HOSANNA-TABOR AND THE MINISTERIAL EXCEPTION

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This Essay was adapted from remarks given during a panel discussion at the 2011 Federalist Society National Lawyers Convention held in November 2011 in Washington, D.C. For an audio and video recording of the complete panel please visit The Federalist Society's website. Religious Liberties: The Ministerial Exception Case: Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, FEDERALIST SOC'Y (Nov. 11, 2011), http://www.fed-soc.org/publications/detail/the-ministerial-exception-case-hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc-event-audiovideo.

This case began, as so many do, with a local dispute inside a church. A member of the congregation represented the church in the lower courts. This lawyer was not a religious liberty specialist, but he preserved all the issues for appeal, so he did his job. The Becket Fund for Religious Liberty discovered this case as it came down in the Sixth Circuit and offered to do a petition for rehearing and then a petition for certiorari. After rehearing was denied, they called and asked if I would help with the cert petition.

The Becket Fund lawyers were a lot more enthusiastic about the case than I was. From our perspective, the case had some good facts and some bad facts. But by the end, I thought this should be a clear case for the Church. And we now know that the Supreme Court agreed.[1]

I. THE FACTS

A. The Facts Relevant to the Ministerial Exception

There were two plaintiffs in the case. The Equal Employment Opportunity Commission (EEOC) has authority to file suit on behalf of employees.[2] The EEOC did so in response to a charge filed by Cheryl Perich, who subsequently intervened as an additional plaintiff.[3] Cheryl Perich was a commissioned minister in the Lutheran Church—Missouri Synod and taught fourth grade at the Hosanna-Tabor Evangelical Lutheran Church and School.[4] If she had been a nun serving as a school teacher, everyone would have understood the religious significance of her position, and this would have been a very easy case. But com-

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

2. 42 U.S.C. § 2000e-5(f)(1) (2006); *see* 42 U.S.C. § 12117(a) (2006).

3. *Hosanna-Tabor*, 132 S. Ct. at 701.

4. *Id.* at 700.

missioned minister is a position that is unfamiliar to most people outside the Lutheran Church.

Commissioned minister is a position that Lutherans have derived from a passage in the Book of Acts, where the Apostles first appoint assistants to help them.[5] The commissioned minister is clearly distinguished from the laypeople on the one hand and from the ordained pastor on the other. The commissioned minister is understood to perform part of the responsibilities of the ordained pastor.[6] The ordained pastor is responsible for teaching the faith to all the faithful, including the children, and he can delegate some of his responsibilities to commissioned ministers.[7] In the Lutheran understanding, "[a] Christian teacher, for instance, is not merely a Christian who teaches but a servant of Christ and the church who, at the call of the church, is helping the called pastor to fulfill his mandate to teach the Gospel."[8]

To be a commissioned minister, a candidate must complete eight college-level theology courses and be approved on standards of Christian faith and character.[9] Once certified as eligible, a candidate must be called by a congregation.[10] A call can be rescinded only for cause and by a supermajority vote of the congregation that issued the call.[11] Perich's call was ultimately rescinded by the congregation at Hosanna-Tabor.[12]

Perich taught a religion class four days a week, and led her class in daily prayers and devotional exercises, devoting about forty-five minutes of class time to religion each day.[13] In rotation with the other six teachers at the school, she planned and led chapel services. A rotation of seven teachers implies that she led chapel about five times a year, but the Court accepted

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5. *Acts* 6:2–5.

6. COMM'N ON THEOLOGY AND CHURCH RELATIONS OF THE LUTHERAN CHURCH—MISSOURI SYNOD, THE MINISTRY: OFFICES, PROCEDURES AND NOMENCLATURE 6, 11–14, 22–27, 30 (1981) [hereinafter MINISTRY], *available at* http://www.lcms.org/Document.fdoc?src=lcm&id=423.

7. *Id.* at 6, 12.

8. *Id.* at 22.

9. *Hosanna-Tabor*, 132 S. Ct. at 707.

10. *Id.*

11. *Id.* at 699.

12. *Id.* at 700.

13. *Id.* at 708.

her testimony that she led chapel only about twice a year.[14] At those chapel services, she delivered short messages on the scripture readings.[15] To outsiders, such messages look exactly like short sermons, but Lutherans distinguish such "teaching" of religion from preaching in the adult worship service, which is a function reserved to the ordained pastor.[16]

Perich also taught the rest of the fourth-grade curriculum, so the Sixth Circuit concluded that her primary duty was to be a schoolteacher.[17] That court treated her religious duties as incidental and her status as commissioned minister as a mere title.[18]

B. The Facts Relevant to Whether There Was Discrimination

The facts summarized so far, concerning whether Perich was a minister, were the facts relevant to the questions before the Supreme Court. But, of course, her lawyers and the government's lawyers also wanted to focus attention on the other facts of the case. What would her retaliation claim have been about if it had been allowed to go forward? What would her disability claim have been about if she had filed a disability claim? Each plaintiff devoted several pages of its brief to what a terrible employer the Church had been.[19] So let me tell you what the Church did right and what some people think it did wrong. What it did was clearly within the teachings of the Lutheran Church.

This employment dispute first arose as a disability issue, although neither plaintiff pled a disability claim. Perich became sick in June 2004 and was still unable to return to work in the fall.[20] Her diagnoses and projected return dates kept chang-

14. *Id.*

15. *Id.*

16. See MINISTRY, *supra* note 6, at 30–31.

17. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 780 (6th Cir. 2010).

18. *Id.* at 780–81.

