No. 19-348

IN THE

Supreme Court of the United States

ST. JAMES SCHOOL,

Petitioner,

v.

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

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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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 must avoid 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

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least 10 days prior to the due date of amicus curiae's intention to file 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.

religious freedom in America's diverse religious landscape.

In this case, however, the Ninth Circuit effectively discarded a function-based approach in favor of an analysis that gives near dispositive weight to an employee's formal title. This was error. Such a formalistic understanding of 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. But the Ninth Circuit's approach—under which an employee's title outweighs all evidence of his or her function—unduly involves the courts in questions that are basic to ecclesiastical autonomy (*e.g.*, How is the faith community to be organized? Who is to lead it? What is a particular individual's significance to the religious community?). The First Amendment exists, in part, precisely to prevent courts from becoming entangled in such questions.

The Ninth Circuit's deviation from precedent is especially concerning for religious minorities. Many religious minorities have faith leaders who do not mirror Christian clergy. Some specifically deny that worship and community leaders have a more sanctified status. For Muslims in particular, an inquiry into whether imams or other religious leaders bear a title equivalent to "minister" forces a troubling choice between denying a central pillar of Islam—the equality of all believers—and risking loss of ministerial exemption protections. This Court's review is therefore needed to confirm that the ministerial exception properly depends on a function-based analysis, and that only such an analysis is aligned 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," which has deep roots in the American constitutional tradition, 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 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 his-

tory.[2] 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, they 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).

It was against the background of this difficult history of church-state relations that the Establishment and Free Exercise Clauses of the First Amendment were adopted. America's early history reflects that these protections were intended to prevent government intrusion in ecclesiastical decisions. For example, 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* Berg et al., *Religious*

[2] For a fuller explanation of the history of the Religion Clauses and the development of the ministerial exception, see *Hosanna-Tabor*, 565 U.S. at 182-185.

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" in declining 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 exclusive focus on the employee's title. *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 the Court discussed. *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 analysis 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 individuals 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 narrowly on a person's 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 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." *Hosanna-Tabor*, 565 U.S. 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"); *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 177-179 (5th Cir. 2012) (ministerial exception applied based on 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 decision below: it made Respondent's lack of a "minister" title effectively dispositive. Ms. Biel's position required her to teach religion classes four days a week using a workbook on the Catholic faith assigned by the school. Pet. App. 5a. 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 5a-6a. 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 at issue in *Hosanna-Tabor*. *Id.* at 10a-12a. 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.* at 11a-12a. 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 of the teacher in *Hosanna-Tabor*. *Id.* at 12a-13a.

As the judges dissenting from denial of rehearing en banc 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*." Pet. App. 42a-43a. The panel's focus on title-related considerations was especially concerning, because considerations of religious function are critically important for "religious groups whose beliefs and practices may render the other three [title-based] considerations less relevant, or not relevant at all." *Id.* at 54a. Rather than defer to the church's determination of Ms. Biel's function, 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.[3] *Id.* at 42a (R. Nelson, J., dissenting from the denial en banc); *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.")

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

Although the Ninth Circuit's narrow application of the ministerial exception will affect many faith communities, religious minorities may be the most sharply affected. Throughout American history, minority groups from Quakers to Jews to Jehovah's Witnesses have struggled to achieve the privileges of Christian ministers for their own faith leaders. In many cases, the obstacle to majority recognition was the fact that such leaders did not mirror Christian clerical titles or formal structures. The experience of American Islamic communities pointedly illustrates how an emphasis on formal titles is inadequate to protect the religious freedom of American Muslims.

Indeed, the very application of a title-focused analysis can impose burdens for non-majority religions.

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[3] In addition to the errors in *Biel*, a separate Ninth Circuit panel in *Morrissey-Berru* v. *Our Lady of Guadalupe Sch.*, 769 F. App'x 460 (9th Cir. 2019), *petition for cert. filed*, No. 19-267 (U.S. Aug. 28, 2019), followed the same reasoning in applying a title-focused test. *See also Su* v. *Stephen S. Wise Temple*, 244 Cal. Rptr. 3d 546 (Ct. App. 2019) (same), *petition for cert. filed*, No. 19-371 (U.S. Sept. 17, 2019).

