



## The Most Important Religious Liberty Case in Twenty Years: Will the Government Dictate Who Teaches at Your Church?

### Introduction

On October 5<sup>th</sup>, the Supreme Court will hear argument in the most important religious liberty case in twenty years: *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. The case is a lawsuit between a church and one of its religion teachers. At issue is the extent to which the government can control a church's selection of religious leaders. The case will have a profound impact on every religious group in the country.

This briefing paper answers three questions: (1) What is this case about? (2) How did this case arise? And (3) Why is this case so important?

### I. What is this case about?

This case is about a clash between two competing legal values. One value is the government's interest in preventing employment discrimination; the other value is the constitutional principle of separation of church and state. These values clash whenever a minister sues his church for employment discrimination.

Take, for example, an employment discrimination lawsuit between an Orthodox Jewish rabbi and a synagogue. The rabbi claims that he was fired because of his age; the synagogue claims that he was fired because his sermons were unorthodox. This sort of lawsuit presents two significant issues for separation of church and state.

First, such a lawsuit entangles the courts in religious questions. The rabbi says he was fired because of his age; the synagogue says it was because his sermons were unorthodox. A jury cannot resolve this dispute without assessing the orthodoxy of the sermons. And that is not a question juries or courts are equipped to resolve. As James Madison famously declared,

the civil magistrate is not a "competent Judge of Religious Truth."

Second, and more importantly, this sort of lawsuit deeply intrudes on the right of religious groups to select their ministers. If the rabbi won his case, it would result in a court order reinstating the rabbi as a minister – thus dictating to the synagogue whom it had to employ as a rabbi. That raises serious First Amendment problems: the government, not the synagogue, ends up choosing the minister.

Thus, for forty years, the lower courts have uniformly held that there is something called a "ministerial exception" to employment laws. The ministerial exception is a constitutional rule that says when someone performs important religious functions – like a pastor, priest, or rabbi – that person cannot sue the church and force it to reinstate him as a minister. Churches have freedom to pick who their ministers are, and the government cannot interfere in that relationship.

The difficult question is how far down the hierarchy the ministerial exception extends. Priests and rabbis are obviously covered; secretaries and janitors are not. What about all the positions in between – like choir directors, school teachers, and leaders of religious charities? That is where the new Supreme Court case comes in. The employee in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* is not a rabbi, and she is not a janitor. She is a fourth-grade teacher at an elementary school. She has some secular duties and some religious duties. She teaches typical secular subjects, like reading, writing, and arithmetic. But she also teaches daily religion classes, serves as a commissioned minister within the Church, and regularly leads students in prayer and worship. The

question is whether a lawsuit by this sort of employee is barred by the ministerial exception.

## II. How did this case arise?

The lawsuit arose in 2004. Shortly before the start of the school year, a teacher named Cheryl Perich became ill with an unknown condition what was eventually diagnosed as narcolepsy. She took a leave of absence, which put the church's small school in a difficult position. It had only 84 students and 7 teachers, so it first tried to combine three grades in a single classroom. But parents complained, and Perich was still unable to return. So after holding her job open for six months, the church finally hired a replacement teacher and offered her a contract for the remainder of the year. It then asked Perich to discuss with her doctor what she could do the following year.

But a few weeks later, Perich presented a doctor's note and demanded that she be allowed to return to her job. The church explained that it had already contracted with a replacement teacher, and that it still had concerns about Perich's ability to supervise a classroom. Perich then showed up at the school anyway, causing a disruption, and threatened to sue if she were not given her job back.

The church congregation then had a special meeting and voted to rescind Perich's call. According to the church, Perich's insubordination and threats to sue were unacceptable behavior. Like many Christian denominations, the church has long taught that Christians should strive to resolve disputes with other Christians outside of court. And the church offers employees like Perich a detailed internal dispute resolution procedure with judicial panels, appeals, and review procedures. But Perich refused to abide by the church's teaching, and refused to use the internal process.