19. Brief for Respondent Cheryl Perich at 7–11, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553); Brief for the Federal Respondent at 5–7, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

20. *Hosanna-Tabor*, 132 S. Ct. at 700.

ing.[21] The school's initial response was to carry her on the payroll and try to preserve her job. Now this was a very small school. There were seven teachers and eighty-four students at the time the record was compiled.[22] Even so, the Church carried her at full pay and full benefits for seven months, from June to January.[23] In an attempt to preserve her job, they put three grades in one classroom rather than hire a replacement in the fall semester.[24]

The Disability Act requires an employer to accommodate any disability to the extent that it can do so without undue hardship.[25] In our opinion, the Church went far beyond the point of undue hardship. The Family and Medical Leave Act, which explicitly addresses the question of how long an employer must hold a job open for a sick or temporarily disabled employee, requires twelve weeks of unpaid leave, not seven months of paid leave.[26] The hardships imposed by Perich's absence were modest in the summer, but they quickly became severe once classes started in the fall. Eventually, at the beginning of the spring semester, the Church decided that it could not do this anymore. It hired a replacement for the spring semester.[27]

In February, Perich said that her illness was now controlled by medication, and her doctor said that she was able to return to work.[28] The Church said that there was no job open for the spring semester, but Perich came to the school on the morning of February 22 anyway.[29] The parties dispute exactly what happened, but there was some kind of confrontation, and

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21. J. App. at 126–27, 131–32, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553) (deposition testimony of Stacy Hoeft, the school's principal).

22. *Id.* at 121 (Hoeft deposition); *id.* at 177 (Hosanna-Tabor Shareholders Meeting: Meeting Minutes (Jan. 30, 2005)).

23. *See id.* at 166–68 (e-mails between Stacy Hoeft and Cheryl Perich); *id.* at 200 (Hosanna-Tabor employee handbook).

24. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 773 n.1 (6th Cir. 2010).

25. 42 U.S.C. § 12112(b)(5)(A) (2006).

26. *See* 29 U.S.C. §§ 2612(a)(1)(D), 2612(c) (2006).

27. J. App., *supra* note 21, at 165, 173–74 (emails between Stacy Hoeft and Cheryl Perich).

28. *Hosanna-Tabor*, 132 S. Ct. at 700.

29. *Id.*

Perich refused to leave until the school gave her a letter that said she had reported for work.[30]

When the principal called her that afternoon, Perich announced that if she did not get her job back, she would sue the Church.[31] The principal asked her if she really meant that, because the Missouri Synod has quite specific teachings that forbid called employees from suing the Church over called positions and require that disputes over such positions be resolved within the Synod.[32] Perich persisted; she repeated the threat to sue.[33] That night, the school board decided to begin the process of recommending to the congregation that it rescind Perich's call.[34]

The Synod has an elaborately developed internal dispute-resolution process, with hearing officers independent of the local church that employs the minister.[35] The Synod provides that this process "shall be the exclusive and final remedy" for internal religious disputes, and that "[f]itness for ministry and other theological matters must be determined within the church."[36] A fundamental purpose of these provisions, which are scripturally based,[37] is that religious disputes should be resolved by persons who understand the religion, are committed to it, and will proceed in accordance with religious understandings—understandings that were generally shared by all parties before the dispute arose. Perich could have used that process to complain that she was being unfairly or improperly excluded from her ministry because of her disability. But she did not use that process; she threatened to sue instead.

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30. *Id.* at 700; *see also* Brief for the Petitioner at 10, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553); Brief for Respondent Cheryl Perich, *supra* note 19, at 11–12.

31. *See Hosanna-Tabor*, 132 S. Ct. at 700.

32. J. App., *supra* note 21, at 152 (Hoeft deposition). *See generally* COMM'N ON THEOLOGY AND CHURCH RELATIONS, 1 CORINTHIANS 6:1–11: AN EXEGETICAL STUDY (1991), *available at* http://www.lcms.org/Document.fdoc?src=lcm&id=415 (explaining the Synod's teaching).

33. J. App., *supra* note 21, at 152 (Hoeft deposition).

34. *Hosanna-Tabor*, 132 S. Ct. at 700.

35. LUTHERAN CHURCH—MISSOURI SYNOD, CONSTITUTION, BYLAWS, AND ARTICLES OF INCORPORATION 42–56 (Bylaws § 1.10) (2010), *available at* http://www.lcms.org/Document.fdoc?src=lcm&id=928.

36. *Id.* § 1.10.1.1.

37. *See id.* (citing 1 *Corinthians* 6:1–7).

It is important to note the precise sequence of events here. Perich lost her job, at least for the spring semester, because she had been unable to work for seven months and the school finally replaced her. Neither plaintiff alleged that this decision, or any other action of the Church, was disability discrimination.[38] Thereafter, the congregation rescinded her call because she had threatened to sue the Church. Both plaintiffs alleged that this decision to rescind her call was an unlawful act of retaliation.[39]

Perich lost her job long before her call was rescinded, but she had been replaced only temporarily, and she remained in good standing theologically. The rescission of her call meant as a practical matter that she would not be rehired by Hosanna-Tabor, and in that sense it was an employment action. But rescinding her call was fundamentally a religious action. A call is a religious status with a theological history going back to the very beginnings of Lutheranism;[40] extending or rescinding a call is a decision about a religious status within the church. And it is only this religious decision that the plaintiffs alleged as retaliation.

II. FRAMING THE CASE IN THE SUPREME COURT

In the Petition for Certiorari, the question presented was "[w]hether the ministerial exception 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

38. *See* J. App., *supra* note 21, at 14–18 (EEOC Complaint); Petition for Writ of Certiorari at 67a–74a, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553) (Perich Complaint).

