

# The First Amendment And The Ministerial Exemption: Federal Statutory Mandates

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## ABSTRACT

*On January 11, 2012 the United States Supreme Court ruled in Hosanna Tabor Evangelical Lutheran School v. Equal Opportunity Commission, et al.<sup>1</sup> that the First Amendment free exercise of religion clause requires the recognition of a ministerial exception from the application of the discrimination provisions of the federal Americans with Disabilities Act. Lower federal courts had long recognized such an exemption in federal anti-discrimination statutes, yet the U.S. Supreme Court had never formally done so. The decision of the Court was unanimous, although separate concurring opinions were filed by Justice Thomas and by Justice Alito, who was also joined by Justice Kagan. Thus, in its decision, the Court has mandated immunity for religious organizations from the laws that prohibit discrimination, and retaliation in the workplace. The Hosanna Tabor decision raises issues of how far such a ministerial exemption extends and to what extent it immunizes religious organizations from liability for other types of statutorily prohibited and tortious conduct. There is concern in some sectors that too broad an exemption would immunize religious organizations under numerous neutral, generally applicable laws, such as those governing sexual abuse, unemployment compensation, employer social Security deductions, and sales taxes, all of which have previously been applied to religious organizations.*

**Keywords:** First Amendment; Ministerial Exemption; Federal Statutory Mandates

## HISTORY AND FACTS OF THE CASE

*H*osanna-Tabor Evangelical Lutheran Church and school is a religious corporation affiliated with the Lutheran Church—Missouri Synod, hereinafter LCMS. Cheryl Perich was a “called” teacher at the Hosanna-Tabor Church School. As such, she had completed a course of study that included classes required by the LCMS and had received a certificate of admission into the teaching ministry. She was then placed upon a list of teachers approved by the LCMS to be “called” as teachers in their affiliated schools. Ms. Perich was “called” and hired as a teacher by Hosanna-Tabor where she taught secular courses for the school. In this respect her teaching duties were identical to other “contract” lay teachers, who did not meet the LCMS teaching ministry requirements. However, in addition to teaching secular course such as math, language arts, English, social studies and music, Perich taught religion classes four days a week for thirty minutes and attended chapel service with her class for thirty minutes once a week. She also led each class in prayer three times a day. Activities related to religion consumed approximately forty-five minutes of the sever hour school day.<sup>2</sup> Evidence in the case indicated that Hosanna-Tabor did not require teachers to be “called” and did not even required teachers to be Lutheran. It also indicated that non-Lutheran teachers had identical responsibilities as Lutheran teachers, including teaching religion classes and leading chapel.<sup>3</sup>

In June, 2004, Perich became ill, was hospitalized and underwent a series of medical tests. Before the beginning of the 2004-2005 academic year, Hosanna-Tabor administrators suggested that she take a disability leave for the school year. She was told by the school principal that she would “still have a job when she regained her

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<sup>1</sup> \_\_\_\_ U.S. \_\_\_\_.

<sup>2</sup> *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & School*, 597 F. 3d 769 (6<sup>th</sup> Cir. 2010) at 772.

<sup>3</sup> *Id.* at 773.

health.” On January 27, 2005, Perich wrote to the school principal that she would be able to return to work between February 14 and February 28, 2005. On February 8, 2005 Perich’s doctor gave her a written release to return to work without restrictions on February 25, 2005. Hosanna-Tabor refused to allow her to return to work and asked her to resign her call. When she refused to do so and filed a charge of discrimination and retaliation with the EEOC, the congregation voted to rescind her call and notified her of her termination. The EEOC then filed a complaint against Hosanna-Tabor in the United States District Court for the Eastern District of Michigan alleging one count of retaliation in violation of the ADA. Perich moved to intervene in the action and was granted leave to and did in fact file her own complaint in the case. The District Court granted summary judgment in favor of Hosanna-Tabor, dismissing Perich’s claim on the grounds that the court could not inquire into her claims of retaliation, because they fell within the “ministerial exception” to the ADA. Perich sought reconsideration, which was denied. Both Perich and the EEOC then filed notices of appeal to the United States Court of Appeals for the Sixth Circuit.<sup>4</sup>

