Nos. 19-267, 19-348

IN THE

Supreme Court of the United States

OUR LADY OF GUADALUPE SCHOOL,
Petitioner,

v.

AGNES MORRISSEY-BERRU,
Respondent.

ST. JAMES SCHOOL,
Petitioner,

v.

DARRYL BIEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KRISTEN BIEL,
Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE ASMA T. UDDIN IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

Asma T. Uddin is a religious liberty lawyer and scholar working for the protection of religious expression for people of all faiths in the United States and abroad. Ms. Uddin is a leading advocate for Muslim religious freedom and has worked on religious liberty cases at every level of the federal judiciary from the Supreme Court to federal district courts. She has defended claimants as diverse as Evangelicals, Sikhs, Muslims, Native Americans, Jews, Catholics, and members of the Nation of Islam. She is the author of the recent book *When Islam Is Not A Religion: Inside America's Fight For Religious Freedom* (2019).

SUMMARY OF ARGUMENT

The ministerial exception is rooted in fundamental principles enshrined in the Constitution's Religion Clauses. As this Court recognized in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), the Religion Clauses absolutely preclude the government from mandating whom faith communities must appoint and employ as their ministers. Further, the determination whether a person is covered by the ministerial exception does not turn on any "rigid formula" and instead must consider "all the circumstances" surrounding the function the individual serves in the faith community. *Id.* at 190. Only this kind of function-based analysis can properly vindicate religious freedom in America's diverse religious landscape.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its counsel, made any monetary contribution to the preparation or submission of this brief.

In these consolidated cases, however, the Ninth Circuit erroneously discarded a function-based approach in favor of an analysis that accords near-dispositive weight to an employee's formal title. Such a formalistic approach to the ministerial exception has no grounding either in *Hosanna-Tabor* or in the history of American religious practice and jurisprudence. To the contrary, this Court has long emphasized the need to refrain from judicial second-guessing of inherently ecclesiastical decisions. The Ninth Circuit's approach, under which an employee's title may outweigh all evidence of his or her function, unduly involves the courts in questions that are basic to religious autonomy—*e.g.*, How is the faith community to be organized? Who is to lead it? And what is a particular individual's significance to the religious community? One purpose of the First Amendment is to avoid entanglement in such questions.

The Ninth Circuit's deviation from this Court's precedent is especially concerning for religious minorities. Many religious minorities do not mirror Christian organizations in their leadership structure. Some specifically deny their worship and community leaders any exalted status. For Muslims in particular, an inquiry into whether imams or other leaders bear a title equivalent to "minister" can present a troubling choice between denying a central pillar of Islam—*i.e.*, the equality of all believers—and risking loss of ministerial exception protections. This Court should confirm that the ministerial exception properly depends on an analysis of all relevant factors (including giving proper weight to an individual's *function*), and that only such an analysis is in accord with *Hosanna-Tabor*, faithful to the Religion Clauses, and protective of the autonomy of all faith communities.

ARGUMENT

I. THE NINTH CIRCUIT'S TITLE-BASED APPLICATION OF THE MINISTERIAL EXCEPTION IS INCONSISTENT WITH THE RELIGION CLAUSES

The Establishment and Free Exercise Clauses allow religious groups the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Under the "ministerial exception," the government cannot displace a religious organization's own judgment about who will serve as a religious leader, messenger, or teacher for that organization. The government cannot tell a church who will be its priest or minister, any more than it can appoint a rabbi to a synagogue or install an imam in a mosque. Yet the Ninth Circuit's narrow application of the ministerial exception invites just such "judicial resolution of ecclesiastical issues," *Sterlinski* v. *Catholic Bishop of Chicago*, 934 F.3d 568, 571 (7th Cir. 2019), contrary to the Constitution's guarantee of religious freedom.

A. The Religion Clauses Forbid The Government From Controlling Ecclesiastical Appointments

This Court first recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. 171 (2012), but the doctrine is deeply rooted in the Nation's constitutional history. For just under a century prior to the establishment of the first colonies in America, the English Crown had exercised formal control over the national church, including through the appointment of clerics.

See McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421-1422 (1990). Many religious dissidents came to the British colonies in America hoping to build a society where their religious exercise would not be impeded by the crown or by the clerical leadership of the Church of England. *See* Weir, *Early New England: A Covenanted Society* 52 (2005); *see also Hosanna-Tabor*, 565 U.S. at 182 ("Seeking to escape the control of the national church, the Puritans fled to New England, where they hoped to elect their own ministers and establish their own modes of worship."). Because these colonists were dissenters, many had particular concern about the majority coercing the minority to violate their consciences. *See* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1591-1592 (1989).

Although most early colonists were religious dissenters, many Protestant groups sought to suppress or constrain the activities of other faith communities, including other Protestants, Catholics, and Jews. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, at 1421-1430. For example, in Puritan-controlled Massachusetts, Presbyterians, Quakers, and Baptists all faced restrictions and, at times, persecution. *Id.* at 1423. And in some states, ministers were appointed by the state itself, as they had been in England. *Id.* at 1424.

It was against the background of this difficult history of church-state relations, both in England and Colonial America, that the newly-founded United States introduced religious liberty protections. At the outset of the Revolutionary War, in a reaction to England and local loyalists, states such as Georgia, North Carolina, South Carolina, and New York eliminated preferences

and state support for the Church of England in their constitutions. *Id.* at 1436. This initial reaction turned into a drive for disestablishment and free exercise throughout the colonies as the 1780s progressed. *Id.* at 1436-1440. By 1789, nearly every state constitution explicitly protected religious freedom. *Id.* at 1455. And at the federal level, the Establishment and Free Exercise Clauses of the First Amendment were adopted as part of the Bill of Rights in 1791.

One purpose of these protections was to prevent government intrusion in ecclesiastical decisions. Although James Madison and Thomas Jefferson had significant disagreements about the scope of religious freedom, both agreed that the state should not interfere in ministerial choices. *See* Esbeck et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 181-182 (2011) (describing Jefferson's and Madison's resolve against "'political interference in religious affairs'" with regard to selecting church "functionaries" and describing Jefferson's position that religious institutions should be able to self-govern "'without interference from the civil authority'" (emphasis omitted)); *see also Hosanna-Tabor*, 565 U.S. at 184-185 (citing instances of Madison's and Jefferson's refusal to involve the government in ecclesiastical decision-making). Madison cited the "scrupulous policy of the Constitution in guarding against a political interference with religious affairs" when, at one time, he declined to render an opinion on the "selection of ecclesiastical individuals." *Hosanna-Tabor*, 565 U.S. at 184.

Both the Establishment *and* Free Exercise Clauses reflect a principle of nonintervention in ecclesiastical decisions. The Free Exercise Clause protects a religious body's "right to shape its own faith and mission

through its appointments," and the Establishment Clause "prohibits government involvement in such ecclesiastical decisions." *Hosanna-Tabor*, 565 U.S. at 188-189; *see also* Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 12 (2011) ("A church losing control of its religious matters implicates the Free Exercise Clause. The government gaining control of those religious matters implicates the Establishment Clause."). The ministerial exception embodies the constitutional policy of both clauses: its purpose is to ensure "that the authority to select and control who will minister to the faithful—a matter strictly ecclesiastical—is the church's alone." *Hosanna-Tabor*, 565 U.S. at 194-195 (internal quotation marks and citation omitted).

B. The Ninth Circuit's Analysis Threatens Religious Freedom

In *Hosanna-Tabor*, this Court took a pragmatic view of the ministerial exception. Its analysis avoided any "rigid formula" for applying the exception, and instead identified four "considerations" supporting the conclusion that Lutheran schoolteacher Cheryl Perich fell within the exception. 565 U.S. at 190, 192. In particular, the Court pointed to the schoolteacher's "formal title," "the substance reflected in that title," her use of the title, and "the important religious functions she performed." *Id.* at 192. "[A]ll the circumstances" surrounding Perich's employment had to be considered, the Court noted, and its analysis avoided an undue focus on the employee's formal position. *See id.* at 190, 193; *see also id.* at 202 (Alito, J., concurring) (noting that "a [religious] title is neither necessary nor sufficient" to trigger the exception). The Court's opinion also took no view "on whether someone with Perich's

duties would be covered by the ministerial exception in the absence of" all the considerations discussed by the Court. *Id.* at 193.