39. *Hosanna-Tabor*, 132 S. Ct. at 701; *see also* J. App., *supra* note 21, at 16 (EEOC Complaint) ("terminating Perich's employment in retaliation for threatening to file an ADA lawsuit"); Cert. Petition, *supra* note 38, at 72a (Perich Complaint) ("terminating Perich's employment in retaliation for threatening to file an ADA lawsuit"). Perich more specifically alleged that the termination occurred "[o]n or about April 10, 2005," *id.* at 71a, which is when the congregation rescinded her call, J. App., *supra* note 21, at 211–12 (Hosanna-Tabor Special Voter Meeting: Meeting Minutes (Apr. 10, 2005)).

40. *See* AUGSBURG CONFESSION art. XIV (1530) ("[N]o one should publicly teach in the Church or administer the Sacraments unless he be regularly called."), *available at* http://www.lcms.org/page.aspx?pid=414.

worship."[41] Notably, the question presented did not ask whether there should be a ministerial exception that precludes application of employment discrimination law to disputes between religious institutions and their ministers. There was no circuit split on the existence of the ministerial exception, and the Supreme Court had repeatedly denied cert on that question. All twelve geographic circuits had recognized the ministerial exception,[42] and the Federal Circuit cannot hear these cases. Twelve state supreme courts agreed,[43] and no state supreme court had gone the other way. Both the Petition for Certiorari and the Briefs in Opposition to Certiorari assumed the existence of the ministerial exception. The EEOC characterized the case as a "fact-intensive examination of Perich's . . . 'primary duties'" to determine whether she fit within the exception.[44] Perich agreed that the case had been decided on its "unique factual circumstances."[45] Plaintiffs gave no hint that they planned to put the existence of the ministerial exception at is-

41. Cert. Petition, *supra* note 38, at i.

42. Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989); Rweyemamu v. Cote, 520 F.3d 198, 204–10 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 303–07 (3d Cir. 2006), *cert. denied*, 550 U.S. 903 (2007); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 800–05 (4th Cir. 2000); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343, 347–50 (5th Cir. 1999); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 225–27 (6th Cir. 2007), *cert. denied*, 552 U.S. 857 (2007); Schleicher v. Salvation Army, 518 F.3d 472, 475 (7th Cir. 2008); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 362–63 (8th Cir. 1991); Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1100–04 (9th Cir. 2004); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655–57 (10th Cir. 2002); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301–04 (11th Cir. 2000); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 460–63 (D.C. Cir. 1996).

43. El-Farra v. Sayyed, 226 S.W.3d 792 (Ark. 2006); Van Osdol v. Vogt, 908 P.2d 1122 (Colo. 1996); Dayner v. Archdiocese of Hartford, 23 A.3d 1192 (Conn. 2011); Pardue v. Ctr. City Consortium Schs. of the Archdiocese of Wash., Inc., 875 A.2d 669 (D.C. 2005), *cert. denied*, 546 U.S. 1003 (2005); Pierce v. Iowa-Mo. Conference of Seventh-Day Adventists, 534 N.W.2d 425 (Iowa 1995), *cert. denied*, 517 U.S. 1220 (1996); Music v. United Methodist Church, 864 S.W.2d 286 (Ky. 1993); Archdiocese of Wash. v. Moersen, 925 A.2d 659, 661–63 (Md. 2007), *cert. denied*, 552 U.S. 1179 (2008); Williams v. Episcopal Diocese of Mass., 766 N.E.2d 820 (Mass. 2002); Miller v. Catholic Diocese of Great Falls, 728 P.2d 794 (Mont. 1986); McKelvey v. Pierce, 800 A.2d 840, 859 (N.J. 2002); Cha v. Korean Presbyterian Church of Wash., 553 S.E.2d 511 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002); Coulee Catholic Schools v. Labor & Indus. Rev. Comm'n, 768 N.W.2d 868 (Wis. 2009).

44. Brief for the Federal Respondent in Opposition at 11, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

45. Brief in Opposition at 14, *Hosanna-Tabor*, 132 S. Ct. 694 (No. 10-553).

sue. If they had done so, they would have made the case appear much more cert-worthy.

It was only in the bottom side merits briefs that Perich and the government first attacked the ministerial exception outright. Perich put "ministerial exception" in scare quotes every time the phrase appeared[46] and repeatedly called it the "so-called 'ministerial exception'" and the "ostensible 'ministerial exception.'"[47] The EEOC used the scare quotes only some of the time,[48] but it insisted that there was no constitutional support for what it called a "categorical 'ministerial exception,'"[49] which is to say, no exception with boundaries defined by a category of employees.

What Perich and the EEOC proposed in place of the ministerial exception is much harder to describe, but they unambiguously rejected anything like the ministerial exception as it had existed in the courts of appeals for the previous forty years. They argued that these cases must be decided one at a time, based on the claims and defenses alleged and the remedies sought, and that Perich's job duties and ecclesiastical office were legally irrelevant.[50]

III. THE LEGAL ARGUMENTS

A. Vocabulary

Before exploring the reasons for the ministerial exception, I should say something about its name. Nearly everyone agrees that "minister" is not the right word, but that is the word that has been attached to this rule. As Justice Alito

46. Brief for Respondent Cheryl Perich, *supra* note 19, at 15, 17, 26–27, 38, 40, 44.

47. *Id.* at 15, 17, 26–27.

48. *See* Brief for the Federal Respondent, *supra* note 19, at 8, 11, 19, 32.

