RESURRECTING FREE EXERCISE IN *HOSANNA-TABOR LUTHERAN CHURCH & SCHOOL V. EEOC*, 132 S. CT. 694 (2012)

Since the rise of federal nondiscrimination laws, every federal court of appeals has recognized a "ministerial exception" that protects some religious organizations from certain kinds of suits by employees.[1] Beyond that baseline, appellate opinions have diverged as to whether the exception protects only churches or whether it extends to other kinds of religious organizations,[2] whether it applies to most employees of religious organizations or only a few,[3] and whether the exception bars all employment-related suits or only discrimination suits.[4] Last term, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court unanimously held that the First Amendment provides a ministerial exception that protects religious schools from retaliatory firing suits under the Americans with Disabilities Act.[5] By holding that the employment decisions of the religious school were shielded by both Religion Clauses of the First Amendment,[6] this decision limited the Court's earlier holding in *Employment Division v. Smith*,[7] and expanded the scope of religious liberty under the Free Exercise Clause.

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1. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 705 (2012).

2. *Compare* Alcazar v. Corporation of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1291 (9th Cir. 2010) (referring to churches specifically when describing the ministerial exception), *with* Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (referring to "church-affiliated institutions," in this case a hospital).

3. *Compare* EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1278 (9th Cir. 1982) (holding that a church secretary did not fall under the exception), *with* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985) (holding that an "associate in pastoral care" was covered by the exception).

4. *Compare* Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004) (allowing minister's claim of hostile work environment under Title VII), *with* Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1246 (10th Cir. 2010) (barring former minister's Title VII claim of hostile work environment).

5. *Hosanna-Tabor*, 132 S. Ct. at 701, 707 (2012).

6. *Id.* at 707.

7. 494 U.S. 872 (1990).

Respondent Cheryl Perich was a "called" (as opposed to "lay") teacher at Hosanna-Tabor, a Lutheran Church–Missouri Synod church and school.[8] After five years of teaching at the school, she became ill with narcolepsy and began the 2004–2005 school year on disability leave.[9] In January 2005 Perich informed the school principal that she would be able to return to work the next month.[10] The principal replied that Perich's position was filled for the remainder of the school year.[11] Three days later, the Hosanna-Tabor congregation extended a "peaceful release" to Perich in return for her resignation.[12] Perich, however, refused to resign.[13] As soon as her doctor authorized Perich to return to work, she appeared at the school and demanded documentation of her willingness to work.[14] When the principal called Perich at home that afternoon and said that she might be fired, Perich answered that she was planning to sue.[15] The Hosanna-Tabor congregation rescinded Perich's call on April 10, 2005.[16] Perich then filed a complaint with the Equal Employment Opportunity Commission (EEOC).[17] The EEOC sued Hosanna-Tabor for firing Perich because she had threatened to bring suit, and Perich intervened as a plaintiff.[18] She sought reinstatement, backpay, compensatory and punitive damages, attorney's fees, and injunctive relief.[19]

The district court granted summary judgment to Hosanna-Tabor: "Because Perich was a ministerial employee of Hosanna-Tabor, this Court can inquire no further into her claims of retaliation."[20] The Sixth Circuit vacated and remanded on the grounds that Perich's primary duties were secular.[21] After not-

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8. *Hosanna-Tabor*, 132 S. Ct. at 699, 700.
9. *Id.* at 700.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 701.
18. *Id.*
19. *Id.*
20. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 582 F. Supp. 2d 881, 892 (E.D. Mich. 2008), *vacated*, 597 F.3d 769 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694.
21. 597 F.3d at 781.

ing that "Perich spent approximately six hours and fifteen minutes of her seven hour day teaching secular subjects,"[22] the court reasoned that under the "governing primary duties analysis[, which] requires a court to objectively examine an employee's actual job function, not her title, in determining whether she is properly classified as a minister[,] . . . . it is clear . . . that Perich's primary duties were secular."[23]

