FILED
United States Court of Appeals
Tenth Circuit

June 7, 2022

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY TUCKER,

Plaintiff - Appellee,

v.

FAITH BIBLE CHAPEL INTERNATIONAL, d/b/a Faith Christian Academy, Inc.,

Defendant - Appellant.

EUGENE VOLOKH; ROBERT J. PUSHAW; RICHARD W. GARNETT; ROBERT COCHRAN; ELIZABETH A. CLARK; THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; THE COLORADO CATHOLIC CONFERENCE; RELIGIOUS LIBERTY SCHOLARS; JEWISH COALITION FOR RELIGIOUS LIBERTY; PROFESSOR ASMA UDDIN; NATIONAL WOMEN'S LAW CENTER; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; AMERICAN SEXUAL HEATH ASSOCIATION; CALIFORNIA WOMEN LAWYERS; DC COALITION AGAINST DOMESTIC VIOLENCE; DESIREE ALLIANCE; EQUAL RIGHTS ADVOCATES; EQUALITY CALIFORNIA; EQUITY FORWARD; FORGE, INC.; GLBTQ LEGAL ADVOCATES & DEFENDERS; HUMAN

No. 20-1230

RIGHTS CAMPAIGN; IN OUR OWN VOICE; NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE AGENDA; KWH LAW CENTER FOR SOCIAL JUSTICE AND CHANGE; LATINOJUSTICE PRLDEF; LEGAL AID AT WORK; LEGAL VOICE; MUSLIMS FOR PROGRESSIVE VALUES; NARAL PRO-CHOICE AMERICA; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL COALITION AGAINST DOMESTIC VIOLENCE; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NEW YORK LAWYERS FOR THE PUBLIC INTEREST; PEOPLE FOR THE AMERICAN WAY FOUNDATION; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; REPRODUCTIVE JUSTICE ACTION COLLECTIVE; SERVICE EMPLOYEES INTERNATIONAL UNION; SPARK REPRODUCTIVE JUSTICE NOW!, INC.; UJIMA INC.; THE NATIONAL CENTER ON VIOLENCE AGAINST WOMEN IN THE BLACK COMMUNITY; WOMEN EMPLOYED; WOMEN LAWYERS ON GUARD INC.; WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; WOMEN'S BAR ASSOCIATION OF THE STATES OF NEW YORK; WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS; THE WOMEN'S LAW CENTER OF MARYLAND; WOMAN'S LAW PROJECT; WV FREE, 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,

Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CV-01652-RBJ-STV)

Daniel H. Blomberg (Daniel D. Benson and Christopher Mills, The Becket Fund for Religious Liberty, Washington, D.C., and Christopher J. Conant and Robert W. Hatch, Hatch Ray Olsen Conant LLC, Denver, Colorado, with him on the briefs), The Becket Fund for Religious Liberty, Washington, D.C. for Defendant-Appellant.

Bradley Girard (Richard B. Katskee, Americans United for Separation of Church and State, and Bradley A. Levin, Jeremy A. Sitcoff, and Peter G. Friesen, Levin Sitcoff, PC, Denver, CO, with him on the brief), Americans United for Separation of Church and State, Washington, D.C., for Plaintiff-Appellee.

Before **BACHARACH**, **EBEL**, and **McHUGH**, Circuit Judges.

EBEL, Circuit Judge.

This appeal presents a single jurisdictional issue: Whether Appellant Faith Bible Chapel International can bring an immediate appeal under the collateral order doctrine challenging the district court's interlocutory decision to deny Faith summary judgment on its affirmative "ministerial exception" defense. Faith operates a school, Faith Christian Academy ("Faith Christian"). Plaintiff Gregory Tucker, a former high school teacher and administrator/chaplain, alleges Faith Christian fired him in violation of Title VII (and Colorado common law) for opposing alleged race

discrimination at the school. As a religious employer, Faith Christian generally must comply with anti-discrimination employment laws. But under the affirmative "ministerial exception" defense, those anti-discrimination laws do not apply to employment disputes between a religious employer and its ministers. Here, Faith Christian defended against Tucker's race discrimination claims by asserting that he was a "minister" for purposes of the exception.

The Supreme Court deems the determination of whether an employee is a "minister" to be a fact-intensive inquiry that turns on the particular circumstances of a given case. Here, after permitting limited discovery on only the "ministerial exception," the district court ruled that, because there are genuinely disputed material facts, a jury would have to resolve whether Tucker was a "minister." Summary judgment for Faith Christian, therefore, was not warranted. Faith Christian immediately appealed that decision, seeking to invoke our jurisdiction under the collateral order doctrine.

The Supreme Court has stated time and again that the collateral order doctrine permits a narrow exception to the usual 28 U.S.C. § 1291 requirement that we only review appeals taken from final judgments entered at the end of litigation. In deciding whether the collateral order doctrine permits immediate appeals from the category of orders at issue here—orders denying summary judgment on the "ministerial exception" because there remain disputed issues of material fact—we must weigh the benefit of an immediate appeal against the cost and disruption of allowing appeals amid ongoing litigation. After conducting that balancing, we

determine that we do not have jurisdiction to consider this interlocutory appeal. Instead, we conclude the category of orders at issue here can be adequately reviewed at the conclusion of litigation.

In deciding that we lack jurisdiction, we reject Faith Christian's arguments, which the dissent would adopt. Faith Christian seeks to justify an immediate appeal first by making the novel argument that the "ministerial exception" not only protects religious employers from liability on a minister's employment discrimination claims, but further immunizes religious employers altogether from the burdens of even having to litigate such claims. In making this argument, Faith Christian deems the "ministerial exception" to be a semi-jurisdictional "structural" limitation on courts' authority to hear Title VII claims. On that basis, Faith Christian then draws an analogy between the decision to deny Faith Christian summary judgment on its "ministerial exception" defense and those immediately appealable decisions to deny government officials qualified immunity from suit under 42 U.S.C. § 1983.

We reject both steps of Faith Christian's argument. The Supreme Court has made clear that the "ministerial exception" is an affirmative defense to employment discrimination claims, rather than a jurisdictional limitation on the authority of courts to hear such claims. Further, the "ministerial exception" is not analogous to qualified immunity available to government officials. The Supreme Court has only permitted immediate appeals from the denial of qualified immunity when the issue presented for appeal is one of law, not fact. Here, on the other hand, the critical question for

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