guess the district court's denial of summary judgment under the ministerial exception, this Court would also have to decide core elements of Tucker's retaliation claim—before the district court ever weighed in on them.

To reiterate, though, it also doesn't matter whether the district court here would in fact need to decide whether *Mr. Tucker* was a qualified teacher, because the collateral-order doctrine focuses on the entire category to which a claim belongs. *Digital Equip.*, 511 U.S. at 868. Recognizing appellate jurisdiction here would open the door to interlocutory appeals

involving all manner of nonfinal district-court rulings respecting fact-bound questions of qualifications, job duties, functions, and the ministerial exception, prematurely enmeshing this Court in countless merits decisions going forward.[7]

The requirement that the appealed issue be separate from the merits stems from the final-judgment rule. *Johnson*, 515 U.S. at 311. That is because when the issues on interlocutory appeal are truly distinct from the merits, there is little risk that a court of appeals will have to take them (or similar issues) up again later, in a subsequent appeal. *Id.*

Take this case as an example. If this Court were to accept jurisdiction and then affirm the decision that disputes of material fact preclude a dispositive application of the ministerial exception at this juncture, the matter would then proceed to merits discovery. At that point the School could file for summary judgment again, raising church autonomy for the first time and asserting the ministerial exception a second time based on evidence collected during full merits discovery (which has not yet begun). If the district court denied that motion, the School could bring a second

[7] *Cf., e.g.*, *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005) (considering employees' relative qualifications in assessing Title VII failure-to-promote claim); *Casalina v. Perry*, 708 F. App'x 938, 941 (10th Cir. 2017) (unpublished) (comparing female and male employees' levels of experience and education in addressing Equal Pay Act claim).

interlocutory appeal on the same issues as here. And then, if the case were remanded for trial and the factfinder concluded that Tucker was not a minister, the School would then have a *third* appeal of these same issues after final judgment.

But that is not all. Consider *Starkey v. Roman Catholic Archdiocese*, __ F.Supp.3d. __, No. 19-cv-3153, 2020 WL 6434979, at *1 (S.D. Ind. Oct. 21, 2020), *appeal docketed*, No. 20-3265 (7th Cir. 2020). The defendants there, represented by the same counsel as the School is here, are currently attempting an interlocutory appeal on Title VII religious-exemption and church-autonomy grounds from a denial of a motion for judgment on the pleadings. The district court there ruled only that discovery was warranted before it could properly address those issues. Under the School's theory, there is no reason for a defendant not to appeal a denial of a motion to dismiss, then appeal again (as here) after limited discovery on the ministerial exception, appeal a third time on denial of summary judgment after merits discovery, *and* appeal a fourth time on final judgment.

Beyond the strain that this piecemeal approach to litigation would put on the courts—clogging the dockets of both the district and circuit courts—it would harm litigants who must endure appeal after appeal, and all the associated time and expense, before they can finally have their day in court. *See Risjord*, 449 U.S. at 374.

c. Even if the first two *Cohen* factors were satisfied, the district court's decision here would still be fully reviewable after final judgment, thus precluding application of the collateral-order doctrine. The ministerial exception protects religious organizations' power to select who serves as a minister of the faith. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 188-89. It "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." *Id.* at 195 n.4. And when there is a dispute of material fact, the proper response is to "remand for a trial." *Morrissey-Berru*, 140 S. Ct. at 2056 n.1. As with any other ordinary interlocutory order, if the trial court gets it wrong, this Court can reverse and correct the error on appeal from the final judgment. Thus, the ministerial exception "should be characterized as the right not to be subject to a binding judgment of the court," which means that "it could therefore 'be effectively vindicated following final judgment,'" *Digital Equip.*, 511 U.S. at 874 n.4 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526-27 (1988)).

That approach aligns with the Supreme Court's treatment of Religion Clause issues generally. For example, a religious organization may be required to undergo state administrative investigations and proceedings before even being able to raise a Religion Clause-based challenge to those proceedings. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs.*, 477 U.S. 619, 629 (1986). Thus, when Ohio's Civil Rights Commission

investigated and began administrative proceedings on a sex-discrimination claim against a religious school, and the school filed suit in federal court to block the investigation on the assertion that the proceedings and any potential penalties would violate the First Amendment, *id.* at 624-25, the Supreme Court held that the district court must abstain from hearing the challenge, *id.* at 628. The Civil Rights Commission "violate[d] no constitutional rights by merely investigating the circumstances of [the teacher's] discharge." *Id.* That was so notwithstanding whether Ohio law forbade the Civil Rights Commission to consider the school's First Amendment objections in the administrative proceedings. *Id.* at 629. Because the school could seek judicial review once those proceedings were complete, that was quite enough. *Id.*

Ignoring *Dayton* altogether, the School insists that the ministerial exception must be resolved on interlocutory appeal at the earliest moment because it is not just an exemption from liability, but an absolute right not to participate in legal proceedings. But the federal courts appropriately view "with skepticism, if not a jaundiced eye" arguments of a right to be free from trial, especially when there is no textual basis for that asserted right. *Digital Equip.*, 511 U.S. at 873-74. And whereas the Double Jeopardy Clause and the Speech or Debate Clause are, by contrast, appropriate for interlocutory appeal as collateral orders because they are explicit

constitutional immunities from suit and not just from liability, *see* U.S. Const. amend. V (no one shall "be subject for the same offense to be twice put in jeopardy"); U.S. Const. art. I, § 6, cl. 1. (members of Congress "shall not be questioned in any other place"), nothing in the text of the Religion Clauses supports treating the ministerial exception as absolute immunity from suit. *Cf. Flanagan v. United States*, 465 U.S. 259, 267 (1984) (characterizing Double Jeopardy and Speech and Debate clauses as "*sui generis*").

