

The U.S. Supreme Court expands the ministerial exception

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On July 8, 2020, in a 7-2 decision, the U.S. Supreme Court in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, expanded the “ministerial exception,” which allows religious organizations to avoid federal anti-discrimination laws.

The Court’s holding emphasizes the importance of the employee’s function, as well as the religious organization’s definition and explanation of a job’s importance when determining the applicability of the exception.

The Court’s holding in *Morrissey-Berru* makes it easier for religious organizations, at least in some cases, to avoid Title VII prohibitions including those described in the *Bostock* decision.

The majority opinion was written by Justice Alito, with a separate concurrence written by Justice Thomas. Justice Sotomayor wrote a dissenting opinion, which was joined by Justice Ginsburg.

The decision was highly anticipated following the Supreme Court’s June 15, 2020 decision in *Bostock v. Clayton County*,¹ which held that Title VII prohibits discrimination based on sexual orientation or transgender status.

In *Bostock*, the dissenting justices expressed concerns that the *Bostock* opinion could impair religious organizations’ First Amendment protections and specifically mentioned the then pending *Morrissey-Berru* case.

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HOSANNA-TABOR AND THE MINISTERIAL EXCEPTION

In the 2012 case *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,² the Supreme Court issued a unanimous opinion written by Chief Justice Roberts, which recognized a “ministerial exception” to federal anti-discrimination laws.

Rooted in the First Amendment’s Establishment and Free Exercise Clauses, the Supreme Court held that in order to avoid unnecessarily interfering with the exercise of religion as a

constitutional matter, religious organizations are exempt from federal anti-discrimination laws when hiring and firing employees deemed to be “ministers.”

While holding that the exception applies to more than the head of a religious congregation, the *Hosanna-Tabor* Court declined to adopt a strict test to determine when the exception applies.

Rather, in rendering its decision, the Court considered the following four factors:

- (1) formal job title and whether the employer held the employee out as a minister;
- (2) whether the employee’s title reflected ministerial substance and training;
- (3) whether the employee held herself out as a minister; and
- (4) whether the employee’s job duties included “important religious functions” performed on behalf of the religious organization.

In *Hosanna-Tabor*, Justice Alito, in a concurring opinion joined by Justice Kagan, emphasized that courts should “focus on the function performed by persons who work for religious bodies” when determining ministerial status.

Specifically, Justice Alito wrote that the exception should apply to anyone “who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith.”

Almost immediately thereafter, lower courts were faced with disputes over the extent of the ministerial exception and how to apply the Supreme Court’s decision to teachers and other employees of religious organizations.

THE NINTH CIRCUIT AND THE TWO CASES BEFORE THE COURT

The Supreme Court’s newest decision on the ministerial exception resolved two significant cases brought against religious schools in which the plaintiffs (former teachers) alleged violations of federal anti-discrimination laws, *Our Lady of Guadalupe School v.*



Morrissey-Berru, No. 19-267 and *St. James Catholic School v. Biel*, No. 19-348.

These cases were consolidated, and oral arguments were heard on May 11, 2020. In both cases, the Court of Appeals for the Ninth Circuit considered whether the ministerial exception applied to the former teachers and ultimately concluded that it did not.

In *Morrissey-Berru*, the plaintiff was a teacher at Our Lady of Guadalupe School and brought a claim against the school under the Age Discrimination in Employment Act (ADEA).

The district court applied the Supreme Court's reasoning as set forth in *Hosanna-Tabor* and held that Our Lady of Guadalupe, a Roman Catholic school, had a protected First Amendment right to choose its teachers because they are within the meaning of "ministers."

In its 2012 *Hosanna-Tabor* decision, the Supreme Court unanimously recognized a "ministerial exception" to federal anti-discrimination laws.

However, on appeal, a three-judge panel for the Ninth Circuit reversed the district court's decision and held that *Morrissey-Berru* was not a "minister" for purposes of the ministerial exception.

In rendering its decision, the Ninth Circuit considered the four factors from *Hosanna-Tabor*, including the fact that the plaintiff-teacher did not have any religious credentials, religious training, or a ministerial background, and did not hold herself out to the public as a religious leader or minister. Therefore, the ministerial exception did not bar the plaintiff-teacher's ADEA claim.

Similarly, in *Biel*, the plaintiff-teacher filed a claim against St. James Catholic School, claiming discrimination under the Americans with Disabilities Act (ADA).

