BNA Daily Labor Report

FIRST AMENDMENT

The U.S. Supreme Court is set to hear oral argument this week in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* , a case that pits core constitutional rights against the government's statutory interest in regulating employment decisions, Wiley Rein attorneys Megan L. Brown and Justin D. Heminger write in this BNA Insights article.

The court's decision likely will provide guidance to religious organizations confronting employment issues, and will speak more broadly to the proper balance in our society between individual statutory rights and constitutional protections, the authors write. The authors analyze the case, weigh the competing arguments, and speculate on positions that could be staked out by several justices.

Supreme Court Weighs Balance Between Religious Liberties and Employment Discrimination Laws

BY MEGAN L. BROWN AND JUSTIN D. HEMINGER

The U.S. Supreme Court begins its new term this week with the justices attempting to strike a balance between a sectarian school's First Amendment rights and a former teacher's retaliation claims under federal and state employment anti-discrimination laws.

The case, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC and Cheryl Perich*, No. 10-553, (59 DLR AA-1, 3/28/11), is viewed as one of the most important religious liberties cases to reach the court in years and is the first for the court in its current configuration, with recent appointees Justices Sonia Sotomayor and Elena Kagan. The court's decision likely will provide guidance to religious organizations confronting employment issues, and will speak more broadly to the proper balance in our society between individual statutory rights and constitutional protections.

At issue is the scope of the ''ministerial exception,'' the First Amendment doctrine that employment decisions by religious organizations concerning ''ministerial'' employees are not subject to challenge in litigation under federal and state anti-discrimination statutes. While the lower courts almost uniformly recognize this constitutional exception to the nation's discrimination laws, its scope and application are the subject of strenu-

 ISSN 0418-2693

ous disagreement. The court's decision to hear the case this term signals that the justices are prepared to weigh in on the fundamental First Amendment values at stake and to confront the considerable tension inherent in government efforts to apply anti-discrimination laws to religious organizations.

EEOC Sues a Church Over Its Employment Dispute With a Religious Teacher

Cheryl Perich was employed as a teacher at a sectarian grade school run by the Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Mich. The church's congregation elected her to be a ''called'' teacher and commissioned minister. Perich taught both secular and religious subjects and led students in prayer and chapel services.

In June 2004, Perich was diagnosed with narcolepsy and began treatment. When she attempted to return to her position at the school in February 2005, the school board resisted. After Perich threatened to sue, the congregation voted to rescind her call, due to ''insubordination and disruptive behavior,'' and terminated her employment.

The Equal Employment Opportunity Commission filed suit against the church in federal district court alleging a single count of retaliation under the Americans with Disabilities Act, and Perich intervened in the suit to file similar federal and state retaliation claims. The district court granted summary judgment to the church, finding that Perich was a ''ministerial'' employee, and therefore the ministerial exception protected the church's employment decision from judicial second-guessing under federal and state anti-discrimination laws. The U.S. Court of Appeals for the Sixth Circuit disagreed and reversed (597 F.3d 769, 22 A.D. Cases 1697; 45 DLR AA-1, 3/10/10). Adopting a ''primary duties'' test, the court concluded that Perich was not a ministerial employee within the exception because, in its view, her ''primary duties'' were not religious.

The church sought Supreme Court review, arguing that the court should review the case to resolve a split in the federal appeals courts over the proper test for determining whether an employee of a religious organization is subject to the ministerial exception. The United States opposed the church's request for Supreme Court review. On March 28, 2011, the court granted certiorari to decide ''whether the ministerial exception, which prohibits most employment-related lawsuits against religious organizations by employees performing religious functions, applies to a teacher at a religious elementary school who teaches the full secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.''

Parties Diametrically Opposed on Doctrinal Questions

The parties present starkly contrasting views of the First Amendment and widely varying predictions of the potential impact the court's ruling will have on religious organizations and their employees.

The church argues that ''the government cannot override the decisions of churches concerning the appointment of clergy.'' The church relies on three distinct First Amendment protections: the free exercise clause, the establishment clause, and the ''freedom of religious association.'' Absent constitutional protection, the church asserts, ''federal, state, and local employment laws would prohibit many common religious practices—including the all-male clergy among Catholics and Orthodox Jews, rules about ethnicity and descent in some branches of Judaism, Islam, Hinduism, Zoroastrianism, and Native American religions, and in states that prohibit marital-status discrimination, celibacy rules.''

In contrast, the United States and Perich contend that the court should not recognize a ministerial exception at all. This represents a noteworthy shift in position, since neither the United States nor Perich previously had challenged the exception's vitality under the First Amendment, only its application.

In her brief to the court, Perich also abandoned her request in the courts below for reinstatement, an implicit acknowledgment of the tension inherent in the argument that the district court could grant relief under the ADA that would not interfere with the church's constitutional rights. The United States stresses its compelling interest in preventing employment discrimination and argues that a categorical constitutional rule exempting certain employment decisions by religious organizations from anti-discrimination statutes would ''critically undermine the[ir] protections.''