And even when postjudgment appeal cannot completely redress asserted harms from an interlocutory order, a party may *still* be required to wait. *See Mohawk*, 558 U.S. at 107. For example, postjudgment review is sufficient to correct a discovery order improperly requiring a party to share privileged information, even if the party argues that the privilege "does not merely 'prohibit use of protected information at trial'" but also "provides a 'right not to disclose the privileged information in the first place.'" *Id.* at 109. Indeed, postjudgment review is sufficient for most pretrial discovery orders, *see Risjord*, 449 U.S. at 377, even though the sharing of information in discovery cannot fully be undone.

In all events, casting an assertion of a right to avoid the burdens of discovery and trial as effectively unreviewable on appeal after a final judgment "is too easy to be sound." *Hallock*, 546 U.S. at 350-51. Many

pretrial orders address issues that could be characterized as implicating a right not to stand trial, including those dealing with personal jurisdiction, statutes of limitations, the Sixth Amendment right to a speedy trial, claim preclusion, and summary judgment. *See Digital Equip.*, 511 U.S. at 873. To treat all such orders as collateral and subject to immediate appeal "would leave the final order requirement of § 1291 in tatters" and wholly undermine the strong jurisprudential and social interests in saving appellate review for after final judgment. *Hallock*, 546 U.S. at 351.

Without any textual or historical support, the School and its amici posit that the ministerial exception is like qualified immunity and should therefore be treated as such for purposes of interlocutory appeal. But qualified immunity is a unique area of law—a judicial creation justified by structural concerns about the basic functioning of government. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It is about not overdeterring public officials from performing governmental functions in accordance with their best judgment because of fear that they might face surprise litigation and liability in their personal capacities—for that would interfere with the basic functioning of the government itself. *Id.* The ministerial exception, by contrast, is a *limitation* on governmental authority. *Hosanna-Tabor*, 565 U.S. at 195. And it normally arises, as here, in suits between private parties that in no way implicate the orderly functioning of government. *Cf. Auraria*

Student Hous. at the Regency v. Campus Vill. Apartments, 703 F.3d 1147, 1151 (10th Cir. 2013) (distinguishing between government parties and private parties in determining whether denials of antitrust immunity are appealable collateral orders).

Finally, the School argues that because this Court reviewed free-speech rights on interlocutory appeal in *United States v. P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992), it can address other First Amendment rights also. *See* Juris. Mem. 12, 17-18; Br. 47-48. But *P.H.E.* was based on "an unusual, perhaps unique confluence of factors: substantial evidence of an extensive government campaign, of which this indictment is only a part, designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights." 965 F.2d at 855. Subsequent decisions by this Court confirmed that these considerations were "essential predicates" to the interlocutory review. *See, e.g.*, *United States v. Wampler*, 624 F.3d 1330, 1340 (10th Cir. 2010) (denial of motion to dismiss arguing that defendant was being prosecuted in response to exercise of First Amendment right of access to the courts was not a collateral order); *see also United States v. Quaintance*, 523 F.3d 1144, 1146-47 (10th Cir. 2008) (denial of motion to dismiss premised on Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act was not a collateral order, despite

alleged concerns about chilled religious-exercise rights). None of the additional factors from *P.H.E.* are present here.

2. There is no jurisdiction to decide the church-autonomy arguments.

a. This Court also lacks jurisdiction to address the School's church-autonomy arguments because they were not properly raised below.

The School's motion to dismiss was premised on the ministerial exception. It did not present church autonomy as an additional or alternative ground for dismissal, App. I 83-97, as the School does now, Br. 37-43. Although the School did make brief references to a supposed religious disagreement with Tucker (which was not alleged in the Complaint), it did so only in arguing the applicability of the ministerial exception. App. I 84, 89-91, 93-95. Indeed, the School characterized that supposed dispute as "the same alleged ministerial controversy and disagreement," *id.* at 93, arguing that the First Amendment prevents courts from interfering with "a religious organization's right to select and employ the ministers that it believes best fit to convey its religious message," *id.* at 94. The School's reply likewise did not raise church-autonomy concerns as a separate issue but instead once again argued the ministerial exception. *Id.* at 220-29. As a result, the district court's order denying summary judgment quite rightly did not address the matter.

The School first mentioned a church-autonomy defense only in a single paragraph in its motion to reconsider, *id.* at 293-94, and the reply supporting that motion, App. II 507-08, by briefly alluding to supposed religious grounds for firing Tucker. But a motion to reconsider under Rule 59(e) may not be used to raise new issues that could have been included in previous briefing. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). And the motion for reconsideration was denied without an opinion. App. II 516-17.