The Supreme Court granted certiorari and reversed.[24] Writing for a unanimous Court, Chief Justice Roberts held that the Religion Clauses of the First Amendment create a "ministerial exception" and that Hosanna-Tabor's decision to fire Perich fell within that exception.[25]

The Court's opinion contextualizes the First Amendment in the history of struggles between church and state authorities concerning the election of church officers. Although Magna Carta guaranteed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired,"[26] as the Court observes, "[t]hat freedom in many cases may have been more theoretical than real."[27] For instance, in 1534, Parliament titled the English monarch Supreme Head of the Church of England and gave it the authority to appoint bishops.[28] The Puritans and Quakers came to New England "[s]eeking to escape the control of the national church."[29] Other colonies retained ties to the Church of England but "sometimes chafed at the control exercised by the Crown and its representatives."[30] In accord with this sentiment, the First Amendment stipulated that the United States government would play no part in ecclesiastical appointments: "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[31]

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22. *Id.* at 780.
23. *Id.* at 781.
24. *Hosanna-Tabor*, 132 S. Ct. at 702, 710.
25. *Id.* at 707.
26. *Id.* at 702 (citation omitted) (internal quotation marks omitted).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 703.
31. *Id.*

Partially because the Religion Clauses of the First Amendment were so well understood, cases concerning government interference in the selection of church officers did not soon arise.[32] However, the Court did apply the Religion Clauses to questions about government interference with a church's ability to settle its own property disputes.[33] In 1872, the Court refused to settle a dispute over control of a church building that the "General Assembly," the national governing body of that denomination, had already decided: "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."[34] The Court reached similar results in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*[35] and in *Serbian Eastern Orthodox Diocese v. Milivojevich*.[36] The *Kedroff* Court struck down a New York statute "requiring every Russian Orthodox church in New York to recognize the determination of the governing body of the North American churches as authoritative."[37] The *Kedroff* Court, Chief Justice Roberts asserted, "declared the law unconstitutional because it 'directly prohibit[ed] the free exercise of an ecclesiastical right, the Church's choice of its hierarchy.'"[38] In *Milivojevich*, a case concerning the removal of an Eastern Orthodox bishop, the Court held that "by inquiring into whether the Church had followed its own procedures, the State Supreme Court had 'unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals' of the Church."[39]

Turning to the issue at hand, the Court held that there is a "'ministerial exception,' grounded in the First Amendment, that precludes application of [employment discrimination laws] to

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32. *Id.* at 704.

33. *See id.*

34. *Id.* (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1872)) (second alteration in original) (internal quotation marks omitted).

35. *Id.* (citing 344 U.S. 94 (1952)).

36. *Id.* at 705 (citing 426 U.S. 696 (1976)).

37. *Id.* at 704–05 (citing *Kedroff*, 344 U.S. at 96–97, 99 n.3, 107 n.10).

38. *Id.* at 705 (alteration in original) (quoting *Kedroff*, 344 U.S. at 119).

39. *Id.* (quoting *Milivojevich*, 426 U.S. at 720 (1976)).

claims concerning the employment relationship between a religious institution and its ministers."[40] The Court reasoned:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[41]

The unanimous Court criticized the government for arguing that the First Amendment provided no special protection for religious organizations beyond the so-called "freedom of association."[42] The Court's language was emphatic: "We find this position untenable . . . . 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."[43]

The Court also disagreed with the EEOC as to whether *Smith* foreclosed a ministerial exception on the grounds that "free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability,"[44] the Court acknowledged that the EEOC had sued Hosanna-Tabor in order to enforce a "valid and neutral law of general applicability."[45] But the Court distinguished *Smith*: "*Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself."[46] Thus, the Court asserted, "[t]he contention that *Smith* forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit."[47]

Although the Court was "reluctant . . . to adopt a rigid formula" for defining who is a minister under the exception, the Court concluded that Perich did qualify as a minister in light of

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40. *Id.* at 705–06.
41. *Id.* at 706.
42. *Id.*
43. *Id.*
44. *Hosanna-Tabor*, 132 S. Ct. at 706 (quoting *Smith*, 494 U.S. at 879).
45. *See id.* at 707.
46. *Id.*
47. *Id.*