Court Will Need to Balance Core Constitutional Rights Against Government's Statutory Interest in Regulating Employment Decisions

The parties do not dispute that a religious organization has First Amendment rights at stake when making certain employment decisions or that the federal government has a legitimate interest in preventing and remedying invidious discrimination in the workplace. The question at the center of this case is how—if at all—religious groups' constitutional rights should be accommodated in applying those federal statutory rights and policies. Such an accommodation is at issue in this case because, as the court has made clear, ''[t]he First Amendment, of course, is a limitation on the power of Congress.'' *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979). Indeed, the court recognized this core tension decades ago when it observed that ''[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school.'' *Id.* at 504.

In *Catholic Bishop*, the court concluded that there was ''no escape'' from the ''serious First Amendment questions that would follow'' from interpreting the National Labor Relations Act to allow collective bargaining by lay teachers at religious schools. *Id*. The court therefore determined that Congress could not have intended the NLRA to bring those teachers within the jurisdiction of the National Labor Relations Board. *Id*. at 504–06.

In this case, Perich and the United States do not directly confront the court's decision in *Catholic Bishop*. Instead, they argue that the First Amendment does not prevent the application of what they characterize as neutral laws of general applicability, even when those laws regulate the employment relationship between a religious school and its ''called'' teacher.

Their position rests heavily on *Employment Div. v. Smith*, 494 U.S. 872, 52 FEP Cases 855 (1990), in which the court, in an opinion by Justice Antonin Scalia, rejected a free exercise challenge by members of the Na-

  DLR ISSN 0418-2693

tive American Church who argued that a state law generally prohibiting the use of peyote infringed on their religious use of the substance.

The church is quick to respond, however, that all 11 federal circuits that have considered the issue since *Smith* have reaffirmed the ministerial exception's vitality. The court thus faces a difficult task in resolving the friction between religious organizations' First Amendment rights and the federal government's interest in enforcing anti-discrimination laws.

In light of the virtual unanimity among the lower courts regarding the existence of the ministerial exception, the court seems poised to recognize some constitutional protection for religious organizations' employment decisions. Indeed, the question on which the court granted certiorari appears to assume the exception's vitality.

Nevertheless, the court's recent First Amendment cases reveal a court regularly divided over the proper balance between important governmental policies, on the one hand, and constitutional rights, on the other. In *Citizens United v. FEC*, 130 S. Ct. 876, 187 LRRM 2961 (2010), for example, the court split 5-4 in concluding that corporations' and unions' First Amendment rights trumped Congress's interest in regulating campaign finances, with Justice Anthony Kennedy writing for a majority that included Chief Justice John Roberts and Justices Scalia, Clarence Thomas, and Samuel Alito. Later that term, in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), Justice Ruth Bader Ginsburg wrote an opinion in which the court, again by a 5-4 vote, rejected a religious student group's argument that a public university's ''accept-all-comers'' policy violated its free speech, expressive association, and free exercise rights. Ginsburg, joined by Justices John Paul Stevens, Kennedy, Stephen G. Breyer, and Sotomayor, concluded that because it was ''a reasonable, viewpoint-neutral condition on access to the student-organization forum,'' the policy did not violate the First Amendment. *Id*. at 2978.

As in *Citizens United* and *CLS*, the court in this case will be called on to find a balance between the important policies embodied in anti-discrimination laws, and the First Amendment rights long recognized as protecting religious organizations' freedom to make decisions about leadership and internal governance.

As the court confronts these substantial public and private interests, close attention will be paid to the views of Justice Kennedy, who often casts the deciding vote in close cases. Many observers also will focus on the court's newest members, Justices Kagan and Sotomayor. Justice Kagan, in her first term on the court, participated in seven First Amendment cases, joining the majority in four. Although her dissent in *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011), praised the establishment clause as ''one of this Nation's defining constitutional commitments,'' *id*. at 1462, Justice Kagan has yet to articulate her broader views on religious liberties. This case very well may provide a vehicle for her to do so.

If past judicial performance is any indication of the future, Justice Sotomayor may sympathize with the church. While a judge on the U.S. Court of Appeals for the Second Circuit, she wrote in a dissent that the doctrine of constitutional avoidance compelled her to conclude that Congress could not have intended the Age Discrimination in Employment Act to apply to a church's decision to force a 70-year-old bishop into retirement because of concerns that government interference would violate the establishment clause.

Quoting from other decisions, she wrote, ''A church's selection of its own clergy is a core matter of ecclesiastical self-governance at the heart of the church's religious mission. Federal court entanglement in matters as fundamental as a religious institution's selection or dismissal of its spiritual leaders risks an unconstitutional trespass[] on the most spiritually intimate grounds of a religious community's existence.'' *Hankins v. Lyght*, 441 F.3d 96, 117 (2d Cir. 2006) (36 DLR A-1, 2/23/06) (Sotomayor, J., dissenting) (citations and quotations omitted).

As with many of the First Amendment cases the court chooses to hear, *Hosanna-Tabor* presents the sometimes uncomfortable tension between statutory interests and constitutional rights. The tactical decision by the United States and Ms. Perich to attack the ministerial exception head-on has raised the stakes even higher. How far a majority of the justices are willing to go in recognizing the First Amendment right of religious organizations to ''ecclesiastical self-governance'' remains to be seen.