NO. 20-1230

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FAITH BIBLE CHAPEL INTERNATIONAL, a Colorado non-profit corporation,

Appellant,

v.

GREGORY TUCKER,

Appellee.

On Appeal from the
United States District Court for the District of Colorado
Judge R. Brooke Jackson
Civil Action No. 1:19-cv-01652-RBJ-STV

BRIEF OF AMICI CURIAE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, AND THE INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION IN SUPPORT OF RESPONDENT

Jonathan L. Backer
Robert D. Friedman
Amy L. Marshak
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. N.W.
Washington, DC 20001
Phone 202 662 9042

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amici curiae state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

ARGUMENT 2

I. Tucker's Claims Present No Issue of Religious Doctrine to be Decided and Therefore Do Not Implicate the Church Autonomy Doctrine 4

a. The Church Autonomy Doctrine Safeguards Religious Belief By Prohibiting Courts from Interpreting Religious Doctrine or Deciding Questions of Religious Faith 4

b. This Court's Interpretation of the Church Autonomy Doctrine Is Consistent with the Supreme Court's 8

c. Tucker's Claim Is Free of Religious Doctrinal Issues 13

II. Applying the Church Autonomy Doctrine on the Present Record Would Eliminate Labor and Employment Protections for Numerous Workers at Religious Institutions 14

CONCLUSION 18

CERTIFICATE OF COMPLIANCE 19

CERTIFICATE OF DIGITAL SUBMISSION 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Page(s)

Cases

Bell v. Presbyterian Church,
126 F.3d 328 (4th Cir. 1997) 10

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 11

Bryce v. Episcopal Church in the Diocese of Colo.,
289 F.3d 648 (10th Cir. 2002) ..... passim

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 16

City of Boerne v. Flores,
521 U.S. 507 (1997) 6

Davis v. Balt. Hebrew Congregation,
985 F. Supp. 2d 701 (D. Md. 2013) 15

Elvig v. Calvin Presbyterian Church,
375 F.3d 951 (9th Cir. 2004 12

Engel v. Vitale,
370 U.S. 421 (1962) 5

Geary v. Visitation of Blessed Virgin Mary Par. Sch.,
7 F.3d 324 (3d Cir. 1993) 15

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,
565 U.S. 171 (2012) 3, 11, 17

Jones v. Wolf,
443 U.S. 595 (1979) 8

Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am.,
344 U.S. 94 (1952) 7

Lukaszewski v. Nazareth Hosp.,
764 F. Supp. 57 (E.D. Pa. 1991) 15

Mammon v. SCI Funeral Servs. of Fla. Inc.,
193 So. 3d 980 (Fla. Dist. Ct. App. 2016) 16

Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.,
396 U.S. 367 (1970) 8

Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969) 7

Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) 10

Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696 (1976) 7

Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299 (4th Cir. 2004) 15

Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238 (10th Cir. 2010) 11, 12

Skrzypczak v. Roman Catholic Diocese of Tulsa, No. 08-CV-298-GKF-PJC, 2009 WL 10695367 (N.D. Okla. May 19, 2009) 12

Smith v. Raleigh Dist. of N.C. Conf. of United Methodist Church, 63 F. Supp. 2d 694 (E.D.N.C. 1999) 15

Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) 16

Watson v. Jones, 80 U.S. 679 (1871) 5, 6

Statutes

29 U.S.C. § 215(a)(3) 16

Civil Rights Act of 1964 Title VII, 42 U.S.C. § 2000e *et seq.* 2

Colo. Rev. Stat. § 8-14.4-102 17

Mich. Comp. Laws § 15.362 17

Utah Code Ann. § 67-21-3 17

Other Authorities

Bureau of Labor Statistics, *May 2019 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 813100 - Religious Organizations*, https://www.bls.gov/oes/current/naics4_813100.htm 19

Jaclyn Pieser, *Megachurch Pastor Who Held No-Mask Services Misses Hearing After Refusing to Wear Mask in Court*, Wash. Post, Sept. 23, 2020, *available at* https://www.washingtonpost.com/nation/2020/09/23/louisiana-pastor-mask-court/ 20

INTEREST OF AMICI CURIAE[1]

The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of race. It is essential to CREEC members and others to be able to participate in the workplace without facing discrimination, and without fear of retaliation if they challenge discrimination.