Justice Alito's concurrence, joined by Justice Kagan, rightly highlighted the functional nature of the inquiry, explaining that the analysis "should focus on the function performed by persons who work for religious bodies." *Hosanna-Tabor*, 565 U.S. at 198. His opinion expressed particular concern that focusing on a person's title would be inappropriate given the diversity of religious practice in the United States: while "[t]he term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy," it "is rarely if ever used in this way by" other religions such as "Catholics, Jews, Muslims, Hindus, or Buddhists." *Id.* Further, Justice Alito observed that "the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions." *Id.* Since "virtually every religion in the world is represented in the population of the United States," Justice Alito explained, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one." *Id.*

A function-based approach to the ministerial exception avoids these problems and properly recognizes that "[d]ifferent religions will have different views on exactly what qualifies as an important religious position." *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring). Despite the diversity of religious practice in the United States, it remains possible to identify individuals "whose functions are essential to the independence of practically all religious groups" and who should be covered by the ministerial exception. *Id.* These in-

dividuals include "those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation." *Id.*

Any analysis that focuses unduly on a person's formal title—or that second-guesses a religious group's determination of an individual's religious function—would improperly insert judges into ecclesiastical decision-making. "[T]he mere adjudication of such questions would pose grave problems for religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205-206 (Alito, J., concurring). Regardless of an employee's formal title, "[i]f a religious group believes that the ability of such an employee to perform [religious] functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position." *Id.* at 199 (Alito, J., concurring); *see also id.* at 196 (Thomas, J., concurring) (Religion Clauses require courts "to defer to a religious organization's good-faith understanding of who qualifies as its minister").

Since *Hosanna-Tabor*, lower courts other than the Ninth Circuit have applied the ministerial exception using such a functional analysis. For example, the Seventh Circuit recently applied the ministerial exception to a teacher of Hebrew and Jewish studies at a Jewish day school because "the importance of [the teacher's] role as a 'teacher of [] faith'" outweighed considerations relevant to her formal title. *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655 (7th Cir. 2018) (per curiam), *cert. denied*, 139 S. Ct. 456 (2018). Similarly, the Massachusetts Supreme Court applied *Hosanna-Tabor* to hold that "the ministerial exception applies to

the school's employment decision regardless whether a religious teacher is called a minister or holds any title of clergy." *Temple Emanuel of Newton* v. *Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433, 443-444 (Mass. 2012). Many other courts have taken a similar functional view of the ministerial exception. *See, e.g.*, *Fratello* v. *Archdiocese of N.Y.*, 863 F.3d 190, 206-210 (2d Cir. 2017) (finding that the ministerial exception applied to a lay school principal in light of her "important religious functions"); *Conlon* v. *InterVarsity Christian Fellowship*, 777 F.3d 829, 834-835 (6th Cir. 2015) (finding that the title and function of a "spiritual director" together pointed toward application of the ministerial exception); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 177-179 (5th Cir. 2012) (applying the ministerial exception based on a music director's role in the church's religious activities); *Kirby* v. *Lexington Theological Seminary*, 426 S.W.3d 597, 613 (Ky. 2014) (holding that courts should focus on "actual acts or functions conducted by the employee" when applying the ministerial exception).

The Ninth Circuit took a different (and erroneous) approach in the decisions below: it treated the Respondents' lack of a "minister" title as effectively dispositive. For instance, in the *Biel* case, Ms. Biel's position required her to teach religion classes four days a week using a textbook on the Catholic faith assigned by the school. *Biel* v. *St. James Sch.*, 911 F.3d 603, 605 (9th Cir. 2018). She was also required to attend prayers and Mass, to work within Church "doctrines, laws, and norms," and to be evaluated on the religious aspects of her role. *Id.* at 605-606. Yet the panel gave little weight to the functions Ms. Biel performed, and instead focused on whether her title was sufficiently similar to the teacher in *Hosanna-Tabor*. *Id.* at 608-

609. The panel noted in particular that the church did not "hold Biel out as a minister," that "there is nothing religious 'reflected in' Biel's title" (which the panel identified as "Grade 5 Teacher"), and that "nothing in the record indicates that Biel considered herself a minister." *Id.* Based on this near-exclusive focus on Ms. Biel's title, the panel majority concluded that the ministerial exception did not apply—despite the evident similarities between Ms. Biel's job functions and those at issue in *Hosanna-Tabor*. *Id.*