Instead, she filed a complaint with the federal Equal Employment Opportunity Commission (EEOC). And the EEOC and Perich both sued the church. They argued that the church had illegally retaliated against Perich for complaining about discrimination, and they sought a court order that would reinstate her as a commissioned minister.

A federal district court in Michigan dismissed the case on the ground that the church was protected by the ministerial exception. Perich taught religion classes, led students in prayer and worship, and held the formal ecclesiastical title of "commissioned minister" within the church. Thus, the court concluded that separation of church and state means that the government could not dictate who would teach the church's religion classes or lead its students in prayer and worship.

But on appeal, the Sixth Circuit disagreed. It said that Perich's religious duties occupied only 45 minutes out of the 7-hour school day, so her duties were predominantly secular, and the ministerial exception does not apply.

Now the case is on appeal at the Supreme Court. As originally presented to the Supreme Court, the question was about the scope of the ministerial exception – who should be included and who should not. Everyone agrees that rabbis are covered and janitors are not. The question is whether someone like Perich was closer to a janitor or closer to a minister.

But critically, while the case has been pending in the Supreme Court, it has taken on a different shape. Perich and the government are no longer arguing about the scope of the ministerial exception. Instead, they are arguing that there should be no ministerial exception at all. They want to get rid of forty years of lower court precedent, and they want the Supreme

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Court to say that any employee of any church can sue to get her job back.

### III. Why is this case important?

This case is crucial to religious groups for a variety of reasons. First, the ministerial exception is vital to the most important personnel decisions that any religious group makes. Take the example of the synagogue and rabbi. With the ministerial exception in place, the synagogue knows that it can fire an unorthodox rabbi without the risk of a lawsuit.

But take away the ministerial exception, and everything changes. If the rabbi is old, he can sue for age discrimination; if he is disabled, he can sue for disability discrimination; if he has been divorced, he can sue for marital status discrimination; and on the list goes. For the synagogue, the question is no longer just whether this rabbi is a good minister. The question is also whether the rabbi might sue if he gets fired, and how much it will cost the synagogue to defend the lawsuit. Thus, getting rid of the ministerial exception makes it impossible for religious organizations to freely choose their leaders based solely on their religious convictions.

Second, the penalties in employment litigation are often severe. Successful plaintiffs are eligible for lost wages, future wages, damages for emotional distress, punitive damages, and attorney's fees. Thus, an adverse judgment in this case would be more than enough to wipe out Hosanna-Tabor's church. Many other churches are in the same boat. Indeed, half of all churches in America have 50 regularly participating adults or less. Religious schools and charities are often even more vulnerable. Thus, getting rid of the ministerial exception dangles a massive threat of financial penalty over every personnel decision in small religious organizations.

Finally, getting rid of the ministerial exception would open the door to novel and destructive lawsuits against churches. If there were no

ministerial exception, the Catholic Church could be sued for gender discrimination because it limits the priesthood to males. Many mainline denominations have affirmative action programs that give preference to female or minority clergy; those affirmative action programs could be challenged by white males who were passed over for ministry. Perhaps even more problematic, would-be ministers could file class-action lawsuits against congregations where the clergy is predominantly male or white, seeking to fundamentally restructure the composition of the clergy. In short, getting rid of the ministerial exception would lead to radical changes in the leadership of religious organizations across the country.

### Conclusion

Separation of church and state, rightly understood, is *not* primarily about whether the government can display a nativity scene at Christmas or whether the President can say "God bless America." It is a recognition that the government and the church occupy separate roles in society and have separate spheres of authority. The church does not get to appoint the leaders of government, and the government does not get to appoint the leaders of the church. That is why the lower courts for almost forty years have recognized the ministerial exception.

And the ministerial exception, rightly understood, embraces not only ordained pastors, priests, and rabbis. It also extends to other employees who perform crucial religious functions. The teacher in this case taught religion classes, led students in prayer and worship, and occupied ecclesiastical office as a "commissioned minister" within the church. She was, without dispute, the primary means by which the church communicated its faith to the next generation. Thus, if separation of church and state means anything, it means that the government cannot dictate to the church who will transmit the faith to the next generation.