"all the circumstances of her employment."[48] The Court highlighted that Hosanna-Tabor "held Perich out as a minister,"[49] that Perich's title "reflected a significant degree of significant religious training followed by a formal process of commissioning,"[50] that Perich "held herself out as a minister of the Church,"[51] and that Perich's job involved "conveying the Church's message and carrying out its mission."[52] The Court concluded that "in light of these considerations . . . Perich was a minister covered by the ministerial exception."[53]

The Court assigned three errors to the Sixth Circuit. First, the circuit court erred by finding that Perich's title of "Minister of Religion, Commissioned" did not matter.[54] "Although such a title, by itself, does not automatically ensure coverage," the Court held that "the fact that an employee has been ordained or commissioned as a minister is surely relevant."[55] The second error was that "the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich."[56] Lastly, "the Sixth Circuit placed too much emphasis on Perich's performance of secular duties."[57] The Court held that the presence of such duties should not be determinative because "[t]he heads of congregations themselves often have a mix of duties, including secular ones."[58]

Chief Justice Roberts concluded by addressing the respondents' warning that the "logic of the exception would confer on religious employers 'unfettered discretion' to violate employment laws."[59] He wrote: "We express no view on whether the exception bars other types of suits . . . . There will be time enough to address the applicability of the exception to other circumstances if and when they arise."[60] But with respect to

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 707.
52. *Id.* at 708.
53. *Id.*
54. *Id.* at 699, 708.
55. *Id.* at 708.
56. *Id.*
57. *Id.*
58. *Id.* at 708–09.
59. *Id.* at 710.
60. *Id.*

discrimination suits, the Court stated, "the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."[61]

Justices Thomas and Alito each wrote separate concurring opinions further addressing the meaning of the word "minister."[62] Justice Thomas argued that "the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister."[63] He reasoned that any solution other than deference would "risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some."[64] Thus, on this view, the evidence "that Hosanna-Tabor sincerely considered Perich a minister" was sufficient to trigger the exception.[65]

Justice Alito, joined by Justice Kagan, expressed concern about the meaning of "minister."[66] He argued that "courts should focus on the *function* performed by persons who work for religious bodies."[67] He further asserted that "the First Amendment protects the freedom of religious groups to engage in certain key religious activities," and that 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."[68] Noting that several circuits have approved this "functional consensus," Alito suggested that "[t]he Court's opinion today should not be read to upset this consensus."[69] He concluded that the religious nature of Perich's work was the deciding issue: "This conclusion rests not on respondent's ordination status or her formal title, but rather on her functional status as the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees."[70]

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61. *Id.*
62. *Id.* at 710 (Thomas, J., concurring); *id.* at 711 (Alito, J., concurring).
63. *Id.* at 710 (Thomas, J., concurring).
64. *Id.* at 711.
65. *Id.*
66. *Id.* at 711–12 (Alito, J., concurring).
67. *Id.* at 711 (emphasis added).
68. *Id.* at 711–12.
69. *Id.* at 714.
70. *Id.* at 716.

By setting its opinion in the context of cases restraining the government from interfering in religious controversies, the Court revitalized a category of behavior protected under the First Amendment—"a religious group's right to shape its own faith and mission."[71] This holding expanded the protections available under the Free Exercise Clause by limiting *Employment Division v. Smith*.[72]

In order to hold that both Religion Clauses applied in favor of Hosanna-Tabor, the Court had to distinguish its previous decision in *Smith*.[73] In *Smith*, the Court considered whether the Free Exercise Clause protected a Native American rite of ingesting peyote, a hallucinogenic drug.[74] The *Smith* Court denied Free Exercise protection to the rite and held that the Free Exercise Clause does not protect religious practitioners who violate "valid and neutral law[s] of general applicability."[75] In *Hosanna-Tabor*, however, the Court refused to find that the religious school had violated a valid and neutral law of general applicability—namely, federal employment discrimination law—and therefore had no Free Exercise protection. Instead, the Court took the opportunity to cabin *Smith*,[76] noting that "a church's selection of its ministers is unlike an individual's ingestion of peyote."[77]