Thus, the district court did not conclusively decide the matter, as *Cohen* requires, but rather never mentioned it.

But even if the School *had* properly raised church autonomy, the defense could not have been conclusively resolved at this stage. Application of the doctrine depends on whether the courts would be required to make religious decisions. *See, e.g.*, *Bryce v. Episcopal Church*, 289 F.3d 648, 657 (10th Cir. 2002). But Tucker alleged that he was fired in retaliation for speaking out against virulent racism, and those allegations must be taken as true at this stage, for there has been no discovery beyond the ministerial exception. So at this point the School is simply asserting, on appeal and without any factual support, that it fired Tucker over a religious disagreement. That cannot be enough to render the issue conclusively determined, as there was no basis to determine it at all—and the district court didn't purport to do so.

The order here is not a "complete, formal, and, in the trial court, final rejection" of the issue, *Abney*, 431 U.S. at 659.

b. As for the second *Cohen* factor, a church-autonomy defense is even more closely intertwined with the merits than is the ministerial exception. That is because the School is arguing that it did not demote or fire Tucker for retaliatory reasons, as Tucker alleged, but instead that it acted on nondiscriminatory reasons. The issue is not separate from the merits of a Title VII claim; it *is* the merits question. *See, e.g.*, *Fischer*, 525 F.3d at 979.

c. For similar reasons, the School's church-autonomy concerns can be adequately redressed on appeal from a final judgment. The School is raising a merits issue: whether its reason for firing Tucker was retaliatory or not. Far from being collateral, *see Herx*, 772 F.3d at 1091, it is likely *the* issue to be addressed on appeal of a final judgment.

More generally, most of the cases that the School cites for its church-autonomy argument were themselves appeals of final decisions. For example, where a state trial court entered a final judgment invalidating a church's reorganization from one diocese into three, the Supreme Court redressed the church's injury by reversing that decision. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 707-08, 724-25 (1976). And as explained above (at 21), although *Fuller* was reviewed interlocutorily, it was the rare case in which the jury was asked to decide not whether a

party's motivation was secular or religious, but instead whether a party was a nun—a purely religious question if there ever was one. *See* 714 F.3d at 976. And that religious question might not have been "germane to the appeal" of a final judgment, presenting an even greater reason to consider it on an interlocutory basis. *Id.* None of those concerns are present here.

C. Resolving the School's appeal would require this Court to resolve factual disputes, which it lacks jurisdiction to do.

1. There is yet another, independent reason why this Court cannot hear this appeal: Appellate jurisdiction over collateral orders is limited to purely legal issues, not factual disputes. *Johnson*, 515 U.S. at 307. When determination of a legal issue would depend on disputed facts, the Court lacks jurisdiction. *See, e.g.*, *Myers v. Okla. Cty. Bd. of Cty. Comm'rs*, 80 F.3d 421, 424-25 (10th Cir. 1996). Thus, this Court cannot entertain an appeal of a lower court's finding that a factual dispute exists and then resolve that factual dispute, even to address a purely legal question. *See, e.g.*, *Ortiz v. Jordan*, 562 U.S. 180, 188, 190-91 (2011). Because this case presents myriad disputes of material fact, the Court has no jurisdiction to decide the legal issues.

2. More concretely, determining whether the ministerial exception applies is a fact-intensive inquiry in which "[w]hat matters, at bottom, is what an employee does." *Morrissey-Berru*, 140 S. Ct. at 2064. And the

district court concluded that what Tucker did is precisely what is in dispute: The court laid out the evidence from both sides and found genuine material issues as to "the facts and circumstances of [Tucker's] employment." App. 1 274-82, 284.

For example, although the School pointed to documents that directed its teachers to incorporate the Bible into their teaching, Tucker put forward evidence that he was not in fact required to, nor did he. *Id.* at 276, 279-80. And while the School said that Tucker's Leadership and Worldviews and Apologetics courses were considered "Bible" courses, *id.* at 277, Tucker showed that he did not have the qualifications to teach classes about the Bible or theology, and that in teaching the courses he was instructed "to avoid the advancement of one Christian perspective over another because there were many Christian perspectives, as well as non-Christian perspectives, represented in the school." *Id.* at 279.