Founded in 1985, NELA is the largest bar association in the country focused on empowering workers' rights attorneys. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to protecting the rights of workers in employment, wage and hour, labor, and civil rights disputes. NELA has a particular interest in the current attempt to broaden religious exemptions in discrimination, harassment, and retaliation claims, as any expansion would potentially strip thousands of people of the workplace protections guaranteed by our nation's laws. NELA and its members, who litigate these issues on behalf of employees, advocate for protecting religious freedom while shielding workers from

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae certifies that (1) this brief was authored entirely by counsel for amicus curiae and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) no person other than amicus curiae contributed money to the preparation or submission of this brief. All parties have consented to the filing of this brief.

invidious discrimination in the workplace and ensuring continuity in the application of anti-discrimination laws.

The Employee Rights Advocacy Institute For Law & Policy ("The Institute") advances workers' rights through research, thought leadership, and education for policymakers, advocates, and the public. The Institute sheds light on the harmful effects of narrowing protections for workers experiencing discrimination in the workplace. The Institute has an interest in the current attempt to broaden religious exemptions in discrimination, harassment, and retaliation claims, as an expansion of this doctrine would also mean an expansion of the population vulnerable to the use of discriminatory practices in an unbalanced weighing of religious freedom and anti-discrimination protections.

The Institute for Constitutional Advocacy and Protection is a nonprofit litigation and advocacy organization dedicated to defending constitutional rights and values. Through litigation in the courts and public education efforts, ICAP has worked to ensure that First Amendment freedoms remain robust without the guise of protected of speech or freedom of religion being exploited to permit harm to third parties. ICAP therefore has a strong interest in the intersection between religious freedom under the First Amendment and workplace protections for employees.

ARGUMENT

Gregory Tucker alleges that Faith Bible Chapel International violated Title VII of the Civil Rights Act of 1964 and state law by terminating his employment in

retaliation for his opposition to a racially hostile work environment. Faith Bible's lead argument is that Tucker was a "minister" whose claim is barred under the "ministerial exception" to Title VII. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012). But it also argues that, even if Tucker was not a minister, the "church autonomy doctrine"[2] precludes his claim because, Faith Bible asserts, its decision to terminate Tucker was rooted in religious belief—an allegation that Tucker forcefully disputes. He contends that Faith Bible, in its own words, fired him because it runs "a business" and parents and students were upset about the attention he drew to racial hostilities pervading the school environment.

The Court need only reach Faith Bible's "church autonomy" argument if it concludes that it has jurisdiction; that Tucker is not a minister; that Faith Bible has not forfeited this argument; and that the argument does not prematurely raise a disputed issue of fact. If the Court does reach the merits of Faith Bible's church autonomy argument—that asserting a religious motive for an employment action is sufficient to provide immunity—it should reject this sweeping and unprecedented claim. The doctrine precludes courts only from interpreting or defining religious doctrine. It does not bar the resolution of the key dispute in this case: whether Faith Bible in fact fired Tucker for retaliatory reasons unconnected to any religious motive.

[2] Courts sometimes refer to the church autonomy doctrine as "ecclesiastical abstention" and the "deference rule." Consistent with the parties, this brief refers to the "church autonomy doctrine."

A decision from this Court expanding the doctrine in this procedural posture would have especially broad consequences because the factual dispute at the heart of this case is about why Faith Bible actually fired Tucker. Crediting Faith Bible's (unsupported) version of the facts simply because it asserts a religious motive would upend the summary judgment standard and make the assertion of such a motive enough to immunize *any* adverse action against *any* employee by *any* religious employer. Adopting this approach would mean that the unproven assertion of a religious motivation could bar a claim brought by a custodian at the school where Tucker works, a nurse at a religiously affiliated hospital, a waiter at a kosher for-profit restaurant, and numerous other employees of religious institutions who perform no religious functions. And the same reasoning would apply not only to Title VII claims, but also to wage and hour claims, whistleblower claims, and any other labor protections.

