THE NATIONAL LAW JOURNAL
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Commentary: Court should reaffirm vitality of religious liberties in 'Hosanna-Tabor'

Wiley Rein lawyers Megan L. Brown and Justin D. Heminger discuss *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a closely watched case testing the proper balance between religious organizations' First Amendment right to self-governance and the government's interest in preventing and remedying employment discrimination.

Megan L. Brown and Justin D. Heminger
September 28, 2011
Early in its new term, the U.S. Supreme Court will hear oral argument in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, No. 10-553, a closely watched case testing the proper balance between religious organizations' First Amendment right to self-governance and the government's interest in preventing and remedying employment discrimination. At issue is the "ministerial exception," a doctrine that, broadly speaking, protects religious organizations' employment decisions concerning "ministerial" employees from challenge in litigation under federal and state anti-discrimination statutes. The exception was crafted to protect religious organizations' First Amendment rights, and variants of the doctrine have been accepted in the lower courts for decades. This case presents the Supreme Court with an important opportunity to weigh in on it and other core First Amendment principles.

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

In June 2004, she became ill, was diagnosed with narcolepsy and began receiving treatment. When she sought to return to her teaching position in February 2005, the school board resisted. After Perich threatened to sue, the congregation voted to rescind her call, due to "insubordination and disruptive behavior," and she was terminated.

The Equal Employment Opportunity Commission and Perich sued the church, alleging it violated the Americans with Disabilities Act by retaliating against her. The district court ruled in favor of the church, finding that Perich was a "ministerial" employee and, therefore, the ministerial exception protected the church's employment decision from judicial second-guessing under federal and state anti-discrimination laws. The U.S. Court of Appeals for the 6th Circuit disagreed and reversed, concluding that Perich was not a ministerial employee within the scope of the exception because, in its view, her "primary duties" were not religious.

The church sought Supreme Court review, arguing that the Court needs to resolve a circuit split over the proper test for determining whether an employee of a religious organization is subject to the ministerial exception. The Court granted certiorari.

In taking this case, the Court is confronting foundational questions about how to reconcile constitutional and statutory rights. No one disputes that a religious organization has First Amendment rights at stake when making certain employment decisions. And no one disputes that the federal government has a legitimate interest in preventing and remedying invidious discrimination in the workplace. What animates this case is how — if at all — religious groups' constitutional rights should be accommodated in applying the government's sweeping statutory enactments. Such an accommodation is

at the center of this case because, as the Court has made clear, "[t]he First Amendment, of course, is a limitation on the power of Congress." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499 (1979). In other words, even when Congress pursues laudable goals, it cannot unduly encroach on the fundamental liberties enshrined in the Constitution. Indeed, the Court recognized this core principle decades ago when it observed that "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school." Id. at 504. In that case, the Court concluded that there was "no escape" from the serious "constitutional conflicts" that would flow from applying national labor laws to lay teachers at religious schools, and found Congress could not have intended such a result.. Similarly, the church in *Hosanna-Tabor* argues that this case falls directly into a long line of the Court's precedents, dating back to the 19th century, that have interpreted the First Amendment to limit many forms of governmental interference in a church's internal decisions.

Remarkably, the United States and Perich do not just argue that the ministerial exception does not apply to the facts at issue here. They contend that the Court need not recognize a ministerial exception at all. This is a noteworthy shift, since they previously had challenged only the exception's application, not its vitality. They argue that the First Amendment does not prevent the application of what they characterize as neutral laws of general applicability, even when those laws directly affect the relationship between a religious school and its "called" teacher. Under their approach, a constitutional accommodation would rarely, if ever, be necessary. Given that the Court has never addressed the ministerial exception, the government's position raises the stakes.

As with many cases the Court chooses to hear, *Hosanna-Tabor* presents the sometimes uncomfortable tension between government regulation and individual liberties. In light of the virtual unanimity among the lower courts regarding the existence of the ministerial exception, the Court seems poised to recognize some constitutional protection for religious organizations' employment decisions. Nevertheless, recent First Amendment cases reveal a Court regularly divided over the proper balance between important governmental policies, on the one hand, and constitutional rights, on the other. Given its past regard for religious liberty, the Court should be comfortable reiterating that, when there is tension, constitutional rights must prevail. But the devil will be in the details. How far a majority of the justices are willing to go in protecting the First Amendment rights of religious organizations to self-governance remains to be seen.

(For another view of the case, read this commentary by Columbia Law School professor Vivian Berger.)

Megan L. Brown is a partner, and Justin D. Heminger is an associate, at Wiley Rein in Washington. They have filed an amicus brief in the case on behalf of experts on religious tribunals in support of the petitioner, the church. Argument in the case will occur on Oct. 5.