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Employment Law and Religious Liberty Clash at the Supreme Court

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By Mark Loeterman

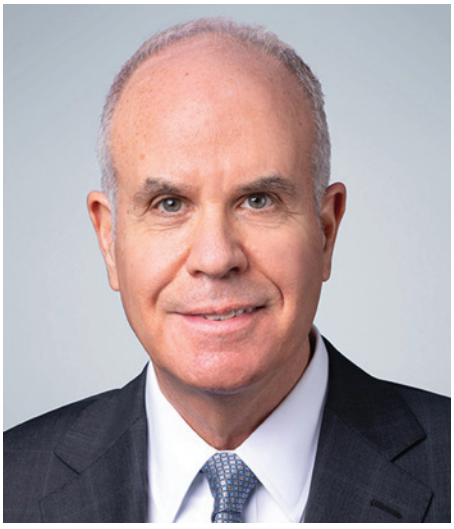
This term the U.S. Supreme Court will decide six cases dealing with religious liberty—an extraordinary number given a docket totaling only 74 matters. Two of the cases were argued via teleconference on May 11, when the court addressed the scope of the "ministerial exception," a legal doctrine shielding religious organizations from otherwise applicable employment law claims. The exception was recognized by a unanimous Supreme Court in its 2012 decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*. It declared that the First Amendment's free exercise and establishment clauses work together to "bar the government from interfering with the decision of a religious group to fire one of its ministers." Thus, a religious institution is afforded a complete defense to claims for discrimination and wage violations brought by an individual who is deemed a "minister" of the faith.

Both appeals involve Catholic school teachers whose employment was terminated, and who then sued their respective employers for discrimination. In *Biel v. St. James School*, a fifth-grade teacher was fired after she told her employer that she had breast cancer and would need time off for chemotherapy treatments. In *Morrissey-Berru v. Our Lady of Guadalupe*, the teacher's employment contract was not renewed allegedly because of age discrimination. The issue before the court is whether these plaintiff-teachers qualify as "ministers" for the purposes of the exception. The outcome could impact an estimated 300,000 teachers employed by religious schools around the country.

Competing Constitutional Values

The cases reflect important competing values: on one hand, the right of the state to protect workers through enforcement of its employment-discrimination laws, and the right of a religious organization to make ecclesiastical decisions, including the selection of those who personify its beliefs, without governmental intrusion.

The defendant Catholic schools, supported by the U.S. Solicitor General, favor a "functionality" test,



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which emphasizes the duties performed over an individual's title or training. They take an expansive view of a minister's role, regarding teachers as the "primary agents" for the transmission of faith from one generation to the next. By contrast, the teachers contend that such a broad standard is tantamount to an unwarranted "categorical immunity." Why should teachers, many of whom have duties only incidentally connected to religion, be denied legal remedies for discrimination?

They argue that the ministerial exception should be narrowly interpreted to apply only to those occupying a position of spiritual leadership in the church, as indicated by title and training, as well as job duties.

The 'Hosanna-Tabor' Decision

In *Hosanna-Tabor,* the court held that a "called teacher" at a Lutheran school could not sue her employer for disability discrimination. That teacher, Cheryl Perich, had alleged she was fired in violation of the Americans With Disabilities Act after being diagnosed with narcolepsy.

While declining to adopt a "rigid formula" for deciding when an employee qualifies as a minister, the court instead looked at all the circumstances of the plaintiff's employment, including: whether the employer held the employee out as a minister, whether the employee's title reflected ministerial substance and training, whether the employee held herself out as a minister, and whether the employee's job duties included "important religious functions."

Justice Samuel Alito authored a concurring opinion (in which Justice Elena Kagan joined) elaborating on the significance of formal ordination and designation as a "minister," noting that the term is commonly used by many Protestant denominations, but rarely if ever used in this way by other religions. Because virtually every religion is represented in the United States, he wrote, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as important to the central issue of religious autonomy … Instead, courts should focus on the function performed by persons who work for religious bodies."

Avoiding Entanglement

During oral argument, the justices expressed concern about how a secular court can decide whether a religious worker's duties are sufficient to characterize that individual as a "minister" of the faith, thus triggering the exception. Their questions showed a court wary of becoming entangled in defining who is a minister, and searching for practical limits as to what constitutes "important religious functions." The lawyers were peppered with provocative hypotheticals: a math teacher who gives an hour of religious instruction weekly, a nun serving as a chemistry teacher who starts class with the Hail Mary, and an art teacher who educates about art in the Vatican. Everyone agreed that the exception would not apply where religious activities are de minimus, such as a coach who leads his team in an opening prayer.

Oral argument revealed the divide between liberal and conservative justices apparent in other cases involving hotly contested social and cultural issues. Justice Ruth Bader Ginsburg described the breadth of the exception being advocated by the church schools as "staggering," asking pointedly, "How can a Jewish teacher be a Catholic minister?" Justice Sonia Sotomayor observed that the plaintiff-teachers were fired not for teaching religion wrong, but for reasons of age and disability, and was skeptical of conferring more power and deference to church-affiliated schools. Kagan noted that the central premise of the ministerial exception is that there are certain individuals within faith communities who have a distinctive role in propagating that faith. "And if a position can be filled by any old person, not by a member of the faith, isn't that a pretty good sign the employee doesn't have that special role within the religious community?"

On the conservative side, Chief Justice John Roberts echoed the concerns found in Alito's *Hosanna-Tabor* concurring opinion, saying "… different faiths put different stock in titles … that's pretty manipulable … you just start handing out titles to everybody and then they are covered." Justice Neil Gorsuch suggested that the parties' "sincerely held religious beliefs" should be the controlling principle. Justice Brett Kavanaugh asked whether the exception extends to those who impart or model religious values as distinct from teaching religious doctrine.

Conclusion

Where will the court draw the line? While impossible to predict, based on the oral argument, the justices appear poised to reject a blanket assertion that all teachers employed by religious groups are "ministers," especially where religious functions are not a meaningful part of the job. Similarly, it seems unlikely a formalistic application of the *Hosanna-Tabor* factors, which disproportionately affects minority religions lacking the same kind of hierarchical structure as the Lutheran church, will prevail. We will soon learn if the court can fashion a middle ground that accommodates the interests of both sides.

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