No. 19-267

In The Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

Petitioner,

v.

AGNES MORRISSEY-BERRU,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ALASKA AND SIXTEEN OTHER STATES IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Religion Clauses prevent a civil court from adjudicating an employment discrimination claim brought by an employee against her religious employer, where the employee carried out important religious functions.

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INTEREST OF *AMICI CURIAE*

The state *amici* have a significant interest in this Court's articulation of a clear, neutral, and broadly applicable standard for determining when the First Amendment-based "ministerial exception" applies to employment discrimination claims. States are asked to step into disputes between religious institutions and their employees in two ways: (1) through the investigation, and sometimes administrative adjudication, of employment discrimination complaints by state civil rights agencies, and (2) through adjudication and disposition of discrimination lawsuits in state court systems. Yet the states have a strong interest in avoiding entanglement in religious affairs, including the kind of doctrinal inquiry that may be required to decide whether a religious employee's title reflects a "ministerial" function. The Ninth Circuit's myopic focus on the formal title of "minister" risks establishing a hierarchy of state-recognized religions and threatens the free exercise of religious minority groups in particular. States should not be asked to implement a rule that favors certain faiths over others.

Because the Ninth Circuit's approach compels states to wade into religious affairs and promotes inconsistent outcomes, the state *amici* respectfully request that the Court reject the Ninth Circuit's rule in favor of a neutral, objective standard: that the ministerial exception applies to employees who perform religious functions, regardless of their formal title.

SUMMARY OF ARGUMENT

The Court confirmed eight years ago in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* that the First Amendment's religion clauses "bar the government from interfering with the decision of a religious group to fire one of its ministers." 565 U.S. 171, 181 (2012). Since the Court's decision in *Hosanna-Tabor*, the Ninth Circuit has narrowed this "ministerial exception" to include only those employees whose positions resemble that of the "called" Lutheran school teacher who was considered a minister in *Hosanna-Tabor*. *See Biel v. St. James School*, 926 F.3d 1238, 1243 (9th Cir. 2019) (Mem.) (R. Nelson, J., dissenting from denial of rehearing en banc) (describing Ninth Circuit's decision in *Biel* as creating a "resemblance-to-Perich test"). Most recently, the Ninth Circuit held in separate opinions that two Catholic school teachers did not fall within the ministerial exception—even though they performed important religious functions in their teaching roles—because they did not have formal ministerial titles or training equivalent to that of the "called" Lutheran teacher in *Hosanna-Tabor*. *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460, 461 (9th Cir. 2019) (unpublished) (OLG App. 2a-3a); *Biel*, 911 F.3d at 607-09 (St. J. App. 10a-15a).

In holding that the important religious functions performed by Ms. Morrissey-Berru in this case do not bring her within the ministerial exception, the Ninth Circuit Court of Appeals departed from the national consensus. OLG App. 2a-3a. Other courts considering the exception after *Hosanna-Tabor* have emphasized

the importance of looking to the acts or functions the religious employee performs. *Fratello v. Archdiocese of New York*, 863 F.3d 190, 205 (2d Cir. 2017); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658-60 (7th Cir.), *cert. denied*, 139 S. Ct. 456 (2018); *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 122 n.7 (3d Cir. 2018); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015). *See also Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 613-14 & n.61 (Ky. 2014); *Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012). The Ninth Circuit's decision, which emphasizes the employee's supposedly "secular" title over the fact that she performed important religious functions, results in religious institutions receiving different levels of constitutional protection depending on how closely their religious terminology resembles that of the Lutheran institutional framework at issue in *Hosanna-Tabor*. This slanted approach burdens the free exercise of religion, subjects minority religions to disproportionate governmental interference, and undermines states' ability to apply their laws equally and fairly to all citizens.

The crux of the ministerial exception is protecting "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor*, 565 U.S. at 196. Given the variety of religious practices, institutions, and organizations in this country, the question of whether a

religious employee falls inside the ministerial exception should not depend on any formal designation, title, or credential. Rather, the "functional consensus" of lower court decisions both before and after *Hosanna-Tabor* provides a reasonable, neutral test: Those lower courts have cogently explained that the religious function performed by the employee—not a title or credential—primarily separates "ministerial" from secular employees for purposes of the exception.

