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The Broad First Amendment Rights Of Religious Groups

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On Wednesday, Jan. 11, 2012, the U.S. Supreme Court issued its decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. U.S. Equal Employment Opportunity Commission* (EEOC) and Cheryl Perich, widely viewed as one of the most important religious liberties cases to reach the court in decades.

The Supreme Court affirmed a religious school's First Amendment right to fire a teacher without its employment decision being subjected to scrutiny under the federal and state anti-discrimination laws.

In a unanimous opinion by Chief Justice John Roberts Jr., the court soundly rejected the federal government's argument that religious groups have no greater rights under the First Amendment than nonreligious groups.

Though narrow by its terms, the decision may have broad implications for the proper balance between religious groups' First Amendment rights and governmental regulation in a variety of contexts.

Court Rejects United States' Position as "Untenable" and "Remarkable"

The question before the court concerned whether a First Amendment doctrine crafted and referred to by the federal courts of appeals as the "ministerial exception" properly protected religious groups' employment decisions from second-guessing by courts under federal

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and state anti-discrimination statutes.

In the decision under review, the U.S. Court of Appeals for the Sixth Circuit had held that the exception did not apply because the employee who filed suit was not a minister within the scope of the exception.

Prior to this case, though the ministerial exception was recognized and applied in various ways by almost all the courts of appeals, the Supreme Court had never blessed it or defined its scope.

On certiorari to the Supreme Court, the United States shifted its position to argue for the first time that the ministerial exception did not exist as a distinct constitutional doctrine.

Although the Courts of Appeals had uniformly recognized the exception under one or both of the religion clauses, the U.S. Department of Justice and the EEOC contended that neither clause afforded any unique rights to religious groups facing discrimination claims by employees.

Instead, the United States asserted in its brief and during oral argument before the court that the only First Amendment protection afforded to religious groups was found in the implied freedom of association — the very same protection that applied to nonreligious groups. Some commentators and court observers viewed this shift in position as a harbinger of government hostility to religious groups' rights.

In the opinion for the court, Roberts emphatically rejected the United States' argument, holding that "[b]oth Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers."[1]

The court characterized the United States' position as "untenable," finding it "hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[2]

"We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers," Roberts wrote.[3]

The court also rejected the federal government's alternative argument that its decision in Employment Division, Department of Human Resources of Oregon v. Smith[4] precluded the ministerial exception.

Smith involved a free exercise clause challenge brought by members of the Native American Church who argued that application of a state law generally prohibiting the use of peyote infringed on their religious use of the substance.

In a decision roundly criticized by religious groups, Justice Antonin Scalia wrote for a majority of the court that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion

prescribes (or proscribes)."[5]

Commentators and lower courts often have struggled to reconcile Smith with religious freedoms.

In Hosanna-Tabor, the court clarified and distinguished Smith, explaining that Smith concerned "government regulation of only outward physical acts," while the case before the court "concerns government interference with an internal church decision that affects the faith and mission of the church itself."[6]

The United States' assertion that Smith foreclosed the ministerial exception, Roberts wrote for the court, "has no merit."[7]

Finally, the court reversed the Sixth Circuit's conclusion that Cheryl Perich, the teacher who filed suit against the religious school for firing her, was not a ministerial employee.

The court indicated that it was "reluctant ... to adopt a rigid formula for deciding when an employee qualifies as a minister," but found sufficient evidence to hold as a matter of law that the teacher was a "minister" for purposes of the ministerial exception.[8]

Implications for Future Religious Liberties Cases

Several features of the court's decision suggest it may have far-reaching consequences on future religious liberties cases.

First, the court's decision to affirm the ministerial exception while declining to establish a clear test for determining who is a minister likely will generate further litigation. Justice Samuel Alito, in a concurrence joined by Justice Elena Kagan, discussed the proper test that should apply to the question, suggesting that lower courts "should focus on the function performed by persons who work for religious bodies," rather than the individual's formal title.[9]

In an important footnote, the court indicated that the exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar," which suggests that lower courts may be inclined to allow limited discovery before resolving the application of the ministerial exception.[10]

Second, while the lower courts have often concluded that the ministerial exception was found in one or the other of the religion clauses, the court held that the exception properly was grounded in both.