As the judges dissenting from denial of rehearing en banc in *Biel* noted, the panel's holding "poses grave consequences for religious minorities … whose practices don't perfectly resemble the Lutheran tradition at issue in *Hosanna-Tabor*." *Biel* v. *St. James Sch.*, 926 F.3d 1238, 1239-1240 (9th Cir. 2019) (R. Nelson, J., dissenting from the denial en banc). Indeed, the panel came dangerously close to adopting a bright-line title-based ministerial exception, to the potential detriment of "a substantial plurality of religious adherents" in the circuit. *Id.* at 1240; *see also Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("Judicial attempts to fashion a civil definition of 'minister'" through a "bright-line test or multifactor analysis" would be insensitive to our nation's robust "religious landscape.")

Similarly, the *Morrissey-Berru* panel held that Ms. Morrissey-Berru was not a minister because her formal title was "Teacher," she "did not have any religious credential, training, or ministerial background," and she "did not hold herself out to the public as a religious leader or minister." *Morrissey-Berru* v. *Our Lady of Guadalupe Sch.*, 769 F. App'x 460, 461 (9th Cir. 2019). The court noted—and largely discounted—Ms. Morrisey-Berru's "significant religious responsibilities as a teacher" including that she "committed to incorporate

Catholic values and teaching into her curriculum," she "led students in daily prayer," she "was in charge of liturgy planning for a monthly Mass," and she "directed and produced a performance by her students during the School's Easter celebration every year." *Id.*

II. THE NINTH CIRCUIT'S APPROACH COULD DISPROPORTIONATELY HARM RELIGIOUS MINORITIES

Although the Ninth Circuit's narrow application of the ministerial exception could affect many faith communities, religious minorities may be the most sharply affected. Throughout American history, minority groups from the Quakers to Jews to Jehovah's Witnesses have struggled to achieve parity in the protections and privileges they are afforded. One obstacle was the diversity in their formal structures—and specifically the fact their leadership structures often did not mirror those of mainline Christianity. Applying the ministerial exception based on formal religious titles has proven inadequate to protect the religious freedom of many Americans.

Indeed, the very application of a title-focused analysis can impose burdens for non-majority religious communities. Many faiths not only differ from the Christian understanding of ministerial roles, but some (Islam included) may doctrinally reject the notion of a clergy with elevated status or a vocation distinct from other adherents. In its title-focused analysis, the Ninth Circuit risked engaging in the very sort of denominationalism that the First Amendment is designed to forbid. The Court should clarify that this is the wrong approach, as it risks subjecting minority religions "to the whims of the majority culture," in that minority "religious practices that conform to this culture would be protected more often than practices that don't." Uddin,

When Islam Is Not A Religion: Inside America's Fight For Religious Freedom 132 (2019).

A. The Ninth Circuit's Analysis Threatens The Religious Autonomy Of Minority Faiths

The concurrences in *Hosanna-Tabor* commented on the essential problem posed by a formalistic rendering of the ministerial exception. The term "minister," Justice Alito explained, is "rarely if ever used … by Catholics, Jews, Muslims, Hindus, or Buddhists," and the concept of ordination "has no clear counterpart in some Christian denominations and some other religions." 565 U.S. at 198. Thus it "would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy." *Id.* Instead, the ministerial exception should properly "focus on the function performed by persons who work for religious bodies." *Id.* As Justice Thomas noted, any other approach "risks disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some." *Id.* at 197 (Thomas, J., concurring). Historically, members of minority faiths in the United States have struggled with precisely this: to claim the protections of ministerial status for their own leaders and teachers, despite their differences from Christian models of ministry and religious organization.

Take, for example, the Society of Friends, often referred to as Quakers. Quakers reject clericalism and affirm a "priesthood of all believers": individual Quakers may exercise an office of ministry and even possess the title of "minister," but never undergo any special education or ordination. *See* Abbott et al., *Historical Dictionary Of The Friends (Quakers)* 225-226 (2nd ed. 2012); *accord* 1 Peter 2:9. Indeed, non-Quaker regimes

sometimes disputed whether Quaker ministers were in fact "ministers." In Massachusetts prior to 1786, for example, a marriage before a Quaker minister was void for failure to be before a "justice or minister." *See Inhabitants of Town of Milford* v. *Inhabitants of Town of Worcester*, 7 Mass. 48, 56 (1810).