I. Tucker's Claims Present No Issue of Religious Doctrine to be Decided and Therefore Do Not Implicate the Church Autonomy Doctrine

a. The Church Autonomy Doctrine Safeguards Religious Belief By Prohibiting Courts from Interpreting Religious Doctrine or Deciding Questions of Religious Faith

The church autonomy doctrine serves the important, but limited, function of ensuring that religious entities, their leadership, and their members maintain sole authority over determining the content of religious doctrine and faith. Keeping the government out of these central areas of religious belief carries forward the founding

generation's understanding "that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the [g]overnment's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). Thus, under the church autonomy doctrine, courts cannot interpret or define religious doctrine.

But nothing in the church autonomy doctrine confers immunity on religious actors merely because a harmful act bears a religious motive. An examination of the Supreme Court's decisions on intra-church disputes demonstrates that the autonomy principle does not stand in the way of courts adjudicating cases based on generally applicable laws when no issue of religious doctrine or faith is presented for decision.

The church autonomy doctrine traces back to the Supreme Court's decision in *Watson v. Jones*, 80 U.S. 679 (1871). In *Watson*, the congregation of a Presbyterian Church in Louisville, Kentucky, split into two factions—one pro-slavery and one anti-slavery—and each claimed the right to control church property. 80 U.S. at 684 & n.6, 717. In evaluating the dispute, the Supreme Court began its analysis with the foundational principle that "[r]eligious organizations come before [civil courts] in the same attitude as other voluntary associations . . . , and their rights . . . are equally under the protection of the law, and *the actions of their members subject to its restraints*." *Id.* at 714 (emphasis added). Thus, the right to "practice any religious principle" is generally subject to the condition that doing so "not infringe personal rights." *Id.* at 728. This recognition that religious actors remain subject to general laws accords with

the view at the founding that the freedom of religious exercise does not provide a license to harm others. *See City of Boerne v. Flores*, 521 U.S. 507, 539 (1997) (Scalia, J., concurring); *id.* at 553 (O'Connor, J., dissenting)

But the Court also recognized that the need to regulate harmful conduct neither necessitates nor renders permissible deciding questions of religious belief. Rather, a "sound view of the relations of church and state under our system of laws" requires that civil courts refrain from deciding disputes about the meaning of religious doctrine. *Watson*, 80 U.S. at 727. Because "[i]n this country . . . [t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect," religious organizations are entitled to decide "controverted questions of faith" for themselves, free from civil court or other governmental interference. *Id.* at 728–29.

Applying these complementary principles in *Watson*, the Court held that it would be improper for a civil court to determine which of the two factions was the true congregation of the church and thus controlled the property at issue. *Id.* at 734. The answer to that question depended on matters of faith to be decided not by a governmental body, but by the appropriate body within the larger Presbyterian Church in the United States to which the two factions had belonged. *Id.* at 731.

Nonetheless, the Court made clear that its determination that courts cannot resolve questions of faith extended only to matters "ecclesiastical in [their] character." *Id.* at 733. Nothing in the decision required a court to, for example, defer to a church's trial and sentencing of a congregant for murder or a church's resolution of a

property dispute between two individuals, unless that dispute somehow "depend[ed] on ecclesiastical questions." *Id.*

In the years since *Watson*, the Supreme Court has reaffirmed that civil courts should not decide civil claims that turn on questions of faith and disputes over the meaning of religious doctrine. For instance, in *Serbian Eastern Orthodox Diocese for United States of America & Canada v. Milivojevich*, the Court overturned a state court decision that reinstalled a defrocked bishop and undid the Serbian Orthodox Church's reorganization of its dioceses. 426 U.S. 696, 718 (1976). The Court explained that the state court, in reaching its decision, had violated the First Amendment both by "evaluat[ing] conflicting testimony concerning internal church procedures" to determine what process the bishop was due in a church proceeding and by overruling the highest church authority's decision on whether the church constitutions permitted the restructuring. Each inquiry impermissibly involved interpreting church doctrine. *Id.* at 718, 721–22; *see also, e.g.*, *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 441, 449–50 (1969) (application of property law rule that made church's ability to control property dependent on whether the church had "departed from the tenets of faith" unconstitutionally required courts to determine what were the tenets of faith); *Kedroff v. St. Nicholas Cathedral of Russ. Orthodox Church in N. Am.*, 344 U.S. 94, 109 (1952) (state law that replaced church authorities with those who would more "faithfully carry out the purposes of the religious trust" violated First Amendment).