The Court of Appeals treated the dismissal of the case by the District Court in a motion for summary judgment as a dismissal for lack of subject matter jurisdiction. In so doing, the Court of Appeals noted that “this Circuit has treated the ‘ministerial exception’ as jurisdictional in nature.” Accordingly, the Court of Appeals held that the application of the ministerial exception by the District Court was a legal conclusion subject to *de novo* review rather than a finding of fact.<sup>5</sup> The Court of Appeals recognized the existence of a “ministerial exception” to the application of the ADA, but held that it did not apply to Hosanna-Tabor in its employment of Perich, because the District Court had found that her primary duties consisted of teaching secular subjects, using secular textbooks, without incorporating religion into the secular materials. Although Hosanna-Tabor met the first prong of the two-pronged test established by the Sixth Circuit in that it was a “religious institution,” it failed to meet the second prong in that its employment of the teacher was more secular than ministerial in nature. Her primary duties were secular rather than religious. Thus, the Court of Appeals found the district court had erred in classifying Perich as a ministerial employee.<sup>6</sup>

In its opinion the Court of Appeals also discussed the application of the ADA to religious employees. In so doing, it noted that the legislative history of the act makes clear that Congress intended the ADA to broadly protect employees of religious entities from retaliation on the job, subject only to a narrowly drawn religious exception. The Court of Appeals cites in its opinion a report of the House of Representatives that gives an interesting hypothetical example. That example is as follows:

[A]ssume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person’s disability.<sup>7</sup>

The Court of Appeals also cites the Code of Federal Regulations, which contains a regulation as follows: “Religious organizations are not exempt from title 1 of the ADA . . . A religious [entity] may give a preference in employment to individuals of the particular religion, and may require that applicants and employees conform to the religious tenets of the organization. However, a religious organization may not discriminate against an individual who satisfies the permitted religious criteria because that individual is disabled.”<sup>8</sup> Thus, the Court of Appeals vacated the district court’s order entering summary judgment on behalf of the Defendant and remanded the case with instructions that the district court make a finding on the merits in favor of Perich based upon her retaliation claim under the ADA. Hosanna-Tabor then requested the United States Supreme Court grant *certiorari* to hear the case, which it subsequently did.

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<sup>4</sup> *Id.* at 773-776.

<sup>5</sup> *Id.* at 776.

<sup>6</sup> *Id.* at 780.

<sup>7</sup> H.R. Rep. No. 485 part 2, 101<sup>st</sup> Cong., 2d Sess. 76-77 (1990).

<sup>8</sup> 29 C.F.R. Pt. 1630, App. §1630.16(a).

## THE U.S. SUPREME COURT DECISION

In a 9-0 decision written by Chief Justice John Roberts, the United States Supreme Court reversed the decision of the Sixth Circuit Court of Appeals.<sup>9</sup> In the decision, the Supreme Court recognized the existence of a constitutionally based “ministerial exception” to the application of the Americans with Disabilities Act, which it used to then rule against Cheryl Perich and the EEOC. Although the ruling of the court was unanimous, not all justices signed on to the opinion written by Chief Justice Roberts. Justice Thomas wrote a concurring opinion, and Justice Alito wrote a concurring opinion, in which Justice Kagan joined. Unlike the Appeals Court, which recognized there was a ministerial exception rooted in the First Amendment’s guarantees of religious freedom, but then concluded that Perich did not qualify as a “minister” under the exception, the United States Supreme Court found the existence of a ministerial exception rooted in the First Amendment’s establishment and free exercise clauses, but then concluded that Perich did in fact qualify as a “minister” under the exception.

Whereas the Court of Appeals focused on the nature of the work performed by Perich and the fact her duties as a “called” teacher were identical to those of lay teachers, the United States Supreme Court focused on the fact she was held out by the church school as a minister and that the church school had extended a “call” to her. In his opinion, Chief Justice Roberts highlighted the formal title of “minister” given to Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church. He then cited three “errors” committed by the Court of Appeals. These were: (1) failing to see any relevance in the fact that Perich was a commissioned minister; (2) giving too much weight to the fact that lay teachers at the school performed the same religious duties as Perich; and (3) placing too much emphasis on Perich’s performance of secular duties.