On the other hand, Jewish congregations in early America attempted to gain protected status for their leaders by likening their roles to those of Christian clergy. Before the 1840s, most synagogues in America were led by *hazzan* (cantors) as opposed to rabbis. *See* Slobin, *Chosen Voices: The Story of the American Cantorate* 30-31 (2002). These *hazzan* generally lacked rabbinical education and were not ordained.[2] However, as one historian has explained, Colonial Jews attempted to approximate majority faith practices to obtain the protection of the law: "rights could be extended to Jewish clergymen on the principle of '*hazzan* equals minister.'" *Id.* at 103. Thus, in 1710 for instance, a New York *hazzan* named Abraham De Lucena requested and obtained "like privileges and advantages" to those "excus[ed] from several[] duties and services" "by reason of their ministerial function." *Id.*

The Church of Jesus Christ of Latter-day Saints ("Church of Jesus Christ") is another example. In a case before the Supreme Court of the pre-annexation Kingdom of Hawaii, a Church of Jesus Christ leader (known as an "elder") had claimed a tax-exemption that applied to "[a]ll clergymen of any Christian denomination regularly engaged in their vocation." *Kupau* v.

[2] Indeed, the *hazzan* ultimately were displaced by later waves of immigration of an educated and ordained rabbinate whose congregations appeared to have viewed them as more appropriately clerical. Slobin, *Chosen Voices* at 40.

Richards, 6 Haw. 245, 245 (1879). The court wrestled with whether, as an "elder," the claimant sufficiently resembled a Christian clergyman. In ruling for the elder, the court explained: "It does not appear why the use of the term 'Rev.' should be the test of the class of persons intended by the statute. It is the custom of some other denominations to style their ministers 'Elder.' The Baptists and Methodists do this to a considerable extent." *Id.* at 248. The court assigned particular importance to the fact that "elder" was "the designation of a minister or clergyman in his denomination, and that he is a clergyman or minister." *Id.*

Similar issues have arisen for religious faiths in more recent times. During the era of the military draft, for example, courts were required to determine when a Jehovah's Witness qualified for a ministerial draft exemption. *E.g.*, *Fitts* v. *United States*, 334 F.2d 416 (5th Cir. 1964). Because ministers of that faith generally work in secular occupations to support themselves, courts sometimes admonished local draft boards not to "fit and mold an ordained pioneer minister of Jehovah's Witnesses into the orthodox straight-jacket of ministers of an orthodox church," or "establish a requirement that a minister earn his livelihood from the ministry or from a particular congregation, or that he have a pulpit before he can claim and receive classification as a minister." *Pate* v. *United States*, 243 F.2d 99, 103 (5th Cir. 1957).

These examples demonstrate that members of minority religions may face inherent difficulties in representing their faiths when making a claim for religious protection *and* that the very elements of the title-focused test applied by the Ninth Circuit—ministerial title, education, and ordination—have been the subject

of profound misunderstandings when applied to minority religions.

B. Muslim-Americans Could Be Especially Burdened By A Title-Focused Analysis

While all minority faiths risk losing protection under the Ninth Circuit's approach, Muslim-Americans may be especially burdened. In particular, a title-focused application of the ministerial exception could require believing Muslims to choose between denying fundamental elements of the Islamic faith or forfeiting ministerial protections.

For one, the test as applied by the Ninth Circuit raises uncomfortable questions as to whether *any* believing Muslim would be entitled to ministerial status. While an imam may superficially resemble a Christian minister—for example, in leading prayers, officiating marriages, educating congregants, and visiting the sick—the offices are profoundly distinct. Indeed, as Justice Alito observed in *Hosanna-Tabor*: "In Islam … 'every Muslim can perform the religious rites, so there is no class or profession of ordained clergy. Yet there are religious leaders who are recognized for their learning and their ability to lead communities of Muslims in prayer, study, and living according to the teaching of the Qur'an and Muslim law.'" 565 U.S. at 202 n.3 (quoting 10 *Encyclopedia of Religion* 6858 (2d ed. 2005)).