At the same time, the Court has not shied away from resolving matters that involve religious parties, but not religious questions. In *Jones v. Wolf*, the Court held that the First Amendment does not preclude courts from deciding a controversy between religious parties that involves no disputed doctrinal question. 443 U.S. 595, 602–03 (1979). There, as in *Watson*, a local congregation of the Presbyterian Church split into two factions, with each claiming the right to control church property. 443 U.S. at 597–98. The Court confirmed again that civil courts cannot "pass on questions of religious doctrine," as in *Watson*. *Id.* at 605. But the Court also made clear that an intra-church dispute is not, on its own, outside a civil court's authority to adjudicate. *Id.* at 605, 609. Rather, so long as a court can apply "neutral principles of law" that are "completely secular in operation"—there, whether deeds or corporate charters included "language of trust in favor of" of one faction—resolving the dispute would not run afoul of the First Amendment. *Id.* at 603–04; *see also Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (per curiam) (finding no substantial federal question in case involving control of church property because the state court's "resolution of the dispute involved no inquiry into religious doctrine").

b. This Court's Interpretation of the Church Autonomy Doctrine Is Consistent with the Supreme Court's

Faith Bible claims that this Court's decision in *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002), supports dismissal of Tucker's case

based on the church autonomy doctrine. But *Bryce* is consistent with the Supreme Court's case law on the church autonomy doctrine and does not bar employment claims like Tucker's that require no interpretation of religious doctrine.

In *Bryce*, an employee[3] of an Episcopal church brought a sexual harassment claim that grew out of the church's decision to fire her after she and her partner entered into a civil commitment that, according to the church, violated then-existing Episcopal doctrine on same-sex relationships. *Id.* at 652. Before Bryce's termination took effect, the church held a series of meetings to "inform the congregation about homosexuality and Bryce's employment situation." *Id.* In advance of those meetings, the church's minister issued letters and memoranda explaining Episcopal doctrine on same-sex relationships and the basis for the church's decision to terminate Bryce's employment. *Id.* Bryce claimed that statements made at the church meetings and in the letters and memoranda amounted to sexual harassment. *Id.* at 653. The defendants argued that the church autonomy doctrine barred Bryce's claim. *Id.* at 654.

This Court stressed in evaluating Bryce's claim that "[t]he church autonomy doctrine is not without limits" and "does not apply to purely secular [employment] decisions, even when made by churches." *Id.* at 657. Because "churches are not—and should not be—above the law," the Court stated, "[t]heir employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's

[3] Although the parties disputed whether the ministerial exception applied to Bryce's claim, this Court affirmed the district court's dismissal of the case without determining whether Bryce qualified as a minister. *Bryce*, 289 F.3d at 658 n.2.

spiritual functions." *Id.* (quoting *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)). The Court therefore held that a determination "whether the dispute is ecclesiastical or secular" must be made "before the church autonomy doctrine is implicated." *Id.* (citing *Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1997)).

Guided by these principles, this Court held that Bryce's claim was barred by the church autonomy doctrine because the statements out of which the alleged sexual harassment arose were ecclesiastical rather than secular in nature. The Court so held because the letters and memoranda at issue discussed "the doctrinal reasons" for the church's decision to terminate Bryce's employment and because the statements made at the pre-termination meetings constituted "religious communication and religious dialogue between a minister and his parishioners" concerning the employment decision. *Id.* at 658–59. But *Bryce* does not foreclose employment claims by non-ministers against churches arising out of disputes that are free from the sorts of religious doctrinal issues that pervaded that case.

