No. 19-267

# In The
# Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,

*Petitioner,*

v.

AGNES MORRISSEY-BERRU,

*Respondent.*

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

## BRIEF OF AMICI CURIAE STATE OF ALASKA AND THIRTEEN OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the First Amendment's 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[1]

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 becoming entangled in religious affairs—such as by having to determine whether a religious employee's title reflects a "ministerial" function. Indeed, the ministerial exception represents a structural limitation ensuring clear separation between the government and religious institutions. Furthermore, states have an important interest in protecting the constitutional rights of all citizens. The Ninth Circuit's myopic focus on the formal title of "minister" threatens the free exercise of religious minority groups in particular.

The states within the Ninth Circuit and the many states whose highest courts have not yet applied the ministerial exception have a particular interest in ensuring that religious institutions and religious minorities

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[1] In compliance with Supreme Court Rule 37.2(a), Alaska provided counsel of record with timely notice of its intent to file this amicus brief.

receive the same First Amendment protections in their states as in other states. Amici therefore have a strong interest in resolution of the split of authority created by the Ninth Circuit in favor of a clear, nationwide rule for state courts and agencies to follow.

The state amici respectfully request that the Court grant Our Lady of Guadalupe School's petition for certiorari and clarify that the ministerial exception applies to all employees who perform religious functions—regardless of their formal titles.

## SUMMARY OF ARGUMENT

The Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, faced with applying the ministerial exception for the first time, declined to "adopt a rigid formula for deciding when an employee qualifies as a minister." 565 U.S. 171, 190 (2012). Now, seven years after the Court first upheld the ministerial exception, lower courts have split on its appropriate application.

In holding that the important religious functions performed by the employee in this case do not place her within the ministerial exception, the Ninth Circuit departed from the national consensus. *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460, 461 (9th Cir. 2019) (App. 1a). Other courts considering the exception after *Hosanna-Tabor* have emphasized the importance of looking to the acts or functions the religious employee carries out, rather

than the employee's title. *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 of Pittsburgh*, 903 F.3d 113, 122 n.7 (3d Cir. 2018); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 205 (2d Cir. 2017); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012). *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—conflicts with these cases and results in religious institutions receiving different levels of constitutional protection depending on which federal circuit they are located in and how closely their religious terminology resembles that of the Lutheran church in *Hosanna-Tabor*.

The lower state and federal courts need further guidance from this Court on the ministerial exception. Amici ask this Court to grant certiorari and adopt a rule ensuring that states do not wade unconstitutionally into religious organizations' internal affairs, that religious institutions' freedom from state interference is consistent nationwide, and that religious minorities—particularly those who do not recognize formal clergy—are not subjected to greater government

interference into their internal affairs than majority religions.

## ARGUMENT

### I. The ministerial exception exists as a limitation to ensure that courts and states do not become entangled in religious controversies.

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 for maintaining a clear separation between governmental and religious affairs led to the development of the "ministerial exception" in 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, *reh'g granted*, 617 F.3d 401 (9th Cir. 2010); *Rweyemamu v. Cote*, 520 F.3d 198, 204-05 (2d Cir. 2008); *Schleicher v. Salvation*

*Army*, 518 F.3d 472, 474-75 (7th Cir. 2008); *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294, 305 (3d Cir. 2006); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 656 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1303-04 (11th Cir. 2000); *Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *6 (4th Cir. Dec. 29, 1998) (unpublished); *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 461-62 (D.C. Cir. 1996); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362-63 (8th Cir. 1991); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (4th Cir. 1985); *McClure*, 460 F.2d at 560. "This constitutional protection is not only a personal one; it is a structural one that categorically prohibits federal and state governments from becoming involved in religious leadership disputes." *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015).

The Court confirmed the importance of the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), 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 the application of the ministerial exception, instead holding that the totality of the circumstances

made clear that the "called" Lutheran teacher in that case was a "minister" for the purposes of the exception. *Id.* at 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.

## II. The Ninth Circuit's decision is anomalous and creates a circuit split.

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 applying the exception. *Fratello v. Archdiocese of New York*, 863 F.3d 190, 205 (2d Cir. 2017) ("'[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 v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) ("[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 v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658-60 (7th Cir.), *cert. denied*, 139 S. Ct. 456 (2018) (focusing on employee's religious functions); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 121-22 & n.7 (3d Cir. 2018)

(noting importance of church's ability "to choose who will perform particular spiritual functions") (internal citation omitted); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 835 (6th Cir. 2015) (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.