49. *Id.* at 11, 19. *Accord, e.g.*, *id*. at 12, 19–20, 29–31, 53.

50. Brief for the Federal Respondent, *supra* note 19, at 48 ("Any prophylactic rule that turns on whether the plaintiff qualifies as 'ministerial' would inevitably bar the adjudication of claims that raise no constitutional concerns . . . ."); *id.* at 50 ("[T]he focus should be on the nature of the plaintiff's claim, the employer's defenses, and the appropriateness of various remedies, not the job responsibilities of the plaintiff."); Brief for Respondent Cheryl Perich, *supra* note 19, at 45 ("Nor does it matter that Perich was a called teacher or commissioned minister."); *id.* at 61 ("No one questions Hosanna-Tabor's belief that Cheryl Perich performed important religious functions in her job.").

pointed out, "minister" is principally a Protestant title; those who perform similar functions in other faiths have different titles.[51] Quite apart from that, the rule is not limited to the pastors of congregations who are the most obvious referent for "minister." The lower courts have said in various ways that the exception applies to other employees who perform important religious functions.[52] The results are not entirely uniform, but all the circuits agree that the rule is not confined to pastors of congregations.

B. The Reasons for the Rule

The rule that "ministers" cannot sue their churches over their employment status serves multiple important functions. These functions sometimes overlap, but they are conceptually distinct. Christopher Lund has helpfully distinguished three components to the rule and four reasons for its most far-reaching component.[53] I will focus here on what I think are the two most basic reasons for the rule.

1. Religious Rules That Would be Prohibited in Secular Employment

First, the ministerial exception protects religious rules of ministry that would be prohibited in a secular context. So, for example, the Catholic Church can insist that all its priests be male. There is no exception for that practice in the employment discrimination laws. The Catholic practice would be flatly illegal except for the Constitution of the United States, which pro-

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51. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 711 (2012) (Alito, J., concurring).

52. *See id.* at 707 (opinion of the Court); *see also, e.g.*, Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003) (Hispanic Communications Manager); EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 795, 804 (4th Cir. 2000) (music director and teacher); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 464–65 (D.C. Cir. 1996) (professor of canon law).

53. Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 23–57 (2011) (distinguishing the relational component, the conscience component, and the autonomy component, and arguing that the autonomy component addresses the reinstatement problem, the restructuring problem, the control problem, and the inquiry problem). The reasons I discuss in the text correspond to Professor Lund's conscience component and parts of his autonomy component.

tects it. The plaintiffs in this case conceded that, somehow, the Catholic Church's refusal to ordain women is protected.[54]

Celibacy rules have the same problem; many states prohibit marital-status discrimination in employment.[55] Celibacy requirements would be flatly illegal in many states except that the Constitution protects them.

The Lutheran teaching that disputes over ministry must be resolved internally is like celibacy or the male-only priesthood—it is a religious rule for ministry. Even if we assume that discharging Perich for threatening to file a lawsuit would be prohibited retaliation for a secular employer, that does not make the church's action any different from firing a priest who gets married or refusing to consider female applicants for the priesthood, practices which would be equally prohibited for a secular employer.

Requiring internal resolution of disputes over ministry is part of the church's internal governance. Cheryl Perich was a commissioned minister, and she could hold that position only in accordance with the rules of the church. One function of the ministerial exception is to protect such religious rules as applied to ministers.

2. *The Church's Right to Evaluate and Select Its Own Ministers*

The second function of the ministerial exception is to protect the church's right to evaluate its own ministers and to decide which individuals should be ministers and which individuals should not be ministers. Even if there is no doctrinal issue at stake, the evaluation of a minister's performance is a decision reserved to the church. Employment discrimination cases brought by individual employees ultimately turn on the quality of the plaintiff's job performance. The employee says he was discharged because of race, sex, age, disability, marital status, or some other protected category. The employer says that that was not the reason at all; the employer acted for some legitimate work-related reason. When the employee is a minister

54. Brief for Respondent Cheryl Perich, *supra* note 19, at 35–36; Brief for the Federal Respondent, *supra* note 19, at 31–32.

55. *See, e.g.*, Mich. Comp. Laws § 37.2202(1) (Supp. 2011).

and the employer is a religious organization, that legitimate work-related reason is about performance in the ministry. Inevitably, religious considerations are part of the overall evaluation of the minister and the decision to discipline or remove that minister. How good a minister was this person, after all? If the judge or jury is not persuaded that the church had good reasons to discharge a minister, then it is likely to conclude that the church acted for an unlawful reason.

For forty years, the judges of the trial and appellate courts have said, with remarkable unanimity, that they cannot decide these cases.[56] Neither judge nor jury is competent to evaluate the qualifications or job performance of a minister. They are not competent constitutionally, because the question is committed to the church. And they are not competent practically, because they cannot know what makes a good minister in each of the enormously diverse array of religions in the United States. Whether or not there is a doctrinal reason like celibacy or the requirement of resolving disputes over ministry internally, evaluation of a minister's qualifications or performance is committed to the churches.

Critics of the ministerial exception often have argued, and Walter Dellinger said twice when we debated the case before the Federalist Society, that there was no religious significance to the church's decisions about Cheryl Perich, because the Lutheran Church does not teach that disabled people cannot be ministers.[57]

In my view, that argument misunderstands or ignores the fundamental point of the ministerial exception—that evalua-

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56. *See supra* notes 42–43 and accompanying text.