Moreover, *Bryce* does not, as Faith Bible claims, stand for the proposition that a claim that an adverse employment action is "rooted in religious belief" is sufficient, on its own, to preclude liability. *See* Aplt.'s Br. at 40 (quoting *Bryce*, 289 F.3d at 657). Such a holding would be counter to the Supreme Court's decision in *Bob Jones University v. United States*, which held that the government *could* regulate a religiously run school (through the tax code) for "engag[ing] in racial discrimination [in

admissions] on the basis of sincerely held religious beliefs." 461 U.S. 574, 602 (1983). Rather, *Bryce* is best understood to hold, far more narrowly, that liability cannot attach merely for the discussion, in an internal church meeting, of the tenets of a church's faith, even if those tenets personally offended the plaintiff. *Bryce*, 289 F.3d at 658 (explaining that the church autonomy doctrine protects the right "to discuss church doctrine and policy freely"). Prohibiting such discussion would indirectly control a church's ability to develop, assess, and shape its faith and doctrine in much the same way as application of employment discrimination laws to ministers indirectly, but still impermissibly, controls a church's ability to choose its own leaders. *See Hosanna-Tabor*, 565 U.S. at 196.

So, if Faith Bible proves that it fired Tucker for religious reasons, that is not enough to warrant protection under the church autonomy doctrine. Under the facts here, it is only if Tucker challenged that those religious beliefs were a "proper" or "correct" interpretation of the Bible or other source of belief—which he does not do—would the doctrine would preclude his claim.

This Court's decision in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010)—on which Faith Bible relies in its separate argument invoking the ministerial exception—further confirms that some hostile work environment claims (or retaliation claims arising out of opposition to a hostile work environment) brought against religious employers do not raise ecclesiastical issues that implicate the autonomy doctrine. In that case, the Court held that the ministerial exception barred

an employee from bringing a hostile work environment claim against the Roman Catholic Diocese of Tulsa based on discriminatory remarks about women that the Bishop of the Diocese allegedly made. 611 F.3d at 1240; *Skrzypczak v. Roman Catholic Diocese of Tulsa*, No. 08-CV-298-GKF-PJC, 2009 WL 10695367, at *2 (N.D. Okla. May 19, 2009). The Court held that allowing *ministers* to bring hostile work environment claims would impermissibly interfere with decisions by houses of worship in selecting and directing their spiritual leaders. 611 F.3d at 1245–46. In so holding, however, this Court stressed that the same rationale does not apply to hostile work environment claims where "the plaintiff [is] found not to be a minister." *Id.* at 1246.

In reaching this decision, the Court distinguished a Ninth Circuit case that had declined to apply the ministerial exception to a sexual harassment claim brought by an ordained minister against a church and her supervisor. *Skrzypczak*, 611 F.3d at 1244 (citing *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 959 (9th Cir. 2004)). But the Court in *Skrzypczak* did not reject the distinction drawn by the Ninth Circuit between sexual harassment claims that "involve a purely secular inquiry" and those in which the employee's "subjection to or the [c]hurch's toleration of sexual harassment was doctrinal." *Elvig*, 375 F.3d at 959. Accordingly, the Ninth Circuit's analysis in *Elvig* provides the proper framework for determining whether the church autonomy doctrine bars hostile work environment claims brought by non-ministers.

c. Tucker's Claim Is Free of Religious Doctrinal Issues

Although the facts in this case are disputed, it is clear that the version that Tucker presents does not implicate the church autonomy doctrine. He contends that he was fired for his opposition to a racially hostile work environment. Aplt. App. Vol. I, at 43–45, ¶¶ 126–34, 46–47, ¶¶ 141–51. Specifically, Tucker alleges that a culture of virulent racism existed at the school, with students hurling racial epithets at classmates of color, promoting neo-Nazism, and even one incident of students wearing Ku Klux Klan robes. *Id.* at 33–34, ¶¶ 48–55. Tucker, whose adopted daughter is Black, also was the target of racial harassment by students. *Id.* at 33, ¶ 48. In an effort to change this culture of racism, Tucker—with the school's blessing—organized a symposium (referred to by the school as a "chapel") on race. *Id.* at 34–35, ¶¶ 64–68. Although school administrators initially expressed satisfaction with the event, students who had engaged in racist behavior and their parents complained to the school about the event. *Id.* at 35–36, ¶¶ 72–77. Acceding to these students and parents' wishes, the school demoted and then fired Tucker. *Id.* at 38, ¶¶ 92–93, 42, ¶ 116. As they explained to Tucker before firing him, "this is a business, and if we lose a dozen students, teachers start losing their jobs." *Id.* at 40 ¶ 103.