In his separate concurring opinion Justice Thomas sided even more with religious organizations than did the Chief Justice. In the view of Justice Thomas, the Religion Clauses of the United States Constitution require civil courts to not only apply the ministerial exception, but to defer to a religious organization’s good-faith understanding of who qualifies as one of its ministers. In his opinion, the evidence in the case demonstrated that Hosanna-Tabor sincerely considered Perich a minister and that would be sufficient for him to conclude that her suit is barred by the ministerial exception. On the other hand, Justices Alito and Kagan thought the Court’s opinion focused too much on the fact that Perich was a “commissioned minister” of the Lutheran Church – Missouri Synod. They believed it would be a mistake if the term “minister” or the concept of ordination were viewed as central to the issue of religious autonomy in cases such as this. They suggested instead that courts should focus on the function performed by persons who work for religious bodies. They pointed out that although the term “minister” is used by many Protestant denominations to refer to members of their clergy, the term is rarely if ever used in the same way by Catholics, Jews, Muslims, Hindus, or Buddhists. They also noted that Judaism and some Christian denominations have no clear counterpart to the term “minister” or to the concept of ordination. The two justices believe the “ministerial” exception should apply to any “employee” who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. Consequently, if a religious group believes that the ability of an employee to perform these key functions has been compromised, the constitution guarantees the group’s right to remove the employee from his or her position.

## CRITICISM OF THE SUPREME COURT’S RULING

None of the parties to the case argued against the existence of a First Amendment based “ministerial” exception to the statutory mandates of federal discrimination laws. Rather, the issue was the scope of such an exception. All parties to the case agreed that the ministerial exception serves an important interest in religious liberty. However, they disagreed as to the scope the exception. This was an issue the United States Supreme Court ignored in its decision. The exception serves the purpose of allowing religious organizations to practice their religion and convey their message without government interference, but at the same time, it thwarts the interests of society in ending discrimination. It fails to serve the exception’s purpose when it is applied to shield a religious

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<sup>9</sup> *Hosanna-Tabor Evangelical Lutheran Church and School, Petitioner, v. Equal Employment Opportunity Commission, Et Al.*, 2012 WL 75047 – Supreme Court 2012, \_\_\_ U.S. \_\_\_\_ (2012).

entity from liability for discrimination or retaliation that is unrelated to religious ideology.<sup>10</sup> That is essentially what the Supreme Court did in overturning the decision of the Court of Appeals and ruling in favor of Hosanna-Tabor. There was circumstantial factual evidence in the case to suggest the motivation for Perich's dismissal was pretextual and unrelated to the religious beliefs of the Hosanna-Tabor school and the Lutheran Church—Missouri Synod. That evidence was ignored by the Supreme Court. After finding that Ms. Perich was a ministerial employee, the Court should have examined the evidence in the case that suggested her termination was motivated by factors unrelated to religious beliefs or doctrines. It failed to do so.

By ignoring the evidence suggesting a pretextual discharge of Ms. Perich, the United States Supreme Court went out of its way to establish a constitutionally based ministerial exception that is more broad than necessary. It could have permitted a limited judicial inquiry into the employer's use of pretext in the discharge of the employee. By failing to do so and failing to inquire into the use of pretext, the Supreme Court created a shield for religious institutions to protect themselves from both religiously motivated and non-religiously motivated employment actions. Both would now seem to be protected from government intervention. This would now seem to permit religious employers to implement employment decisions that would otherwise be prohibited. They can do so by merely claiming the decision is related to some sort of religious belief. In doing so, the Supreme Court has now prevented wronged employees from even attempting to submit evidence showing pretextual reasons for termination. It is understandable why the Supreme Court would not want to resolve matters involving church doctrine. However, it is baffling why the Court would want to completely defer to a religious organization simply because an employment dispute involves such an organization.