As for Tucker's work as Director of Student Life, the School pointed to Tucker's Extension Agreement for the 2017-18 school year, which referred to him as "Chaplain," and a single PowerPoint slide that described his position as "Director of Student Life/Chaplain." *Id.* at 275, 277. But when asked to choose his title from among "Director of Student Life," "Dean of Student Life," and "Chaplain," Tucker chose Director of Student Life because he did not think that Chaplain was an accurate label. *Id.* at 209

¶¶ 21-22. And he presented evidence that although the position was described as "Chaplain" in his employment contracts, he was not called chaplain by the students, teachers, or administrators. *Id.* at 280. Likewise, Tucker's e-mail signature, job description, and business cards identified him as Director of Student Life, not Chaplain. *Id.*

The district court observed that the School's evidence consisted primarily of formal documents, particularly employee handbooks and Tucker's employment extension contract. *Id.* at 284. Although these documents may be considered, under *Morrissey-Berru* they must be weighed against the far more important consideration of what Tucker actually did on a day-to-day basis. *See* 140 S. Ct. at 2064. Put another way, though the School presented documents characterizing its teachers as ministers and saying that they were supposed to integrate Christianity in their classes, Tucker presented evidence that these documents did not align with the School's actual expectations or the functions that the teachers performed: The School in fact expected and directed Tucker to avoid advancing particular religious principles in the classroom. If the School's formal documents spoke to Tucker's job responsibilities, they certainly did not establish him as a minister as a matter of law, and he presented evidence to the contrary that under *Morrissey-Berru* is far more probative and important, and certainly enough to raise genuine fact questions.

3. In finding disputes of material fact, the district court disagreed with the School's reliance on *Skrzypczak v. Roman Catholic Diocese*, 611 F.3d 1238 (10th Cir. 2010). *See* App. I 284-85. There, the defendant presented evidence that the plaintiff taught religion and that her religious duties were a significant portion of her job. *See* 611 F.3d at 1243-44. The plaintiff's only evidence that she was not a minister consisted of three affidavits written by others who merely repeated the standard for determining when a person is a minister but did not include any specific facts about the plaintiff's job responsibilities or functions. *Id.* at 1244. An affidavit from the plaintiff describing her functions would, in contrast, have been valuable for the court to consider in determining whether she was a minister. *Id.* at 1242-43.

But here, Tucker's declaration *did* include specific facts about his job. And additional evidence, including the depositions of Andrew Hasz and Tucker, countered and cast serious doubt on the School's description of Tucker's job responsibilities. In short, Tucker has presented exactly the kind of evidence that *Skrzypczak* said would justify a denial of summary judgment under the ministerial exception.

For this Court to determine whether the ministerial exception applies, it would first have to resolve these factual disputes about Tucker's job functions, responsibilities, qualifications, expectations, and more—

precisely the sorts of determinations that *Johnson* forbids. *See* 515 U.S. at 307.

4. The School contends that application of the ministerial exception is a pure question of law. To do so, it disregards Tucker's evidence and ignores the glaring factual disputes—or simply resolves them in its own favor. For example, the School describes Tucker as a "Bible teacher." Br. 33. Yet it elides Tucker's evidence that he taught no classes on the Bible or theology, App. I 206 ¶ 8, and that, unlike Tucker, the School's actual Bible teachers had specific training in the Bible, Supp. App. 22 121:4-11. Likewise, the School states that Tucker's work as Director of Student Life (which it stubbornly insists on labeling as "Chaplain") "'[f]ocused on students' 'spiritual wellbeing' and 'provid[ing] opportunities for student spiritual growth,'" Br. 26, while failing to acknowledge Tucker's evidence of his actual job responsibilities, App. I 209 ¶¶ 23-24. Just because the School ignores inconvenient facts, that does not mean they don't exist.

The School also wrongly contends that any disputes of fact are not material. That contention cannot be squared with *Morrissey-Berru*, which expressly held that "[w]hat matters, at bottom, is what an employee does." 140 S. Ct. at 2064. The district court found that there were numerous disputes of material fact and that Tucker had come forward with sufficient

facts for a jury to find in his favor. App. I 284-85. As such, the denial of summary judgment was proper.

* * *

The School asks this Court to wade into a contested—yet underdeveloped—factual record to answer one question that the district court determined was premature and another that was never even properly presented. To achieve that goal the School asks the Court to steamroll the principle that "[n]othing is to be more jealously guarded by a court than its jurisdiction." *United States v. Ceja-Prado*, 333 F.3d 1046, 1051 (9th Cir. 2003). This case does not justify creating two new categories of interlocutory appeals, both of which fail all the *Cohen* factors—especially because, to do so, the Court would also have to resolve numerous factual disputes, which it lacks jurisdiction to do. *See Johnson*, 515 U.S. at 307.

II. The district court correctly denied summary judgment as to the ministerial exception.

If this Court were to conclude that it has jurisdiction to decide now whether as a matter of law Tucker was a minister, the Court would be required to take Tucker's facts as true and draw "all justifiable inferences . . . in his favor," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Then, and only then, could the Court decide the legal question whether *those* facts demonstrate that Tucker was a minister. *Cf. Tolan v. Cotton*, 572 U.S.

650, 657 (2014) (applying this approach for qualified immunity). Considering those facts, the answer would be no, the School has not conclusively established that Tucker was a minister.

1. The ministerial exception is a limited exemption from liability under certain employment laws to ensure that religious entities can select "which individuals will minister to the faithful." *Hosanna-Tabor*, 565 U.S. at 188-89. In *Hosanna-Tabor*, the Supreme Court adopted a fact-intensive, case-by-case approach to determining whether an individual is a minister, rather than "adopt[ing] a rigid formula." *Id.* at 190. There, four considerations justified applying the ministerial exception to a Lutheran "called" teacher: (1) the school held her out as a minister, with the formal title "Minister of Religion, Commissioned"; (2) she had, and was required to have, considerable religious training and commissioning; (3) she held herself out as a minister, including claiming tax benefits exclusive to ministers; and (4) she had substantial religious functions "in conveying the Church's message and carrying out its mission," including teaching religion four times a week and leading students in prayer throughout the day. *Id.* at 191-92.