57. *See* MARCI A. HAMILTON, GOD VS. THE GAVEL 190 (2005) ("[I]f the characteristic is not required under the religion's set of beliefs, the antidiscrimination laws can apply full force."); Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2031 (2007) ("Religious organizations whose beliefs are consistent with the goals of Title VII, or even silent on the issue of discrimination, cannot complain that compliance interferes with their expression."); Hon. Walter E. Dellinger, III, Remarks at the 2011 Federalist Society National Lawyers Convention: The Ministerial Exception Case: *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (Nov. 11, 2011) (audio/video available at http://www.fed-soc.org/publications/detail/the-ministerial-exception-case-hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc-event-audiovideo); Brief for Respondent Cheryl Perich, *supra* note 19, at 33; Brief for the Federal Respondent, *supra* note 19, at 36–37.

tion of a minister is inherently a religious decision. Hosanna-Tabor is entitled to select its ministers without outside interference. The fundamental religious activity in the case was not disability discrimination, or even internal dispute resolution, but rather the church's evaluation and selection of its own ministers. This right is overridden when a court reviews the church's decision to rescind a minister's call. It does not matter whether the dispute about Perich's ministerial status turned on a doctrinal basis (although in this case it did), or simply on the employer's all-things-considered judgment. The right to evaluate and select a church's ministers is protected.

It was also somewhat disingenuous for plaintiffs to insist that there had to be a religious reason for the church's decision. When the religious reason in this case was pointed out—that Perich had defied the church's teaching on internal resolution of disputes over ministry—Perich and the government then said that the religious reason was irrelevant. They said the courts could just decide that the church had retaliated and ignore the religious reason for retaliation.[58] The religious reason, they argued, was just an argument for an exemption from the retaliation rules, and *Employment Division v. Smith*[59] says that no such exemptions are constitutionally required.

I will return to *Smith* below; the point here is simply to compare the plaintiffs' arguments. They said nonreligious reasons for employment actions do not count, because the courts can evaluate those reasons. And religious reasons do not count if they would be prohibited in a secular context, because the courts can ignore those reasons under *Smith*. The Catholic teaching that priests must be male is a special religious reason that somehow does count, but only under the freedom of association and not under the Religion Clauses.[60] Explaining how that protected religious reason was different from other prohib-

58. Brief for Respondent Cheryl Perich, *supra* note 19, at 53–54; Brief for the Federal Respondent, *supra* note 19, at 37–38.

59. 494 U.S. 872 (1990).

60. Brief for Respondent Cheryl Perich, *supra* note 19, at 35–36; Brief for the Federal Respondent, *supra* note 19, at 31–32.

ited religious reasons was a serious difficulty for the plaintiffs.[61]

In the end, the Court understood both reasons for the ministerial exception. In an important passage, the Court said:

> The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical"—is the church's alone.[62]

So a church can invoke the ministerial exception without stating a religious reason for an employment decision about a minister. It need not state or explain its reasons for the decision, because the decision is an inherently religious one, left entirely to the church. The church's reasons for the decision are legally irrelevant.

C. The Supreme Court Precedent

1. The Church Governance Cases

Supreme Court doctrine had long protected this right to independent religious judgment in the evaluation of ministers. It is true that the Court had never decided a ministerial exception case by that name. Nor had it decided a ministerial exception case that involved a modern civil rights statute. But it had decided a series of cases over many years, from 1872 to 1976, holding that churches are entitled to resolve disputes over ministry without interference by the civil courts.

These cases mostly involved common-law and equitable claims alleging that ministers or would-be ministers had been improperly treated in ways that violated neutral and generally applicable principles of contract or trust law: *Watson v.*

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61. *See, e.g.*, Transcript of Oral Argument at 32–33, 36–40, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553) (questions by Chief Justice Roberts and Justices Scalia, Breyer, and Alito about why Catholics were protected and Lutherans were not).

62. *Hosanna-Tabor*, 132 S. Ct. at 709 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952)).

Jones;[63] *Gonzalez v. Roman Catholic Archbishop*;[64] *Kedroff v. Saint Nicholas Cathedral*;[65] *Kreshik v. Saint Nicholas Cathedral*;[66] and most recently, *Serbian Eastern Orthodox Diocese v. Milivojevich*.[67] These cases said that churches are entitled to resolve disputes over ministry for themselves and that civil courts must defer to the religious authorities that both sides had recognized before the dispute arose. These cases were decided by large majorities: *Gonzalez* and *Kreshik* were unanimous; *Kedroff* was eight-to-one; *Watson* and *Milivojevich* were seven-to-two.

In *Jones v. Wolf*,[68] in 1979, the Court held that civil courts could decide a church property dispute on the basis of the church's secular documents and neutral principles of law, even if the court reached a result opposite to that of the highest church authorities.[69] But *Jones v. Wolf* also reaffirmed the earlier cases and emphasized that if the case turned on a religious question, the rule of deference to religious authorities still applied.[70] We argued that evaluation of a minister is inherently a religious question.

No justice who was sitting at the time of *Milivojevich* or *Jones v. Wolf* was still on the Court that decided *Hosanna-Tabor*. We were relying on the *Watson* line of cases. Perich and the EEOC were betting that the Court did not believe the reasoning in those cases anymore, or that *Jones v. Wolf* could be read to sweep them away. The Court's opinion in *Hosanna-Tabor* is a sweeping and unanimous reaffirmation of the earlier cases, particularly *Watson*, *Kedroff*, and *Milivojevich*.[71]

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63. 80 U.S. 679, 729 (1872) (deferring to religious authorities for resolution of church property dispute, and affirming right of religious organizations to "create tribunals" for their internal governance).

64. 280 U.S. 1 (1929) (deferring to religious resolution of claim of right to be appointed to an endowed chaplaincy).