Accepting Tucker's facts as true, no part of this claim requires this Court (or the district court or a jury) to decide a dispute over religious doctrine or challenges whether Faith Bible has "correctly" interpreted religious doctrine. This case is unlike *Watson, Milivojevich*, or any other case where the Supreme Court declined to adjudicate

a claim because doing so necessitated examining the tenets of a party's faith. Rather, Tucker's claim presents only the first issue that *Bryce* identified: whether the employer's conduct is actually rooted in religious belief, or whether, as Tucker claims, that assertion is pretextual. *Bryce*, 289 F.3d at 658–59. If Tucker can prove his version of the facts at trial, the church autonomy doctrine has no relevance here.

To be sure, Faith Bible argues that a court will be forced to determine "whether the message conveyed at the chapel [Tucker] organized was consistent with Scripture." Aplt.'s Br. at 41. But Tucker's version of the facts does not actually present that issue because, contrary to Faith Bible's characterization of the record, he does not assert that he was fired because Faith Bible "did not believe" that the view of scripture he presented at the chapel was "correct."[4] *Id.*

II. Applying the Church Autonomy Doctrine on the Present Record Would Eliminate Labor and Employment Protections for Numerous Workers at Religious Institutions

As already explained, Faith Bible's position boils down to a claim that, under the church autonomy doctrine, the mere assertion of a religious motivation for an employment action—i.e., a claim that the termination decision or misconduct was

[4] Even Faith Bible's version of the facts does not require a court to answer this question and, therefore, does not require application of the autonomy doctrine. If Tucker was, in fact, fired because the symposium presented an impermissible view of scripture—and not for complaining about a racially hostile work environment—then he likely has not stated a claim under Title VII, irrespective of any First Amendment concerns. But in all events, because Tucker never raises whether what he said was "consistent with scripture," there would be no reason for a court to resolve that unasked question.

"rooted in religious belief," *see* Aplt.'s Br. at 40 (quoting *Bryce*, 289 F.3d at 657)—shields a defendant from any liability. Endorsing that view not only would upend the summary judgment standard by accepting the moving party's facts as true, but also would eviscerate an array of protections for numerous workers who are not "ministers."

Religious institutions employ a wide variety of employees. An expansion of the autonomy doctrine to, in essence, capture what the ministerial exception excludes would leave vulnerable non-minister teachers like Tucker, *see, e.g.*, *Geary v. Visitation of Blessed Virgin Mary Par. Sch.*, 7 F.3d 324, 328 (3d Cir. 1993), facilities managers, *see, e.g.*, *Davis v. Balt. Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013); *Lukaszewski v. Nazareth Hosp.*, 764 F. Supp. 57, 59 (E.D. Pa. 1991), receptionists and secretaries, *see, e.g.*, *Smith v. Raleigh Dist. of N.C. Conf. of United Methodist Church*, 63 F. Supp. 2d 694, 697 (E.D.N.C. 1999), and a range of other non-ministerial employees.

And not only houses of worship would be able to invoke the doctrine in defending against claims from employees. As this case and numerous others have shown, religious schools regularly invoke the ministerial exception and could be expected to take advantage of an expanded autonomy doctrine. The same is true of other religiously run nonprofit institutions. *Cf. Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) ("Numerous courts have held that" the ministerial exception covers "religiously affiliated schools, hospitals, and corporations."). There are hundreds of thousands employees of houses of worship

and other religious nonprofits.[5] And because for-profit companies and their management are equally capable of holding and acting on religious beliefs, *see Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 709 (2014), the autonomy doctrine might, under Faith Bible's theory, be extended to them as well. *See, e.g.*, *Mammon v. SCI Funeral Servs. of Fla. Inc.*, 193 So. 3d 980 (Fla. Dist. Ct. App. 2016) (applying autonomy doctrine to preclude deceptive practices act claim against burial home). Thus, if a mere religious motive is deemed sufficient to warrant the application of the church autonomy doctrine, courts can expect to encounter the defense regularly and employees can expect to be left without a remedy for unlawful employment practices just as often.

