No. 19-371

In The
Supreme Court of the United States

STEPHEN S. WISE TEMPLE,

Petitioner,

v.

JULIE SU, as Labor Commissioner, etc.,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

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

KEVIN G. CLARKSON
Attorney General of Alaska

DARIO BORGHESAN
KATHERINE DEMAREST
Counsel of Record
ANNA JAY
1031 West Fourth Avenue
Anchorage, Alaska 99501
(907) 269-5100
kate.demarest@alaska.gov

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

STEVE MARSHALL
Attorney General
STATE OF ALABAMA

LESLIE RUTLEDGE
Attorney General
STATE OF ARKANSAS

CHRISTOPHER M. CARR
Attorney General
STATE OF GEORGIA

CURTIS T. HILL, JR.
Attorney General
STATE OF INDIANA

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

TIMOTHY C. FOX
Attorney General
STATE OF MONTANA

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

ALAN WILSON
Attorney General
STATE OF SOUTH CAROLINA

JASON R. RAVNSBORG
Attorney General
STATE OF SOUTH DAKOTA

KEN PAXTON
Attorney General
STATE OF TEXAS

SEAN D. REYES
Attorney General
STATE OF UTAH

QUESTION PRESENTED

Whether courts should apply a functional approach to the ministerial exception that applies equally to all religious institutions, whether or not they employ religious adherents to transmit religious precepts to the next generation.

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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 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 complaints by state civil rights agencies; and (2) through adjudication and disposition of employment 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 California Court of Appeal's undue focus on an employee's formal title and training threatens the free exercise of religious minority groups in particular.

The State of Alaska recently filed an amicus brief in support of the petition for certiorari in *Our Lady of Guadalupe School v. Agnes Morrissey-Berru*, No. 19-267.

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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.

Our Lady of Guadalupe challenges the Ninth Circuit Court of Appeals' approach to the ministerial exception—the very approach the California Court of Appeal has adopted in this case. Because these two cases present nearly the same question, amici have a strong interest in the Court's granting certiorari in either case—or both—in order to resolve the existing split of authority in favor of a clear, nationwide rule for state courts and agencies to follow.

The state amici respectfully request that the Court grant Stephen S. Wise Temple's petition for certiorari and clarify that the ministerial exception applies to all employees who perform religious functions—regardless of their formal titles or religious background.

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 employees in this case do not place them within the ministerial exception, the Court of Appeal—like the Ninth Circuit in *Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460 (9th Cir.

2019)—departed from the national consensus. 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 to the employee's formal title, credentials, or training. *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); *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 Court of Appeal's decision, which emphasizes employees' training, title, and private religious beliefs over the fact that they performed important religious functions, conflicts with these cases and results in religious institutions receiving different levels of constitutional protection depending on how closely their "ministry" 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 Court of Appeal's decision conflicts with nationwide consensus on the application of the ministerial exception.

Since *Hosanna-Tabor*, six federal appellate courts and two state high courts have applied the ministerial exception. Every court—other than the Ninth Circuit in *Our Lady of Guadalupe School* and the Court of Appeal here—has emphasized the importance of an employee's religious function in applying the exception. *Compare 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), *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 613-14 & n.61 (Ky. 2014) (noting that "hyper-focusing" on title may obscure actual function performed by employee), *and Temple Emanuel of Newton v. Massachusetts Comm'n Against Discrimination*, 975 N.E.2d 433, 443 (Mass. 2012) ("[T]he State should not intrude on a religious group's decision as to who should (and should not) teach its religion to the children of its members."), *with Morrissey-Berru v. Our Lady of Guadalupe School*, 769 F. App'x 460, 461 (9th Cir. 2019) ("[A]n employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework."). 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.

By contrast, the Ninth Circuit's rule—now adopted by the California Court of Appeal, App. 16—results in religious institutions in those jurisdictions receiving less robust First Amendment protection than similarly situated institutions in other parts of the country. The Court of Appeal in this case acknowledged that the teachers at Stephen S. Wise Temple "have a role in transmitting Jewish religion and practice to the next generation." App. 15. Yet because the teachers were not required to adhere to the Jewish faith themselves or have any particular religious credential, the court concluded that they did not fall within the ministerial exception. App. 14-17. In other jurisdictions, religious institutions employing teachers in materially the same capacity receive the protections of the ministerial exception. *See, e.g.*, *Grussgott*, 882 F.3d at 656-61 (school teacher who was not a rabbi, and who was not required to be Jewish, but who taught Hebrew and Jewish Studies was a "ministerial" employee); *Temple Emanuel of Newton*, 975 N.E.2d at 443-44 (teacher who was not a rabbi but who taught religious subjects at Jewish school was a "minister"). The rule promulgated by the Ninth Circuit and the Court of Appeal thus results in inconsistent outcomes based on materially indistinguishable facts.

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 jurisdiction. Only by resolving the nationwide split on the appropriate

application of the ministerial exception can the Court ensure consistent protection of religious freedom nationwide.

III. The Court of Appeal's approach allows excessive government interference in religious affairs.

The Court of Appeal's approach—focusing on an employee's religious training, title, and personal religious beliefs rather than the nature of her work—is itself an inappropriate overstep into religious doctrine. States should not attempt to assess whether individuals whom a religious institution has "entrusted with teaching and conveying the tenets of the faith to the next generation," *Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring), have the requisite qualifications to be considered the equivalent of a Lutheran "minister." But in California and throughout the Ninth Circuit, courts 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; or whether a non-adherent can adequately transmit the tenets of a faith tradition to the next generation. 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 quintessentially religious questions of devotion and religious institutional structure, a court's inquiry should focus on the employee's actual duties within the religious institution—in this case, "transmitting Jewish religion and practice to the next generation." App. 15. 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 doctrines or the employee's personal religious beliefs.

The minority rule adopted by the Court of Appeal 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. Minority religious institutions might need to rely more heavily than majority religions on non-adherents to teach their faith to children. If the application of the ministerial exception depends on the existence of a formal religious credential, some level of formal religious training, or the

employee's personal religious practice, then minority faith institutions will be less likely to receive the protections of the ministerial exception. Because the approach promulgated by the Ninth Circuit and adopted by California's Court of Appeal 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 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 or a formal course of study—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 her personal religious practice, formal training, or title.

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 Stephen S. Wise Temple'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,

KEVIN G. CLARKSON
Attorney General of Alaska

DARIO BORGHESAN
KATHERINE DEMAREST
Counsel of Record
ANNA JAY
1031 West Fourth Avenue
Anchorage, Alaska 99501
(907) 269-5100
kate.demarest@alaska.gov