65. 344 U.S. 94 (1952) (deferring to religious resolution of dispute over identity of bishop entitled to control the cathedral).

66. 363 U.S. 190 (1960) (reaffirming *Kedroff* and rejecting a new state-law theory for evading *Kedroff*).

67. 426 U.S. 696 (1976) (deferring to religious resolution of claim to reinstatement by bishop who had been removed from office).

68. 443 U.S. 595 (1979).

69. *See id.* at 602–06.

70. *See id.* at 602–04.

71. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 704–05 (2012).

2. Employment Division v. Smith

The other case that shaped the argument is the 1990 decision *Employment Division v. Smith*,[72] in which the Supreme Court said that neutral and generally applicable laws can be applied to religious practices, and that the Free Exercise Clause requires no exceptions. To critics of the ministerial exception, and to the Solicitor General's office and to Cheryl Perich's lawyers, *Smith* controlled this case. They said the Americans with Disabilities Act[73] is a neutral and generally applicable law, and it therefore applies to churches, and even to the employment of ministers, with no exceptions.[74]

All the courts of appeals had heard that argument, and they all said that choosing ministers is outside the scope of *Smith*.[75] *Smith* is about the government's general power of regulation; *Smith* is not about the internal governance of churches. There is a passage in *Smith* itself, a portion of one sentence, that makes this point explicitly. In listing what the Free Exercise Clause *does* protect, the Court said that government cannot "lend its power to one or the other side in controversies over religious authority," citing three cases from the *Watson* line.[76] Ministers occupy positions of religious authority, so a controversy over who should be a minister is a controversy over religious authority.

Of course, some lawyers think that not everything Justice Scalia said in *Smith* about preserving prior law was entirely sincere. Las Vegas could have made a betting book on whether he had meant this passage. Did he really mean to preserve the cases on internal church governance? Or was he just deferring their repudiation to a later date?

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72. 494 U.S. 872 (1990).

73. 42 U.S.C. § 12101 *et seq.* (2006 & Supp. III 2009).

74. Brief for Respondent Cheryl Perich, *supra* note 19, at 42–45; Brief for the Federal Respondent, *supra* note 19, at 20–29, 37–38.

75. *See supra* note 42.

76. *Smith*, 494 U.S. at 877 (citing Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)).

Justice Scalia's apparent answer to that question emerged early in the oral argument; he was clearly trying to help me.[77] His answer became more explicit early in the government's argument. Responding somewhat incredulously to the government's theory that whatever rights the church might have derive only from freedom of association, he said that "there, black on white in the text of the Constitution are special protections for religion."[78] A little later, he was even more explicit: "*Smith* didn't involve employment by a church. It had nothing to do with who the church could employ. I don't—I don't see how that has any relevance to this."[79]

The entire Court agreed. The Court dismissed *Smith* in a paragraph that critics of the new decision find conclusory and unsatisfactory.[80] The Court distinguished regulation of "outward physical acts" from regulation of "an internal church decision that affects the faith and mission of the church itself."[81] It attributed this distinction to *Smith*, quoting *Smith*'s ban on government "lend[ing] its power to one or the other side in controversies over religious authority or dogma."[82] Those who did not believe it the first time the Court said it were unpersuaded the second time the Court said it.[83]

The distinction is not really about "physical acts" versus nonphysical beliefs. It does not matter that discharging a minister can be described as conduct, and even, less idiomatically, as a physical act. Rather, the distinction is about "*outward* physical acts" versus "*internal*" church decisions. The word outward is

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77. *See, e.g.*, Transcript of Oral Argument, *supra* note 61, at 10 ("I think your point is that it's—it's none of the business of the government to decide what the substantial interest of the church is.").

78. *Id.* at 29.

79. *Id.* at 38.

80. *See, e.g.*, Mike Dorf, *Ministers and Peyote*, DORF ON LAW (Jan. 12, 2012, 12:30 AM), www.dorfonlaw.org/2012/01/ministers-and-peyote.html; Leslie C. Griffin, *Reconsidering Free Exercise:* Hosanna-Tabor v. EEOC, ACS BLOG (Jan. 13, 2012), www.acslaw.org/acsblog/reconsidering-free-exercise-hosanna-tabor-v-eeoc.

81. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012).

82. *Id.* (quoting Emp't Div. v. Smith, 494 U.S. 872, 877 (1990)).

83. *Compare, e.g.*, Griffin, *supra* note 80, *with* Leslie C. Griffin, *Ordained Discrimination: The Cases Against the Ministerial Exception* (Univ. of Hous. Law Ctr., Paper No. 2011-A-9, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1936073.

at least as important as the word physical. The essential point is that internal church governance is constitutionally protected and is outside the domain of *Smith*.

It would appear that the Court found the point too obvious to require much explanation. There was much more it could have said. The central point of *Smith* was to sharply limit the right to regulatory exemptions for religiously motivated conduct that had developed under *Sherbert v. Verner*[84] and *Wisconsin v. Yoder*.[85] But the ministerial exception never rested on *Sherbert* or *Yoder*. It rested instead on cases protecting internal church governance, including the selection and evaluation of ministers, going back to 1872 in the Supreme Court. The earliest of these cases, *Watson v. Jones*, said that churches have a right "to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association."[86] That is exactly what the Missouri Synod did here: it created tribunals for the governance of its congregations and officers and for the resolution of religious disputes among them. The Court in *Hosanna-Tabor* quoted with approval a condensed version of the *Watson* formulation: "[T]he First Amendment 'permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters.'"[87]

The Court decided *Watson*, the first case in the line leading to *Hosanna-Tabor*, six years before *Reynolds v. United States*,[88] the first case in the line leading to *Smith*. *Reynolds* upheld a bigamy prosecution against a religiously motivated polygamist, holding that the Free Exercise Clause required no exception for reli-

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84. 374 U.S. 398 (1963) (holding that government-imposed burdens on religious exercise must serve a compelling government interest by the least restrictive means).