In *Morrissey-Berru*, the Supreme Court reaffirmed this case-by-case, fact-driven approach, underscoring that the most important consideration was the fourth *Hosanna-Tabor* factor—what the employee actually did—

and that the other three factors also remain pertinent. 140 S. Ct. at 2063-64.

2. Viewing the facts in Tucker's favor, and starting with that most important consideration—what he did—Tucker's job was a far cry from those of the teachers that the Supreme Court has deemed ministers.

The teachers in *Hosanna-Tabor* and *Morrissey-Berru* all taught religious doctrine. The teacher in *Hosanna-Tabor* taught religion four days a week. 565 U.S. at 192. Both teachers in *Morrissey-Berru* taught religion alongside secular subjects. 140 S. Ct. at 2057, 2059. By contrast, Tucker did not teach any "specific theology," nor was he required to set aside any class time to do so. App. I 206 ¶¶ 6-8, 207 ¶ 14. From the beginning, he was a science teacher. There "was no theology" or "unique Christian principle" in the classes, and the textbooks were those used by public schools. *Id.* at 206 ¶ 6.

Later, when Tucker also taught the Leadership and Worldviews and Apologetics classes, he was required and expected to avoid advancing one Christian principle over another. *Id.* at 206 ¶ 7. If students asked religious questions, he was supposed to direct them to their parents or family clergy, not to try to answer. *Id.* at 208 ¶¶ 15-16. He was not to preach or convey messages about church doctrine or theology, *id.* at 208 ¶ 15-16, 18, which made sense because the students came from a variety of faith traditions and backgrounds, including non-Christian and atheist, *id.* at 206-07 ¶ 9. And

other teachers were responsible for teaching classes on theology and the Bible; Tucker was not. *Id.* at 206 ¶ 8.

Moreover, the School never provided Tucker with any "interpretative guidance," "training, counseling, instruction, or literature" on how religion should guide his teaching, other than vaguely saying that it should be "Bible-oriented." *Id.* at 207 ¶¶ 13-14. Although teacher evaluation forms did include a small number of religion-related criteria, they were not weighted heavily in practice and were never even explained to Tucker. *See id.* at 208 ¶ 17, 216-17. And Tucker was not required to have classroom prayers. *See id.* at 154-56 (requiring classroom prayer for elementary- and middle-schoolers, but not for high school, which is all that Tucker ever taught); *see also id.* at 207 ¶ 14.

By contrast, the teacher in *Hosanna-Tabor* led her students in prayer three times each day and in other daily devotional exercises also, 565 U.S. at 192, and the two teachers in *Morrissey-Berru* would open or close each school day with a prayer and were the students' "primary teachers of religion," 140 S. Ct. at 2057, 2059, 2067.

As for Tucker's role as Director of Student Life, his duties included organizing community-service and mentoring opportunities for students, answering parents' questions about their children's progress, addressing student-discipline issues, and promoting a positive student climate. App. I

209 ¶ 23. He was not required to, and did not, discipline students who disagreed with the School's religious doctrine or counsel them on "what to believe." *Id.* at 209 ¶ 24.

Although Tucker became responsible during his final year at the School for helping coordinate weekly "chapel" assemblies, *id.* at 209 ¶ 25, the School explicitly stated it did not view those programs as church, *id.* at 210 ¶ 27. They were student assemblies, pep rallies, and the like, often featuring outside speakers, who came from a variety of religious and nonreligious backgrounds. *Id.* at 210 ¶ 26-27. And while many included religious music, Tucker was not involved in selecting the music; students did that. App. II 378:1-5, 391:24-25, 392:1-6. Similarly, while the meetings usually included prayer, and Tucker would sometimes pray at them like most everyone else, *id.* at 377:15-17, 19, the prayers, too, were organized and delivered by students, *id.* at 392:12-22, 393:1-3. Tucker "did not teach, lead, or plan devotions." *Id.* at 378:6-8. By contrast, the teacher in *Hosanna-Tabor* led daily devotional exercises and occasional worship services, 565 U.S. at 192, one of the teachers in *Morrissey-Berru* directed and produced the school's annual passion play, and both teachers in *Morrissey-Berru* regularly led the students in prayer, 140 S. Ct. at 2057, 2059.

Ignoring these facts, the School points principally to its teacher and employee handbooks to say that Tucker was a minister. But while the

religious entity's view of the employee's status is considered, it does not overcome what is actually required of the employee or what the employee actually does. *Morrissey-Berru*, 140 S. Ct. at 2064. And the vague requirement that teachers incorporate a religious perspective in their classes is not enough to make them ministers as a matter of law. *See, e.g.*, *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396 (4th Cir. 1990) (that sort of requirement combined with requirement to agree to a statement of faith insufficient to make employee a minister). Viewing the evidence in the light most favorable to Tucker, there is at the very least a significant dispute as to whether the written expectation aligns with what the School truly required of Tucker and what he actually did. *See, e.g.*, App. I 208 ¶¶ 15-16, 18.