In drawing this distinction, the Court limited *Smith* to situations in which the regulated acts can be described as "only outward physical acts."[78] The Court declared that Hosanna-Tabor's employment decision was *not* merely an "outward physical act," but rather "an internal church decision that affects the faith and mission of the church itself."[79] There is little doubt that the dichotomy between a "physical act" and a "decision that affects the faith and mission of the church itself" is weak. As Professor Michael Dorf has suggested, the use of peyote in *Smith* might have been protected by the Free Exercise

71. *Id.* at 706 (majority opinion).
72. 494 U.S. 872 (1990).
73. *Hosanna-Tabor*, 132 S. Ct. at 706–07.
74. *Smith*, 494 U.S. at 874.
75. *Id.* at 879 (citation omitted) (internal quotation marks omitted).
76. *Hosanna-Tabor*, 132 S. Ct. at 706–07.
77. *Id.* at 707.
78. *Id.*
79. *Id.*

Clause if only the ceremonial leaders had explained to the Court that ingesting peyote was a key rite "that affects the faith and mission of the church."[80] Dorf's quibble misses the point. Regardless of whether the two categories are mutually exclusive, they limit each other. The new question in Free Exercise jurisprudence is whether the challenged behavior is more like a "physical act," devoid of Free Exercise protection under *Smith*, or more of a "decision that affects the faith and mission of the church itself,"[81] protected by the Free Exercise Clause under *Hosanna-Tabor*. The Court's limitation of *Smith* resurrects the Free Exercise Clause by offering advocates of religious liberty a meaningful category of protected behavior.

Although the Court expressly reserved the question as to whether the First Amendment might bar other kinds of employment-related lawsuits,[82] the limitation on *Smith*'s reasoning suggests that it does. Because the ministerial exception flows from both Religion Clauses and because *Hosanna-Tabor* has cabined *Smith*'s ability to eclipse the Free Exercise Clause,[83] the ministerial exception can theoretically apply to any statute that affects "a religious group's right to shape its own faith and mission through its appointments." This reasoning vindicates those decisions in the courts of appeal that have used the ministerial exception to protect religious organizations from suits brought under all varieties of employment-related law: intentional infliction of emotional distress,[84] breach of contract,[85] age discrimination,[86] Title VII hostile work environment,[87] state minimum wage law,[88] and the Fair Labor Standards Act.[89]

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80. Michael C. Dorf, *Ministers and Peyote*, DORF ON LAW, (Jan. 12, 2012, 12:30 AM), http://www.dorfonlaw.org/2012/01/ministers-and-peyote.html (last visited Oct. 2, 2012).

81. *Id.*

82. *Hosanna-Tabor*, 132 S. Ct. at 710.

83. *Id.* at 706.

84. *See, e.g.*, Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940, 940–41 (6th Cir. 1992).

85. *See, e.g.*, Bell v. Presbyterian Church (U.S.A.), 126 F.3d 328, 329 (4th Cir. 1997).

86. *See, e.g.*, Skrzypczak v. Roman Catholic Diocese of Tulsa, 611 F.3d 1238, 1240–41 (10th Cir. 2010).

87. *See, e.g.*, *Skrzypczak*, 611 F.3d at 1246.

88. *See, e.g.*, Alcazar v. Corporation of the Catholic Archbishop of Seattle, 627 F.3d 1288, 1293 (9th Cir. 2010).

89. *See, e.g.*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 301 (4th Cir. 2004).