Amici ask this Court to adopt the majority consensus and hold that the primary criterion for application of the ministerial exception is the religious function performed by the employee.

ARGUMENT

I. Most courts recognize the primacy of an employee's religious functions in determining whether the ministerial exception applies.

For nearly 150 years, this Court has recognized that civil courts should not wade into religious disputes. In *Watson v. Jones*, 80 U.S. 679 (1871), the Court announced that matters "concern[ing] theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them" were not for the courts to resolve. *Id.* at 733.

In the twentieth century, the necessity of maintaining a clear separation between governmental and

religious affairs led to the development of the "ministerial exception" to employment disputes involving religious institutions and their employees. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). To avoid unnecessary state entanglement in internal religious matters, federal and state courts have historically exempted "ministerial" employees from certain employment laws. *See*, *e.g.*, *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 670-71, *reh'g granted*, 617 F.3d 401 (9th Cir. 2010) (seminarian not subject to Washington's Minimum Wage Act); *Rweyemamu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008) (priest could not bring Title VII discrimination claim against Catholic Diocese); *Schleicher v. Salvation Army*, 518 F.3d 472, 474-75 (7th Cir. 2008) (ministers not subject to minimum-wage and overtime provisions of Fair Labor Standards Act); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225-26 (6th Cir. 2007) (abrogated on other grounds by *Hosanna-Tabor*, 565 U.S. at 195 n.4) (resident in religiously affiliated hospital's clinical pastoral education program not protected by Americans with Disabilities Act); *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 (3d Cir. 2006) (chaplain could not file Title VII claim against religious college); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 651, 656 (10th Cir. 2002) (youth minister could not bring sexual harassment claim against church); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000) (Title VII not applicable to employment relationship between a church and its minister); *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648,

1998 WL 904528, at *6 (4th Cir. Dec. 29, 1998) (unpublished) (teacher at religious school could not bring claims under Age Discrimination in Employment Act and Title VII); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 461-62 (D.C. Cir. 1996) (ministerial exception applied to teaching appointment at Catholic university); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362-63 (8th Cir. 1991) (chaplain at church-affiliated hospital could not bring age and sex discrimination claims against hospital); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989) (clergy could not file employment suit against religious corporation); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (4th Cir. 1985) (ministerial exception applied to Title VII claim brought by associate in pastoral care); *McClure*, 460 F.2d at 560 (ordained minister could not bring sex discrimination and retaliation claim against religious employer).

The Court in 2012 confirmed the importance of the ministerial exception in *Hosanna-Tabor*, 565 U.S. at 171, emphasizing that both the Free Exercise Clause and the Establishment Clause of the First Amendment "bar the government from interfering with the decision of a religious group to fire one of its ministers." *Id.* at 181. The Court in *Hosanna-Tabor* declined to announce a strict test for which employees come within the ministerial exception, instead holding that the totality of the circumstances made clear that the "called" Lutheran teacher in that case—who had completed a course of theological study and was "regarded as

having been called to [her] vocation by God"—was a "minister" for the purposes of the exception. *Id.* at 177, 190. The Court identified four considerations that led it to conclude that the employee in *Hosanna-Tabor* fell within the exception: (1) her formal title of "minister," (2) "the substance reflected in that title," (3) the employee's "own use of that title," and (4) "the important religious functions she performed for the Church." *Id.* at 192. The Court declined, however, to opine on whether an individual who performed the same functions as the teacher in *Hosanna-Tabor* would fall within the ministerial exception in the absence of the other three considerations. *Id.* at 193.