3. Nor do the other *Hosanna-Tabor* factors establish Tucker as a minister as a matter of law—which is what matters on summary judgment. First, Tucker did not have the title of minister, and when he asked the School about a tax benefit available to ministers, he was expressly told he "did not qualify because [he] was not a minister." *Id.* at 210 ¶ 29.

Though the School ignores that it told Tucker he *wasn't* a minister, it suggests that his title as "teacher" supports an inference that he was a minister. Br. 32. But the title that mattered in *Hosanna-Tabor* was "Minister of Religion, Commissioned"; all the teachers, ministerial or

otherwise, were "teachers." 565 U.S. at 177, 191. And even that special ministerial title was merely a factor in the inquiry. *Id.* at 193. If being a Minister of Religion, Commissioned, did not dispositively make her a minister, surely the secular title "teacher" does not.

And while the School also attempts to characterize Tucker specifically as a "Bible" teacher, Br. 32-33, Tucker presented evidence that he did not teach classes about the Bible or theology, App. I 206 ¶¶ 6-8. He was, first and foremost, a *science* teacher. The two classes he ultimately taught that were housed within the "Bible Department" were not courses on the Bible or theology, *id.*,—they were in effect comparative-religion classes. And Tucker did not believe himself qualified to teach theology or the Bible because he lacked the religious training to do so. *Id.* at 206 ¶ 8.

4. Nor did Tucker ever hold *himself* out as a minister. *Cf. Hosanna-Tabor*, 565 U.S. at 191-92. Indeed, when given the opportunity to choose his title, he specifically refused a religious-sounding one, because he "believe[d] it would be disingenuous for [the School] to refer to [him] as a chaplain." App. I 209 ¶¶ 21-22.

5. Tucker was not required to have any training in the School's religious doctrine, or in Christian doctrine generally. *Id.* at 206-07 ¶¶ 8, 13-14. He was not required to attend Faith Bible Chapel, which would have exposed

him to the church's beliefs and teachings, whereas the *church's* employees *were* required to attend. *Id.* at 207 ¶ 10, 236.

By contrast, the plaintiff in *Hosanna-Tabor* was required to take eight college-level religion courses in subjects that included biblical interpretation and Lutheran doctrine, obtain an endorsement from her local Synod, and pass an examination—a process that took her six years. 565 U.S. at 191. And while the Supreme Court viewed religious training as less relevant in *Morrissey-Berru*, where the plaintiffs taught elementary students, for whom religious training would be less expected, 140 S. Ct. at 2064, both teachers were considered "catechists" specially trained to teach Catholic doctrine, *id.* at 2067 & n.28.

As for Tucker, he taught high school. And the high-school teachers who taught religion classes typically *did* have specific training in theology, such as seminary education or ordination. App. I 206 ¶ 8; Supp. App. 22 121:4-11. For teachers generally, the job description did not list or identify any religious training as a job requirement, App. I 213, and nor did the School's superintendent, Supp. App. 22 121:4-11. And although the Director of Student Life job description called for "a passionate relationship with Jesus Christ" and a desire to help build students' relationships with Christ, it did not list any required religious training or formal qualifications. App. I 218.

Having not required any religious training or qualifications, the School nonetheless points to Tucker's involvement during college with religious groups and that he happened to minor in religious studies. Br. 33. But only one of his college courses covered the Bible; the others for his minor were in comparative religions and counseling. App. II 306:11-25. And wide-ranging interests as an undergraduate, not required for obtaining or keeping a teacher post, hardly make one a minister as a matter of law.

6. Finally, the School's argument that the Court should defer to its characterization of Tucker as a minister is simply wrong. In *Morrissey-Berru* and *Hosanna-Tabor*, the Supreme Court refused to adopt that standard and instead imposed the multifactor judicial inquiry just described. *Compare Morrissey-Berru*, 140 S. Ct. at 2063, *and Hosanna-Tabor*, 565 U.S. at 190-92, *with Morrissey-Berru*, 140 S. Ct. at 2069-70 (Thomas, J., concurring) (arguing instead for deference to a religious entity's good-faith characterization of its employee), *and Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring) (same).

And for good reason. The ministerial exception is a *legal* standard that defines *legal* rights and duties for *legal* purposes, not theological ones. So it requires a *legal* test. *See, e.g.*, *Morrissey-Berru*, 140 S. Ct. at 2063. A religious entity can as a theological matter consider everyone, or no one, to be a minister, and the courts should not second-guess that theological view.

Here, for example, the superintendent testified that he would consider the school nurse, athletic coaches, and potentially the maintenance staff all to be ministers. *See* Supp. App. 22 124:12-25, 23 131:15-19, 132:7-18. And the employee handbook labels *all* teachers and "full-time worker[s]" as such. App. I 109. As a matter of church doctrine, all students and members of the church could be viewed that way also—or the church could decline to recognize anyone as a "minister." *See Hosanna-Tabor*, 565 U.S. at 202-03 (Alito, J., concurring). But for apportioning constitutional rights and duties and all the legal consequences that follow from them, deference to those views makes no sense. An employer's subjective view, though it may have bearing, can hardly be the last word.