Many faiths may not only differ from the Christian understanding of ministerial roles; some (Islam included) may doctrinally *reject* the notion of a clergy with a heightened status or a vocation distinct from other adherents. In basing its analysis on title-focused considerations, the Ninth Circuit engages in the very sort of denominationalism that the First Amendment precludes. The Court should clarify that this is the wrong approach, one that risks subjecting adherents of minority religions "to the whims of the majority culture," with the result that "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 Ninth Circuit's application of the ministerial exception turns in large part on an individual's title, "credentials, training, or ministerial background." Pet. App. 10a. But as Justice Alito's concurrence thoughtfully explained in *Hosanna-Tabor*, the term "minister" 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. Justice Alito thus concluded that 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.* It is for this reason that Justice Alito emphasized the need for courts to reject the sort of formalistic test applied by the panel below, and instead "focus on the function performed by persons who work for religious bodies." *Id.* Such emphasis on ministerial

function promises just outcomes for religious majorities and minorities alike. A rigid focus on title and credentials, on the other hand, threatens religious minorities with unfair treatment. *See, e.g.*, *id.* at 197 (Thomas, J., concurring) ("Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multifactor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some."); Pet. App. 42a-43a (R. Nelson, J., dissenting from the denial of en banc) (the Ninth Circuit's rule "poses grave consequences for religious minorities … whose practices don't perfectly resemble the Lutheran tradition at issue in *Hosanna-Tabor*").

Historically, members of minority faiths have often struggled to claim the benefits of ministerial status for their own leaders and teachers. In such efforts, they have frequently suffered from the mistaken assumption that deviations from Christian models of ministry and religious organization precluded ministerial status. 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. Perhaps unsurprisingly, non-Quaker regimes long 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 making their leaders seem more like 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.[4] However, as an historian of the *hazzan* office 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.*

Similar issues have arisen for religious faiths even in recent times. During the era of the military draft, for example, courts were required to carefully delineate 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 were forced to admonish local draft boards not to "fit and mold an ordained pioneer minister of Jehovah's Witnesses into the orthodox straightjacket of ministers of an orthodox church," or "establish a requirement that a minister earn his livelihood from

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[4] 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.

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 are meaningful in two respects. First, they illustrate that members of a minority religion will face inherent difficulties in representing their faith to a less informed majority population. Second, the examples caution 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. Determining whether a member of a minority faith fits within the ministerial exception by analogy to mainline Christian ministerial titles, credentials, trainings, and backgrounds does not adequately capture the rich diversity of American religious tradition. Only a functional test would consistently arrive at a conclusion faithful to the Religion Clauses.

B. Muslim-Americans Would Be Especially Burdened By A Title-Focused Test

Although all minority faiths are affected by a test that implicitly analyzes religious adherents in the framework of majority religion's hierarchy, Muslim-Americans may be especially burdened.

To start, 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, 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)).

And this is no mere doctrinal quibble, but a point with roots at the heart of the faith. Central to Islam is the equality of all believers. *See* 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"). No Muslim is warranted any entitlement by virtue of any religious office. To say, as did the Ninth Circuit, that one can know whether a person is a minister if among other things he "claim[s] … benefits available only to ministers," Pet. App. 12a, is therefore to ask a question with a presumption alien to Islam.[5]

To steer clear of such controversies, courts should "defer to the individual's interpretation of her religion." Uddin, *When Islam Is Not A Religion: Inside America's Fight For Religious Freedom* 126. If judges instead engaged in "parsing Islamic beliefs to protect on-

[5] In addition, as a minority faith, Muslim Americans are especially vulnerable to misunderstandings about their religion based on a general lack of knowledge by members of majority religions. As one comprehensive study of Free Exercise accommodations 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).

ly those they deemed acceptable, they would violate the most basic tenets of religious freedom." *Id.* at 127.

The Ninth Circuit's test fails in other respects to protect the religious freedom of American Muslims. Under the panel's test, whether a Muslim imam is subject to the ministerial exemption implicates sophisticated theological dimensions—for instance, concerning the role of a cleric as intermediary between God and the believer and whether the Islamic concept of *ulama* is analogous to Christian ordination. A functional test, by contrast, properly asks whether an imam "convey[s] the [institution]'s message and carr[ies] out its mission." *Hosanna-Tabor*, 565 U.S. at 192. Only the latter inquiry is consistent with, and properly vindicates, the Religion Clauses.

By prioritizing title-focused characteristics, the Ninth Circuit reduced the ministerial exception to a narrow and rigid test and ignored the diversity of religious practice protected by the First Amendment. None of this is to say that 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 taken into account: 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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