This issue goes to the heart of the Islamic faith. Central to Islam is the concept that a Muslim worships Allah directly, without needing an intermediary.[3] No

[3] Indeed, the *Al-Fatiha*, the first *surah* (chapter) recited in every prayer cycle, affirms: "It is *You* [Allah] we worship and *You* we ask for help." (Quran 1:5) (emphasis added).

Muslim can be elevated over another by virtue of occupying a religious office, as this would be incompatible with Islam's understanding of the equality of all believers. *Cf.* Qur'an 49:13 ("O mankind, verily We have created you from a single (Pair) of a male and a female, and have made you into nations and tribes, that you may know each other. Verily the most honored of you in the sight of Almighty Allah is the most righteous."). Indeed, the Qur'an rejects the notion of priesthood as understood in the Christian and Jewish tradition. *See* Qur'an 9:31 ("They [Christians and Jews] have taken their scholars and monks as lords besides Allah, and [also] the Messiah, the son of Mary."). To ask a Muslim religious leader whether he bears the same title as a Christian minister is to set a standard that Islamic teachings require him to reject.

Moreover, the complex nature of Muslim practice frustrates any effort to map Christian religious structures onto Islam. Many non-Muslims know that imams lead prayers at a mosque, in a manner ostensibly similarly to a Christian minister. Yet the title "imam" only means the person chosen by the community for the purpose of leading prayers. *See* Imam, *Oxford Religious Studies Online*, http://www.oxfordislamicstudies.com/article/opr/t125/e1017. Different leaders, known as muftis, issue non-binding interpretations of Islamic law, Mufti, *Oxford Religious Studies Online*, http://www.oxfordislamicstudies.com/article/opr/t236/e0548, whereas leaders known as faqīh serve as experts on family law jurisprudence, Faqih, *Oxford Religious Studies Online*, http://www.oxfordislamicstudies.com/article/opr/t125/e613. Finally, an individual known as a shaykh would be known for his scriptural learning and may preach in the mosque. Shaykh, *Oxford Religious Studies Online*, http://www.oxfordislamicstudies.com/

article/opr/t125/e2183. Which of these (if any) is a minister?

The fact that a variety of persons perform ministerial functions in Islam suggests the basic incongruence of applying a title-focused analysis to Muslims. In Catholicism, for instance, the title "priest" applies to the person who leads a service, teaches a catechism, solemnizes a marriage, and elucidates the canon law. Yet in Islam, a separate label may apply to each of these activities. Steering clear of such complications generally requires deference to an individual's interpretation of her religion. *See* Uddin, *When Islam Is Not A Religion: Inside America's Fight For Religious Freedom* 126. And any alternative would invite courts to "pars[e] Islamic beliefs to protect only those they deemed acceptable," which "would violate the most basic tenets of religious freedom." *Id.* at 127.

In addition, as a minority faith, Muslim Americans are especially vulnerable to misunderstandings about their religion based on a general lack of knowledge by the majority. Because Muslims are an unwelcome minority in many areas of American society, they may not benefit from the same presumption of good faith that other religious groups are afforded. *See* Uddin, *When Islam Is Not A Religion* 116-117. As one comprehensive study of Free Exercise accommodation claims has shown, Muslims face disproportionate difficulties in religious litigation, in part due to significant misconceptions about the faith. *See* Sisk & Heise, *Muslims and Religious Liberty in the Era of 9/11: Empirical Evidence from the Federal Courts*, 98 Iowa L. Rev. 231 (2012); *see also* Uddin, *When Islam Is Not A Religion* 110-118 (discussing the study).

None of this is to say that the facts of a cleric's history, title, interactions with communities, or role in spiritual rituals cannot be relevant in a functional test. Indeed, as the *Hosanna-Tabor* Court emphasized, all relevant factors should be considered: a "factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above." *Hosanna-Tabor*, 565 U.S. at 194. But the analysis must remain focused on religious function if the ministerial exception is to be responsive to the diversity of American religious practice.

CONCLUSION

This Court should grant certiorari and reverse.

Respectfully submitted.

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