* * *

Again, what matters most "is what an employee does." *Morrissey-Berru*, 140 S. Ct. at 2064. And when the facts are viewed in the light most favorable to Tucker, as they must be on summary judgment, it cannot be said that he is a minister as a matter of law.

III. The church-autonomy doctrine does not apply.

The School argues that regardless of whether Tucker was a minister, his claims are barred by the church-autonomy doctrine. Br. 37-43. As already noted, the School's failure to raise that issue in its motion to dismiss (or reply) forfeited it for purposes of this appeal. Beyond that, no court has

treated the church-autonomy principle as expansively as the School urges. This Court should not be the first.

A. The School forfeited the church-autonomy issue for purposes of this appeal.

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). As already explained (at 32-33), the School did not properly raise its church-autonomy issue in the district court. It did not invoke the doctrine in its initial motion. It did not invoke it in its reply. Instead, it waited to mention church autonomy as an issue distinct from the ministerial exception until its motion for reconsideration. But that is not a permissible way to raise a new legal issue. *See Servants of the Paraclete*, 204 F.3d at 1012.

When a "theory simply wasn't raised before the district court," this Court will "usually hold it forfeited." *Richison*, 634 F.3d at 1128 (Gorsuch, J.). And though the School casts the issue as a purely legal one, Br. 18, this Court has long held that it potentially "will reverse on the basis of a legal theory not previously presented to the district court [only] when the correct resolution of that theory is beyond a reasonable doubt and the failure to intervene would result in a miscarriage of justice." *Id.*

The School does not, and cannot, satisfy that standard. There would be no prejudice to anyone in not deciding an issue that was not presented below, because it can be properly raised, fully litigated, and later appealed if need be, after remand. If there is any potential miscarriage of justice here, it would be in finding jurisdiction on an issue not properly presented below, then resolving the substantial predicate factual disputes, before any discovery, and then ruling dispositively on the merits in favor of the forfeiting party. That would not serve fundamental fairness, nor would it be consonant with the appellate judicial function.

B. The School's assertion of church autonomy is legally irrelevant, factually wrong, and procedurally inappropriate.

1. The church-autonomy doctrine is a narrow one that prohibits courts from deciding "strictly and purely ecclesiastical" questions. *Watson v. Jones*, 80 U.S. 679, 733-34 (1871). So, for instance, a court cannot decide whether church doctrine requires the defrocking of a bishop. *Milivojevich*, 426 U.S. at 718. Nor may a court determine which ecclesiastical authority controls a church. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119 (1952). Nor may it decide whether someone is a nun. *Fuller*, 714 F.3d at 979.

But this prohibition against courts' making *religious* decisions has no bearing on adjudication of claims over a religious entity's secular decisions.

Bryce, 289 F.3d at 657. And the doctrine simply does not, as the School would have it, forbid courts to resolve cases involving religious entities under "neutral principles of law." *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

Most pertinent here, outside the ministerial exception courts *can* decide whether a defendant's asserted religious reason for firing an employee was the actual reason for the termination. *See Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 329-30 (3d Cir. 1993). While a court cannot determine whether religious beliefs are true or reasonable, it most certainly can decide whether religion is asserted as a pretext for discrimination. *See id.*; *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170-71 (2d Cir. 1993).[8] That inquiry does not require the courts to evaluate religious doctrine.

2. This case will present precisely that kind of neutral application of the law. Tucker alleged that he was fired in retaliation for his opposition to race-based harassment in the School. The School will be able, in due course, to argue that it fired Tucker for a nondiscriminatory reason. And the district

[8] The School cites *Van Osdol v. Vogt*, 908 P.2d 1122, 1129, 1134 (Colo. 1996) (en banc), to argue that Tucker's state-law claim must fail because any judicial determination would "excessively entangle[]" the Court in religious matters. Br. 43. But the School neglects to mention that the plaintiff in *Van Osdol* was a minister and the court decided the case on that ground. 908 P.2d at 1134. Indeed, the court explicitly refused to answer how employment laws apply to a *non*minister. *Id.*

court can evaluate at that time—after proper discovery and with the benefit of briefing based on the evidence—whether Tucker has made his case.

That is mine-run litigation of a retaliation claim. Resolving Tucker's claims will not require the district judge or jury to determine which party has correctly interpreted the Bible or whether the message delivered at the symposium was, in fact, consistent with Scripture. It will merely require determining whether Tucker was fired in retaliation for speaking out against a racially discriminatory environment (of which he was a victim) or instead for some other, nonretaliatory reason.

3. But that neutral application of the law is premature. Again, there has been no discovery on the merits of Tucker's claims, nor has there been any briefing beyond the ministerial exception. If the School wanted the district court to consider a church-autonomy defense, it could either have raised that point in its motion to dismiss or went forward with discovery on the merits and then sought summary judgment. It did neither.