85. 406 U.S. 205 (1972) (reaffirming *Sherbert*); *see also* Emp't Div. v. Smith, 494 U.S. 872, 883–85 (1990) (rejecting "the balancing test set forth in *Sherbert*").

86. 80 U.S. 679, 729 (1872). This passage was quoted at length and with approval in *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711 (1976), and in *Hosanna-Tabor*, 132 S. Ct. at 713 (Alito, J., concurring).

87. *Hosanna-Tabor*, 132 S. Ct. at 705 (opinion of the Court) (quoting *Milivojevich*, 426 U.S. at 724).

88. 98 U.S. 145 (1878).

gious practice.[89] Six of the Justices who decided *Watson* were still on the Court to decide *Reynolds*, and no Justice suggested that the two cases had anything to do with each other. The internal governance of the church was outside the scope of the rule that general government regulation can be applied to acts that are the exercise of religion. The two rules coexisted until the era of *Sherbert* and *Yoder* and constitutionally required religious exemptions, and they can coexist again in the era of *Smith* and many fewer exemptions.

The distinction can be found in nascent form much earlier than *Reynolds* and *Watson*, in John Locke's *Letter on Toleration*.[90] Locke proposed something like the *Smith* rule for the regulation of religiously motivated conduct,[91] but he also insisted that churches have a right to internal self-governance[92] and an essentially absolute right to decide who is and who is not a member of the church.[93] He did not expressly consider the selection of ministers. But a church's right to make its own religious laws and to expel members for nonconformance to those laws would seem to apply a fortiori to appointing and removing ministers. Control of membership and control of the ministry are both matters of internal church governance, and, of the two, control of the ministry is clearly the more important.

I do not think that *Smith* was rightly decided.[94] But I said in the immediate wake of *Smith* that if the language of the opinion were taken seriously, church employment was outside the scope of the *Smith* rule.[95] More particularly, I said that the ministerial exception was protected by *Smith*'s statement that government cannot take sides "in controver-

89. *See id.*

90. JOHN LOCKE, *A Letter Concerning Toleration* (1690), *reprinted in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215 (Ian Shapiro ed., 2003).

91. *Id.* at 236.

92. *Id.* at 221 ("[T]he right of making its laws can belong to none but the society itself . . . .").

93. *Id.* at 224 ("This is the fundamental and immutable right of a spontaneous society, that is [sic] has to remove any of its members who transgress the rules of its institution . . . .").

94. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (sharply criticizing the decision).

95. *Id.* at 42–44.

sies over religious authority or dogma."[96] The Supreme Court has now explicitly so held.

D. Litigating These Cases Without a Ministerial Exception

Perich and the government argued that the courts could decide these cases and somehow avoid the religious questions on a case-by-case basis.[97] How this was supposed to work was never made clear, but the only real limit we could identify in their briefs was that church employees would be precluded from introducing subjective evidence about how well they had performed their religious functions.[98] But they could introduce any other evidence suggesting that the church's reasons for its employment decision were a pretext for discrimination.[99]

Whatever the intended details, the proposal was entirely unworkable. Either the religious elements in the church's decision to discharge a minister would be reviewed, evaluated, and ultimately decided by a judge or a jury, or those elements would simply be ignored and all religious questions would be resolved against the church sub silentio. Even if the minister could not introduce subjective evaluations of his job performance, the factfinder would have to assess the church's subjective evaluation of his job performance and balance that evaluation against the minister's evidence of pretext. It is not possible to litigate these cases without getting deep into the merits of the minister's job performance.

We have some experience of how this works in the context of religious employment. Most cases about ministers have been cut off at the threshold by the ministerial exception. But a few exceptional cases about ministers—and many more cases about other employees of churches—have been allowed to go forward. The resulting opinions do not inspire confidence in the ability of courts to decide these cases without intruding deeply

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96. *Id.* at 42 (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990)).

97. *See* Brief for Respondent Cheryl Perich, *supra* note 19, at 54–55; Brief for the Federal Respondent, *supra* note 19, at 14, 48–53.

98. Brief for Respondent Cheryl Perich, *supra* note 19, at 54–55; Brief for the Federal Respondent, *supra* note 19, at 41.

99. Brief for Respondent Cheryl Perich, *supra* note 19, at 54–55; Brief for the Federal Respondent, *supra* note 19, at 36, 41.

into religious questions. Once courts begin to consider the merits, they seem determined to push on and resolve the controversy. Courts will say the most amazing things to render religious arguments irrelevant and to justify judicial resolution of the controversy.[100]

IV. THE COURT'S OPINION

When I presented this paper orally, I said that neither side could confidently count to five in this case, but that few judges would be comfortable deciding the questions that would arise if the plaintiffs' view of the law were sustained.[101] Judges and juries would inevitably be evaluating the performance of priests, ministers, rabbis, imams, religion teachers, and other leaders in America's religious organizations. That would have been a disaster for the ability of American churches to select and control the ministers who deliver their message.

The Supreme Court agreed, and it agreed unanimously and without qualification. I think that no one who heard the oral argument would have predicted unanimity; certainly I did not. But unanimous it is.