Moreover, Faith Bible's broad interpretation of the church autonomy doctrine could undermine more than discrimination-based employment actions. It could also apply to a religious employer's claim that it had a religious reason not to pay minimum wage to a non-ministerial employee. *But cf. Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (rejecting that "imposition of the minimum wage and recordkeeping requirements" violates the First Amendment). Or, an employer could claim that it had a religious reason to retaliate against an employee who reported unlawful working conditions to government authorities. *See, e.g.*, 29 U.S.C. § 215(a)(3) (prohibiting retaliation against anyone who reports a violation of the Fair Labor

[5] *See* Bureau of Labor Statistics, *May 2019 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 813100 - Religious Organizations*, https://www.bls.gov/oes/current/naics4_813100.htm

Standards Act). States' whistleblower protection laws that extend to the private sector could become toothless for employees of religious entities. *See, e.g.*, Utah Code Ann. § 67-21-3; Mich. Comp. Laws § 15.362.

The interpretation of the autonomy doctrine that Faith Bible urges this Court to adopt would equally interfere with the government's ability to combat the current public health crisis. Colorado, for instance, passed a law in July 2020 to prohibit employers from taking adverse employment action against any employee who reports concerns "related to a public health emergency" or who wears "personal protective equipment, such as a mask, faceguard, or gloves." Colo. Rev. Stat. § 8-14.4-102(1), (3). A religious employer may well have a religious reason for wanting employees to raise their concerns only through internal channels or even to not wear protective equipment.[6]

Retaliation-based claims, like the one in this case, may become particularly difficult to vindicate. In *Hosanna-Tabor*, the religious employer invoked as a "religious reason" for the plaintiff's discharge the "belief that Christians should resolve their disputes internally," rather than resorting to secular protections and the courts. 565 U.S. at 180. Although the Supreme Court concluded that the ministerial exception

[6] *Cf.* Jaclyn Pieser, *Megachurch Pastor Who Held No-Mask Services Misses Hearing After Refusing to Wear Mask in Court*, Wash. Post, Sept. 23, 2020, *available at* https://www.washingtonpost.com/nation/2020/09/23/louisiana-pastor-mask-court/ ("Since the beginning of the coronavirus pandemic, Tony Spell, a pastor of a Pentecostal megachurch in Baton Rouge, has preached to hundreds of parishioners to not wear masks . . . .").

applied to the plaintiff's discrimination claim, it reasoned that its decision would not undermine employee protections in general "because the exception applies *only* to suits by or on behalf of ministers themselves." *Hosanna-Tabor,* 565 U.S. at 196 (emphasis added). But under Faith Bible's view, the same belief or a similar one that prefers internal dispute resolution justifies taking adverse action against *any* employee—whether a custodian or a receptionist—who seeks to report misconduct or to invoke the protections of discrimination, minimum wage, and workplace safety laws.

CONCLUSION

For the foregoing reasons, if the Court reaches Appellant's argument under the church autonomy doctrine, it should affirm.

Dated: January 19, 2021

Respectfully submitted,

/s/ Robert D. Friedman

Jonathan L. Backer
Robert D. Friedman
Amy L. Marshak
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIV. LAW CENTER
600 New Jersey Ave. N.W.
Washington, DC 20001
Phone 202 662 9042

Counsel for Amici

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 4,577 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point font.

Dated: January 19**,** 2021

/s/ Robert D. Friedman
Robert D. Friedman

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submission has been scanned for viruses with Microsoft Defender Antivirus 1.329.2479.0, updated January 19, 2021, and according to the program is free of viruses.

Date: January 19, 2021

/s/ Robert D. Friedman
ROBERT D. FRIEDMAN

CERTIFICATE OF SERVICE

I certify that on January 19, 2021, I caused the foregoing motion to be served via the Court's CM/ECF system upon all counsel of record. All counsel in this case are registered CM/ECF users.

/s/ Robert D. Friedman
ROBERT D. FRIEDMAN
Counsel for Amici Curiae