The Ninth Circuit's emphasis on a religious employee's formal title and training means that religious institutions in the Ninth Circuit receive less robust First Amendment protection than similarly situated religious institutions in other parts of the country. In this case, the Ninth Circuit acknowledged that Ms. Morrissey-Berru had "significant religious responsibilities as a teacher," including leading students in daily prayer, helping plan the liturgy for a monthly Mass, and "incorporat[ing] Catholic values and teachings into her curriculum"—as required by her employment contract. App. 3a. Yet because her designation was "teacher" and she had no formal religious credentials or training, the court concluded that she did not fall within the ministerial exception. App. 2a-3a. If Ms. Morrissey-Berru had filed her claim in, for example, the Second or Fifth Circuit, the result almost certainly would have been different. *See Fratello*, 863 F.3d at 205 (holding that a formal religious title "is neither

necessary nor sufficient" (quoting *Hosanna-Tabor*, 565 U.S. at 202 (Alito, J., concurring)) and that "[i]t is the relationship between the activities the employee performs for her employer, and the religious activities that the employer espouses and practices, that determines whether" the ministerial exception applies); *Cannata*, 700 F.3d at 177 (noting that the employee "furthered the mission of the church and helped convey its message to the congregants."). The Ninth Circuit's rule will thus result in inconsistent outcomes based on materially indistinguishable facts.

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, App. 45a-51a, 90a-94a; leading students in daily prayer, App. 86a-87a; taking students to Mass, App. 88a-89a; and helping plan the liturgy for Mass once a month, App. 83a-84a). *Hosanna-Tabor*, 565 U.S. at 192. Yet because Ms. Morrissey-Berru did not have a title similar to "called" teacher—a title highly specific to the Lutheran school context—the court concluded that she fell outside the ministerial exception. App. 2a-3a. The Ninth Circuit's rule thus results in the different application of employment discrimination laws to individuals who performed materially the same role as employees. The right to free

exercise of religion is a bedrock principle of American governance. The extent to which a religious institution is subject to judicial oversight—and the limits of citizens' right to freely exercise their religion—should not vary based on the arbitrary geographical contours of the federal circuits. Only by resolving the circuit split on the appropriate application of the ministerial exception can the Court ensure consistent protection of religious freedom nationwide.

## III. The Ninth Circuit's decision allows excessive government interference in religious affairs.

The Ninth Circuit's approach—focusing on an employee's title rather than the nature of her work—is itself an inappropriate overstep into religious doctrine. It is not for courts or state agencies to decide the religious significance of an employee's title. States should not be required to assess which of the various titles used to describe individuals involved in the myriad religious communities in this country are the equivalent of a Lutheran "minister." And in the majority of circuits to have applied *Hosanna-Tabor*, states do not have to. But in the Ninth Circuit, a court may be asked to determine whether a Catholic catechetical lay minister carries the same ecclesiastical authority as a Lutheran "called" teacher; whether an instituted acolyte or literature evangelist "ministers" to the faithful; who qualifies as an "alim" and what his role is in the Muslim community; or whether "ragi" is a religious or musical qualification for a Sikh. Resolving these questions requires precisely the substantive entanglement with

religion that the Religion Clauses forbid. *See Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 at 120. Rather than delve into these quintessentially religious questions of devotion and religious hierarchy, a court's inquiry should focus on the employee's actual duties within the religious institution.

Ms. Morrissey-Berru's formal devotional status in this case 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." 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 a religious employee's objective duties—in this case, "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." App. 7a-8a. By focusing on the employee's function within the religious institution, the court 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.

The Ninth Circuit's rule opens the door to state interference in the religious affairs of minority groups in particular. Many minority faith communities employ

religious designations with no ready analogue to the Protestant Christian designation of "minister." *See 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. Because the Ninth Circuit's split from the national consensus on the ministerial exception thus has the potential to disproportionately burden the Free Exercise rights of religious minorities, it is imperative that the Court establish a uniform, broadly applicable test that protects the rights of all citizens equally.

## IV. This case allows the Court to establish a neutral and universally applicable test for applying the ministerial exception.

Seven years after this Court's first decision applying the ministerial exception, the lower courts have once again diverged on the appropriate application of the exception. The consequences of this circuit split—inconsistent protection of First Amendment rights, undue government interference in religious affairs, and

disparate treatment of religious minorities—oblige this Court to clarify the appropriate standard for the ministerial exception and announce a neutral, broadly applicable test for its application.

The Court need not adopt a "rigid formula for deciding when an employee qualifies as a minister," an approach it eschewed in *Hosanna-Tabor*, 565 U.S. at 190. 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—separates "ministerial" from secular employees for purposes of the exception.

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 vast variety of religious practices, institutions, and organizations in this country, whether a religious employee falls under the ministerial exception should depend on the religious function she performs within the organization—not on any formal designation, title, or credential.

By announcing a neutral, objective rule, this Court can provide individuals and religious organizations with robust First Amendment protection, regardless of geographical location and regardless of which faith community they belong to.

## CONCLUSION

Absent clear guidance from the Court on which religious employment relationships are beyond state interference, state amici risk entangling themselves in religious affairs and "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 therefore grant Our Lady of Guadalupe School's petition for certiorari and clarify the contours of the ministerial exception to ensure that lower courts and civil rights departments across the country apply the exception uniformly.

Respectfully submitted,

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