Unanimous opinions often are narrow, but this opinion is a sweeping reaffirmation of the ministerial exception. There is a ministerial exception that covers a category of employees identified as ministers, and that exception is required by both the Free Exercise Clause and the Establishment Clause.[102]

The Court declined to lay down a test for identifying ministers,[103] and that caution may well have been essential to unanimity. But the Court held that whatever the definition, it is broad enough to include Cheryl Perich.[104] I think that Perich

100. *See* Patrick J. Schiltz & Douglas Laycock, *Employment in Religious Organizations*, *in* RELIGIOUS ORGANIZATIONS IN THE UNITED STATES 527 (James A. Serritella et al. eds., 2006) (reviewing many of these cases).

101. *See* Douglas Laycock, Remarks at the 2011 Federalist Society National Lawyers Convention: The Ministerial Exception Case: *Hosanna Tabor Lutheran Church and School v. EEOC* (Nov. 11, 2011) (audio/video available at http://www.fedsoc.org/publications/detail/the-ministerial-exception-case-hosanna-tabor-evangelical-lutheran-church-and-school-v-eeoc-event-audiovideo).

102. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 707 (2012).

103. *Id.*

104. *Id.*

should clearly be within the ministerial exception, even though her position is not what first comes to mind when one talks about ministers. She was not the pastor of a congregation, or the assistant pastor. She did not spend full time, or even a majority of her time, on the explicitly religious portions of her work. But the religious work that she did was important: she taught the faith, she led worship, and she represented the church to her students.

The Court's holding that Cheryl Perich was a minister for purposes of the ministerial exception marks one point on the minister side of the line between ministers and nonministers. That point puts the line somewhere in the same vicinity where it has been in the lower courts for the past forty years. Perich and the government emphasized cases holding that employment decisions about teachers in religious schools are not protected; none of these cases involved a teacher shown to teach religion or to lead worship on a regular basis.[105] We emphasized cases holding that teachers of religion are ministers and are within the ministerial exception, even if they also teach secular subjects.[106]

Holding that Cheryl Perich was a minister puts the line in a range that is broadly protective of the right of religious organizations to evaluate and select the personnel who perform important religious functions. Of course, we do not know how the Court would decide other cases that resemble *Hosanna-Tabor* in some ways and differ from it in others. Consider a teacher with the same mix of religious and secular functions that Cheryl Perich had, but in a denomination that does not have a formal ecclesiastical office analogous to commissioned minister. It seems to me unlikely that the courts would treat the two de-

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105. *See* Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 326 (3d Cir. 1993) (no description of job duties); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1391–92 (4th Cir. 1990) (no indication whether teachers taught religion or led worship); Ritter v. Mount St. Mary's Coll., 814 F.2d 986, 988 (4th Cir. 1987) (education professor); EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1369–70 (9th Cir. 1986) (no description of job duties); EEOC v. Miss. Coll., 626 F.2d 477, 479, 485 (5th Cir. 1980) (psychology professor). Each of these cases presented an employment dispute with a religious employer; only some of them were defended on the basis of the ministerial exception.

106. Clapper v. Chesapeake Conference, No. 97-2648, 1998 WL 904528 (4th Cir. Dec. 29, 1998); Coulee Catholic Schs. v. Labor & Indus. Rev. Comm'n, 768 N.W.2d 868 (Wis. 2009).

nominations differently, for the reasons emphasized in the concurring opinion of Justices Alito and Kagan: religions are organized in a great variety of ways, and the law must be sufficiently flexible to protect religious liberty for all of them.[107]

The Court rejected without discussion the plaintiffs' argument that anyone working in a school should be outside any ministerial exception that might be recognized,[108] and their argument that retaliation claims should be outside any ministerial exception.[109] If the Court had created an exception for retaliation claims, every case with a gradually escalating employment dispute would have henceforth been pled as a retaliation case. Good lawyers would have advised ministers to provoke confrontations that could plausibly be portrayed as evidence of retaliation.

The Court reserved judgment on whether ministers can sue their churches for breach of contract or for tort.[110] Those questions are important, but they are also marginal. It is the discrimination cases that would be filed in large numbers and that almost inevitably turn on evaluation of the minister's job performance.

As for the contract and tort cases, the answer will almost surely be that it depends. A minister's contract claim for unpaid salary or retirement benefits surely can proceed to the merits. A minister discharged for cause, suing in contract on the theory that the church lacked adequate cause to discharge him, should be squarely within the rationale of *Hosanna-Tabor*. He would be directly challenging the church's right to evaluate and select its own ministers, and he would be asking the court to substitute its evaluation of his job performance for the church's evaluation.

Similarly, in tort, a minister's workers' compensation claim for physical injury surely can proceed to the merits. A defamation claim alleging that church officials made false statements in the proceedings leading to his discharge, or when they ex-

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107. *Hosanna-Tabor*, 132 S. Ct. at 711–12 (Alito, J., concurring).

108. Brief for Respondent Cheryl Perich, *supra* note 19, at 32; Brief for the Federal Respondent, *supra* note 19, at 52–53.

109. Brief for Respondent Cheryl Perich, *supra* note 19, at 39–40; Brief for the Federal Respondent, *supra* note 19, at 42–47.

110. *Hosanna-Tabor*, 132 S. Ct. at 710 (opinion of the Court).

plained the discharge to the congregation, should be barred. A church cannot evaluate its ministers without making statements about their performance, and it is in no one's interest—not the church's and certainly not the minister's—to encourage them to make such decisions without discussion and deliberation. Statements evaluating a minister's performance should be within the ministerial exception.

Those issues are for the future. For now, we have a ringing and unanimous reaffirmation of the liberty of religious organizations to control their own message and select their own messengers.