In other employment discrimination related disputes, the Supreme Court has employed a burden-shifting framework in its analysis. For example, in Title VII cases involving non-religious employers, the courts use the framework established in *McDonnell Douglas Corporation v. Green*.<sup>11</sup> Under the burden-shifting approach of the *McDonnell Douglas* case, the employee must first establish a prima facie case of discrimination. The employer must then produce evidence of a legitimate non-discriminatory reason for its actions. If the employer does so, the plaintiff must then present facts to infer discrimination. He/she may do so by showing that the employer's explanation is insufficient and/or a pretext for discrimination. The Supreme Court could have established a similar framework to evaluate allegedly pretextual decisions made by religious employers. Such an approach would allow courts to evaluate claims of pretext without becoming enmeshed in issues of religious doctrine. Such a limited scope of inquiry would not intrude into the internal organization or belief system of a religious institution. It would protect employees of religious institutions from employment discrimination without subverting the organization's selection of its "ministers."

When Congress enacted Title VII of the Civil Rights Act<sup>12</sup> and Title I of the Americans with Disabilities Act<sup>13</sup> it created defenses for religious organizations that allow them to discriminate against individuals on the basis of religion, even when hiring for non-ministerial positions. As the Court of Appeals noted in its opinion, Congress clearly intended for the ADA to apply to religious employers. A safe-harbor that applies to conduct not motivated by religion undermines the will of Congress in combating discrimination. In effect, the Supreme Court held in its decision that it is fair and appropriate to permit a religious employer to engage in otherwise illegal discrimination. Because Hosanna-Tabor argued that its religious doctrine opposed suits in civil court, the Supreme Court in effect held that the First Amendment allows a religious organization to adopt an internal agreement that ignores and exempts it from otherwise applicable civil law.

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<sup>10</sup> See *Brief of Americans United for Separation of Church and State, American Civil Liberties Union, ACLU of Michigan, National Council of Jewish Women, Sikh Council on Religion and Education, and Unitarian Universalist Association as Amici Curiae In Support of Respondents* at 3.

<sup>11</sup> 411 U.S. 792 (1973).

<sup>12</sup> 42 U.S.C. §2000e-1(a).

<sup>13</sup> 42 U.S. C. §12113(d)

## CONCLUSION

Despite the fact the ADA expressly prohibits retaliation against employees who report or complain of discrimination in the workplace, and despite the fact Congress intended the ADA to apply to religious employers, with an exemption only from the prohibition against religious discrimination in Title VII, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, et al, the United States Supreme Court established a constitutionally based “ministerial” exemption from the application of federal employment discrimination laws. The broad exemption established in this case appears to exempt religious employers from a federal statutory mandate that Congress clearly intended to apply to these employers. Critics of the Supreme Court opinion point out that a commitment to the eradication of discrimination and the maintaining of First Amendment guarantees can co-exist. Trial courts could have been allowed to review such discrimination claims on the merits with sensitivity to First Amendment concerns. As a result of the decision in the case, a large portion of the workforce has been denied the protection of federal discrimination law that could have been addressed by requiring the religious employer to affirmatively raise and prove using a burden-shifting analysis the application of any religious dogma. The Court’s decision in the case is troubling in that it opens the door to the exemption of religious institutions from other statutory mandates. Indeed, the Roman Catholic Church is already raising the issue that separately incorporated non-profit universities and hospitals affiliated with the Roman Catholic Church should be exempt from provisions of the Affordable Health Care Act based upon the Church’s belief that provisions of the act requiring insurance coverage of birth control prescriptions are morally objectionable. Some say it may signal the Supreme Court’s willingness to exempt religious institutions from other employment laws. Others suggest it may protect religious institutions from civil suits for clergy abuse of minors. The decision in this case is likely to be the first in a series of cases exempting religious institutions from federal statutes. Rather than settling issues on the exemption of religious institutions from federal statutes and disentangling government from religion, the decision in this case has raised questions on the power of courts to apply civil law to churches and other religious organizations. Although the intent of the decision was to distance courts from disputes involving church administration and beliefs, future cases could result in more rather than less court entanglement in issues of religious dogma.

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