This conclusion suggests that viewing particular conduct as protected only by the free exercise clause or the establishment clause may be too simplistic and narrow for the present court. Religious groups in the future undoubtedly will argue that their conduct is protected by both clauses.

Indeed, one of the most significant facets of the decision may be the court's willingness to declare Smith inapplicable based on a distinction between "outward physical acts" and "internal church decision[s]." This distinction may embolden future religious liberties litigants to challenge Smith's applicability in other contexts.

Third, the court did not shy away from confronting the fundamental tension between a government interest in preventing and remedying discrimination and religious groups' interest in self-governance. Writing for the court, Roberts acknowledged that while "[t]he interest of society in the enforcement of employment discrimination statutes" was "undoubtedly important," "so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith and carry out their mission."[11]

Roberts then explained that where the religious groups' employment decisions were concerned, "the First Amendment has struck the balance for us."[12] Thus, while the United States argued that its interest in anti-discrimination overrode the First Amendment's protections, the court's decision vindicates the vitality of religious groups' constitutional rights in the face of government regulation.

Finally, the court's decision is notable because of its unanimity. At oral argument, several of the justices, including Justices Anthony Kennedy and Ruth Bader Ginsburg, expressed concerns that the ministerial exception would chill the rights of workers to seek relief for discriminatory retaliation or to report unsafe working conditions.

While the court was united in its affirmation of the core First Amendment principle embodied in the ministerial exception, it declined to decide "whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers."[13]

The court's solidarity provides a sharp contrast with its decisions in other recent religious liberties cases, such as Christian Legal Society (CLS) v. Martinez.[14]

In CLS, Ginsburg, joined by Justices John Paul Stevens, Kennedy, Stephen Breyer and Sonia Sotomayor, wrote an opinion in which the court, 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.

Relying in part on Smith, Ginsburg concluded that the policy did not violate the First Amendment because it was "a reasonable, viewpoint-neutral condition on access to the student-organization forum."[15]

In contrast to CLS, the court's decision in Hosanna-Tabor suggests that there is broad acceptance among the justices that the First Amendment's protections are significantly stronger where the religious group's internal practices and beliefs are at stake, even when those practices and beliefs may clash with important external governmental and societal interests.

As Alito reasoned in his concurrence, "it is easy to forget that the autonomy of religious groups, both here in

the United States and abroad, has often served as a shield against oppressive civil laws."[16]

"To safeguard this crucial autonomy," wrote Alito, "we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."[17]

The ministerial exception, concluded Alito, thus was required by the First Amendment because it "gives concrete protection to the free 'expression and dissemination of any religious doctrine.'"[18]

Conclusion

The Supreme Court's broad and unanimous rejection of the United States' position in Hosanna-Tabor demonstrates that all members of the court remain committed to the fundamental religious liberties embodied in the First Amendment's religion clauses.

The fact that recent President Barack Obama-appointee Kagan joined Alito's concurrence suggests that the constitutional principles at play crossed the typical liberal-conservative divide and appealed to the justices on a deeper level.

How these convictions will play out in future religious liberties cases — from conscience clause disputes to litigation over eligibility for federal funds — remains to be seen.

Megan Brown and Justin Heminger filed an amicus brief in the case on behalf of experts on religious tribunals in support of the petitioner, the Church.

[1] Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC and Cheryl Perich, No. 10-553 (U.S. Jan. 11, 2012), Slip Op. at 6.

[2] Id. at 14.

[3] Id.

[4] 494 U.S. 872 (1990).

[5] Id. at 879.

[6] Hosanna-Tabor, Slip Op. at 15.

[7] Id.

[8] Id. at 15.

[9] Id. at 2 (Alito, J., concurring).

[10] Id. at 20 n.4 (Roberts, C.J.).

[11] Id. at 21.

[12] Id. at 22.

[13] Id. at 21.

[14] 130 S. Ct. 2971 (2010).

[15] Id. at 2978.

[16] Id. at 2–3 (Alito, J., concurring).

[17] Id. at 3.

[18] Id. at 5 (quoting Watson v. Jones, 13 Wall. 679, 728–29 (1872)).