Additionally, by limiting *Smith*, the Court invited lower courts to explore whether this revived Free Exercise doctrine—that the government may not act in a way that interferes with decisions affecting the faith and mission of the church—might apply to any organization with a religious mission, rather than churches only. Indeed, even before *Hosanna-Tabor*, the courts of appeals had applied the ministerial exception to hospitals,[90] universities,[91] and nursing homes with religious missions.[92] Although the Court's opinion in *Hosanna-Tabor* did not specifically address what kinds of organizations the new Free Exercise doctrine should protect, the opinion acknowledges "a *religious group*'s right to shape its own faith and mission through its appointments."[93] This language is inclusive and arguably vindicates the previous decisions that applied the ministerial exception beyond churches—decisions that affect the faith and mission of the church itself.

Although the Court declined to speak definitively on the question of who may be classified as a minister, the opinion provides helpful language and powerful reasoning. First, the Court recognized "a religious group's right to shape its own faith and mission through its appointments."[94] Second, that right is largely determinative of who qualifies as a "minister." A "minister" is simply shorthand for "one whose appointment is an act of Free Exercise"; or, to avoid the tautology, one whose appointment may influence the church's faith and mission. In short, "a religious group's right to shape its own faith and mission through its appointments"[95] entails the approach that Justice Alito offered in his concurrence: that a minister is "the type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees."[96] Thus, the Court's reasoning implicitly vindicates those courts of appeals that applied the ministe-

90. *See, e.g.*, Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 361 (8th Cir. 1991).

91. *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294, 299 (3d Cir. 2006).

92. *See, e.g.*, *Shaliehsabou*, 363 F.3d at 301.

93. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 706 (2012) (emphasis added).

94. *Id.*

95. *Id.*

96. *Id.* at 716 (Alito, J., concurring).

rial exception to a kosher food supervisor at a nursing home,[97] a choir director,[98] and a church communications manager,[99] insofar as those employees were influential on the faith and mission of the organization.

The Free Exercise holding of *Hosanna-Tabor* challenges the Court's earlier ruling in *Christian Legal Society v. Martinez*.[100] In *Martinez*, the Court held that the First Amendment did not shield a religious student group from a law school's nondiscrimination policy.[101] This case dealt a blow to the religious liberty of such organizations because it required them either to make voting rights and positions of authority available to all comers, or to forego monetary and advertising benefits that the university provided to registered student organizations.[102] Although the Christian Legal Society briefly argued that such a requirement violated the Free Exercise Clause, Justice Ginsburg, writing for the majority, noted: "Our decision in *Smith* forecloses that argument."[103] Because the Society sought an exception from an "otherwise valid regulation[] of general application," its actions would not be protected under the Free Exercise Clause.[104]

Hosanna-Tabor changes that situation. Under the *Hosanna-Tabor* reading of *Smith*, the Court must inquire whether the challenged behavior is more like the physical act of ingesting peyote or more like a decision that affects the faith and mission of the church itself. In *Martinez*, the challenged behavior was the organization's desire to have the ability to exclude individuals from membership and leadership positions on the basis of religion and sexual orientation. Arguably, such membership decisions affect the faith and mission of the religious organization because, like the employment decision in *Hosanna-Tabor*, they determine what individuals will represent and control the organization and, accordingly, what messages about their faith they project to their members and non-members. Thus, follow-

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97. *See Shaliehsabou*, 363 F.3d at 301.

98. *See* Starkman v. Evans, 198 F.3d 173, 174 (5th Cir. 1999).

99. *See* Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698, 704 (7th Cir. 2003).

100. 130 S. Ct. 2971 (2010).

101. *Id.* at 2978.

102. *Id.* at 2979 (describing the benefits given to registered student organizations).

103. *Id.* at 2995 n.27.

104. *Id.*

ing *Hosanna-Tabor*, student religious organizations have a compelling argument that their decisions to withhold membership or leadership from persons with different religious views are protected by the Free Exercise Clause.

Hosanna-Tabor does more than affirm the mere existence of a ministerial exception to employment discrimination laws. It significantly alters contemporary Free Exercise doctrine. By establishing the ministerial exception as a subset of the protections offered by the First Amendment, *Hosanna-Tabor* limited *Smith* and revitalized a category of behavior protected under the Free Exercise Clause of the First Amendment—"decision[s] that affect[] the faith and mission of the church itself."

Elliott Williams