Since *Hosanna-Tabor*, every federal appellate court to apply the ministerial exception—other than the Ninth Circuit—has emphasized the importance of an employee's religious function in determining whether the employee is a "minister." *Fratello*, 863 F.3d at 205 ("'[C]ourts should focus' primarily 'on the function[s] performed by persons who work for religious bodies.'") (quoting *Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring)); *Cannata*, 700 F.3d at 177 ("[I]t is enough to note that . . . [the employee] played an integral role in the celebration of Mass and that by playing the piano during services, [he] furthered the mission of the church and helped convey its message to the congregants."); *Grussgott*, 882 F.3d at 658-60 (focusing on employee's religious functions); *Lee*, 903 F.3d at 122 n.7 (noting importance of church's ability "to choose who will perform particular spiritual functions") (internal citation omitted); *Conlon*, 777 F.3d at

835 (holding that religious function and formal title were sufficient to invoke ministerial exception, despite employee's lack of religious training or public role as ambassador of faith). The objective approach employed by these courts minimizes state entanglement in matters of religion and reduces conflict among state courts, state civil rights departments, and religious institutions and their employees.

II. Focusing on an employee's religious functions—rather than her formal title or training—minimizes inappropriate state entanglement in religious affairs and protects the Free Exercise rights of diverse faith communities.

The Ninth Circuit's narrowing of the ministerial exception requires excessive government interference in the internal doctrinal affairs of religious institutions, opening the door to disparate treatment of different faith communities. Upholding the Ninth Circuit's rule would license courts and states to accord different treatment to individuals who perform essentially the same functions, depending on how closely the employee's title and training conform to mainline Protestant Christian institutional structures. Affording different protections to different religious communities not only interferes with individuals' rights to freely exercise their religion—particularly for religious minorities—but it also undermines public faith in the legitimacy of state governments. The "functional consensus" employed by the majority of courts, by

contrast, ensures consistent protection of religious freedom nationwide and fosters an appropriate degree of separation between government and religious institutions.

By emphasizing an employee's formal title and training, the Ninth Circuit encourages excessive intrusion into a religious employer's decision-making process. Not only must the court determine whether the employee performed a religious function, but it must also wade into the question of "who is qualified to serve in positions of substantial religious importance." *Cannata*, 700 F.3d at 175 (quoting *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring)). Determining whether an individual meets the criteria to be considered a lay minister, for example, may require a court to interpret canon law—something it is uniquely unqualified to do. *See Cannata*, 700 F.3d at 179 (holding that employee's argument about whether he met formal qualifications for lay minister was "in essence, . . . a challenge to Catholic Church doctrine and precisely the kind of challenge the Supreme Court concluded that government is foreclosed from deciding by the Religion Clauses").

Ms. Morrissey-Berru's formal devotional status in this case thus presents the sort of religious doctrinal question a court cannot answer. She did not dispute that she was "committed to faith-based education, . . . grounded in Catholic social teachings, values, and traditions," but she testified that she "did not feel formally 'called' to the ministry." OLG App. 8a. A court should not attempt to determine the significance of whether

Ms. Morrissey-Berru felt a "calling"—such an inquiry would require the court to delve into matters of spirituality and church doctrine. Rather, the court should look only to Ms. Morrissey-Berru's objective duties—"conveying the church's message" to students, "integrating Catholic values and teachings into all of her lessons," and teaching students "the tenets of the Catholic religion," including "how to pray." OLG App. 7a-8a.

By focusing on an employee's function within a religious institution, courts can determine whether the employee "serves as a messenger or teacher of [the] faith," *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring), without delving into the religion's tenets or the employee's personal religious beliefs. Limiting the court's inquiry to what functions the employee actually performed—regardless of any doctrinal debate over who may qualify as a catechetical lay minister, a hospital chaplain, an acolyte, or any other formal designation short of ordained clergy member—will thus minimize state entanglement in religious affairs.

In its application, the Ninth Circuit's rule also opens the door to disparate treatment of employees nationwide depending on the religious significance a court attaches to their particular title. Comparing the facts of this case with *Hosanna-Tabor* provides an excellent illustration of the inconsistency that results from the Ninth Circuit's rule. The duties performed by the teacher in *Hosanna-Tabor* (teaching religion, leading students in daily prayer and devotional exercises, taking students to chapel services, and leading chapel services about twice a year) are nearly identical to the