If the School *had* raised the issue in the motion to dismiss, the district court would have been limited to answering one question: Accepting the allegations in the Complaint as true and viewing all reasonable inferences in his favor, does he plead plausible claims for relief? *Cf. Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1309 (10th Cir. 2020). The answer is yes, and the School does not say otherwise.

The School could *not* have argued on a motion to dismiss that this case is about a religious disagreement because the Complaint alleges none. Nor can one reasonably be inferred. Indeed, the only reasonable inference from the allegations is that the School was happy with the anti-racism symposium, *see* App. I 35 ¶¶ 72-74, and changed its tune only when some tuition-paying parents voiced their displeasure, *see id.* at 40 ¶ 103. As one administrator bluntly put it: "[T]his is a business, and if we lose a dozen students, teachers start losing their jobs." *Id.*; *see also id.* at 36-38 ¶¶ 76-92. So Tucker instead lost his.

Recasting the issue as proper for summary judgment in this Court—when it was not raised below and no evidence was developed—the School presents assertions in its Answer as though they are evidence and simply states that it fired Tucker because of disagreements over biblical interpretation regarding race. *See* Br. 41-42; App. II 481 ¶72. But while an Answer may contain admissions that can be used *against* a defendant, it is never affirmative evidence in *support* of the defendant.

That leaves the School with just one document as support for the position it now advances: Tucker's letter to the school community following the symposium. App. I 163-66; Br. 12. Again, though, the School fails to acknowledge that there has been no merits discovery, so Tucker has not yet had any opportunity to develop and present *his* evidence. In all events, the

letter must be construed in Tucker's favor at this stage. And Tucker wrote it in early February, before he was fired. App. I 25-26 ¶ 2, 163. So it naturally does not discuss the termination. Nor does it mention any religious disagreements with the School. It does, however, address the parental backlash over the symposium, *id.* at 165, which Tucker has alleged is why the School fired him. *See, e.g.*, *id.* at 26 ¶ 3, 37-38 ¶¶ 84-92.

Because none of this was properly raised, it makes no difference whether the School's arguments now are viewed through the lens of a motion to dismiss or a motion for summary judgment. However the School's filings are construed, they simply did not pose the question below that the School wants this Court to answer now.

4. What is more, if the School's expansive view of church autonomy were right—if dismissal were required whenever a religious entity asserted that it made an employment decision for a religious reason—that would render the ministerial exception superfluous. A defendant like the School would never have to go through the factual inquiry into whether an employee was a minister. Instead, it could just say—without any factual support and contrary to well-pleaded allegations—that it made its decision for "religious reasons," and leave it at that.

For example, the church in *Hosanna-Tabor* argued that it fired the plaintiff because her threat to sue violated its belief in internal dispute

resolution. *See* 565 U.S. at 180. Yet the Title VII claim failed because she was a minister. *Id.* at 196. If an asserted religious reason alone had been sufficient to dispose of her claim, the Supreme Court's entire consideration of the ministerial exception would have been a frolic and detour.

5. *Bryce* is even less helpful to the School. The plaintiffs there brought sexual-harassment claims based on statements made about sexual orientation in a church's internal discussions about discipline. 289 F.3d at 657. Because that discussion focused on the church's doctrinal views of same-sex relationships, *see id.* at 653, 657, this Court concluded that the allegedly harassing statements were instead protected internal consideration of church doctrine and how it applied to church governance, *id.* at 657-58.

What is more, the *Bryce* plaintiffs did not bring wrongful-termination or retaliation claims. Their claim was instead that the church's internal discussion of its religious doctrine itself constituted harassment. Tucker does not seek to hold the School liable for theological discussions. He claims that the School illegally fired him for his opposition to race-based discrimination.

The Court in *Bryce* did not say that *every* statement of religious belief was protected. And it certainly did not hold that every *action* motivated by religious belief was protected. As stated by the district court in that case,

"the First Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but . . . the second cannot be." *Bryce v. Episcopal Church*, 121 F.Supp.2d 1327, 1343 (D. Colo. 2000) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)) (cleaned up), *aff'd*, 289 F.3d 648. Tucker challenges the School's actions. Protections for certain internal conversations about doctrine have no bearing on this question.

CONCLUSION

This Court should dismiss for lack of appellate jurisdiction. If the Court were to conclude instead that there is jurisdiction, it should affirm the district court's decision denying summary judgment and remand for further proceedings.

Respectfully submitted,

/s/ *Bradley Girard*

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Date: January 13, 2021

STATEMENT REGARDING ORAL ARGUMENT

The School did not meet its burden to show why this Court should expand the collateral-order doctrine to two new substantive areas of law. So we do not believe that oral argument is necessary to decide that this Court cannot hear the case. If, however, the Court finds that oral argument would be helpful in addressing the issues, counsel will, of course, be prepared to present argument on Mr. Tucker's behalf.

CERTIFICATE OF COMPLIANCE

1. **Word Count.** This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 12,947 words.
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Date: January 13, 2021 /s/ *Bradley Girard*

CERTIFICATE OF SERVICE

I certify that on January 13, 2021 this corrected brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Bradley Girard*