duties performed by Ms. Morrissey-Berru (teaching about Catholic doctrine, sacraments, and scripture, OLG App. 45a-51a, 90a-94a; leading students in daily prayer, OLG App. 86a-87a; taking students to Mass, OLG App. 88a-89a; and helping plan the liturgy for Mass once a month, OLG App. 83a-84a). *Hosanna-Tabor*, 565 U.S. at 192; OLG App. 3a. The Ninth Circuit acknowledged that Ms. Morrissey-Berru had "significant religious responsibilities as a teacher," including those activities and, more broadly, "incorporat[ing] Catholic values and teachings into her curriculum"—as required by her employment contract. OLG App. 3a.[1] Yet because Ms. Morrissey-Berru did not have a title or training similar to a "called" teacher—a title highly specific to the Lutheran school context—the court concluded that she fell outside the ministerial exception. OLG App. 2a-3a. By attempting to shoehorn a Catholic designation into the Lutheran institutional framework, the Ninth Circuit endorsed different levels of constitutional protection for institutions representing different faith communities.

Making the ministerial exception dependent on an employee's formal title or training has the potential to burden the free exercise rights of religious minorities in particular. Many minority faith communities employ religious designations with no ready analogue to the Protestant Christian designation of "minister." *See*

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[1] While *amici* file this brief in support of Our Lady of Guadalupe School, the argument applies equally to Ms. Biel's case. She was responsible for "guid[ing] the spiritual formation of the student" and "help[ing] each child strengthen his/her personal relationship with God." St. J. App. 20a.

Hosanna-Tabor, 565 U.S. at 198 (Alito, J., concurring) ("The term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists." (citing 9 Oxford English Dictionary 818 (2d ed. 1989) (def. 4(b)); 9 Encyclopedia of Religion 6044-6045 (2d ed. 2005))). Some religions do not recognize formal clergy at all. If the application of the ministerial exception depends on the existence of a formal title or religious credential, then minority faith institutions will be less likely to receive the protections of the ministerial exception.

A rule that allows—or even encourages—courts and state enforcement agencies to intervene in the religious doctrinal decisions of certain faith communities more than others is detrimental not only to individual religious freedoms, but also to "the very essence of a scheme of ordered liberty." *Prince v. Massachusetts*, 321 U.S. 158, 174 (1944) (Murphy, J., dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Assigning relative importance to difference faiths' institutional and doctrinal designations can be perceived as an endorsement of certain religious practices over others—or, at the very least, as a governmental decision to respect the autonomy of some religious institutions more than others. Yet "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Grussgott*, 882 F.3d at 658 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). The perception that government is granting preferential treatment to particular

religious groups thus can undermine public faith in the legitimacy of state courts and institutions. Rendering equal protection of the law upon all citizens is crucial to good governance. *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."). Providing different levels of protection to adherents of different religions will undermine state authority and threaten "that moderation and harmony which the forbearance of our laws to intermeddle with Religion has produced among its several sects." JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS para. 11 (1785).[2] Indeed, James Madison warned that laws favoring any particular religion would signal a lack of religious tolerance, driving away citizens and deterring those fleeing religious persecution in other countries. MADISON, MEMORIAL AND REMONSTRANCE at para. 9.

The same is true of a rule that would allow courts to treat religious employees differently depending on how closely their official title resembles that of the "called" Lutheran teacher in *Hosanna-Tabor*. Indeed, it is for this reason that the ministerial exception cannot be waived; it is a "structural limitation imposed on the government by the Religion Clauses." *Conlon*, 777 F.3d at 836. The Court should therefore reject the

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[2] *Available at* https://founders.archives.gov/?q=memorial%20and%20remonstrance%20Author%3A%22Madison%2C%20James%22&s=1111311111&r=8&sr=.

Ninth Circuit's approach and instead endorse the neutral, uniformly applicable majority rule for determining whether a religious employee falls within the ministerial exception: Look to the employee's religious function.

* * *

The Ninth Circuit's rule, which requires courts to delve into matters of religious doctrine and to weigh the relative importance of various faith communities' religious designations, risks "depriving the church of control over the selection of those who will personify its beliefs." *Hosanna-Tabor*, 565 U.S. at 188. The Court should hold that the religious function performed by an employee—not a title—separates "ministerial" from secular employees for purposes of the ministerial exception. By announcing an objective and consistent rule, this Court can prevent excessive state entanglement in religious affairs and provide individuals and religious organizations with robust First Amendment protection, regardless of which faith community they belong to.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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