The district court ruled in favor of St. James Catholic School, finding that the 2012 *Hosanna-Tabor* case protected the school's right to be free from government interference when choosing who teaches the Catholic faith to the next generation because their teachers were within the meaning of "ministers."

However, on appeal, a divided panel for the Ninth Circuit reversed the district court's decision, finding that Ms. Biel was not a "minister" for purposes of the ministerial exception and could bring her claims under the ADA.

The majority reviewed the four factors set forth in *Hosanna-Tabor* and found that the school did not hold Ms. Biel out as a minister "by suggesting to its community that she had special expertise in Church doctrine, values, or pedagogy."

Furthermore, Ms. Biel's title was "Grade 5 Teacher" and "nothing in the record indicat[ed] that Biel considered herself a minister or presented herself as one to the community."

While there was evidence that Ms. Biel performed some "important religious functions," the court held that this element was not dispositive.

Notably, the Ninth Circuit denied en banc review, though nine judges dissented and argued for en banc review. These nine judges expressly criticized the court's decision in *Morrissey-Berru* and found that the Ninth Circuit's decision meant "thousands of Catholic schools in the West have less religious freedom than their Lutheran counterparts nationally."

THE COURT'S DECISION IN MORRISSEY-BERRU

The Supreme Court's majority reversed the Ninth Circuit opinions and held that when a school entrusts a teacher with the responsibility of educating and forming students in the faith, the judiciary should not intervene into disputes between the school and the teacher, as this threatens the school's independence in a way the First Amendment does not allow.

Key to the Court's *Morrissey-Berru* decision, was the fact that both plaintiffs were teachers at Catholic schools, who led and taught prayers and religion, and signed similar contracts mentioning the role of religion in the school.

The opinion relies on a reading of *Hosanna-Tabor* that emphasizes that the key factor in determining whether the ministerial exception applies is the employee's function.

This is, perhaps, unsurprising because the author of the majority opinion, Justice Alito, also drafted the concurring opinion in *Hosanna-Tabor*, which also emphasized job responsibilities as the primary focus of any determination.

The Court's opinion is summarized best by its statement that "[w]hat matters, at bottom, is what an employee does."

As noted, *Hosanna-Tabor* focused on four factors when making a determination of ministerial status:

- (1) the employee's title;
- (2) the degree of religious training required for the position;
- (3) how the employee held herself out to others; and, of course;
- (4) the employee's job duties.

The majority criticized the Ninth Circuit Court of Appeals for applying these four factors in a "checklist" fashion and

ignoring the explicit statement in *Hosanna-Tabor* that the Court was not adopting a “rigid formula.”

The Court found that not all factors were equal. According to the Court, the first three factors — title, job training, and how employees refer to themselves — may be relevant, but they are not alone sufficient to support a finding that someone is or is not a “minister.”

In contrast, the Court found that the fourth factor, job function, was sufficient and, by its nature, the most important factor.

The Court, however, went further and described how lower courts should approach an examination of an employee’s job function.

Key to the Court’s decision in the current matter, was the fact that both plaintiffs were teachers at Catholic schools, who led and taught prayers and religion, and signed similar contracts mentioning the role of religion in the school.

The dissent was deeply troubled by the majority’s choice to emphasize function over all else, and expressed further concern that religious organizations might designate virtually every employee as having a job that is ministerial in nature.

“[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”

The Court noted that, while neither plaintiff had a ministerial title and their religious training may not have been elaborate, the religious organizations viewed them as having important religious roles and that function was paramount. “[T]he schools’ definition and explanation of [the employees’] roles is important.”

Indeed, the Court further emphasized that point and wrote that,

“[i]n a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution’s explanation of the role of such employees in the life of the religion in question is important.”

While the Court did not go so far as to say that courts should defer to the religious organization on this point, lower courts will have to struggle with how important such views are and whether they are decisive.

Justice Thomas wrote a concurring opinion that suggested that the majority opinion did not go quite far enough. That is, holding the religious organization’s opinion as merely “important” is not enough.

Rather, to avoid a possible entanglement with a religious organization’s right to govern the selection of its key employees, Justice Thomas argued that the Court should have “defer[red] to religious organizations’ good-faith claims that a certain employee’s position is ‘ministerial.’”

THE DISSENT

Justice Sotomayor, joined by Justice Ginsburg, issued a separate dissent, finding that the majority’s “simplistic approach has no basis in law” and grants religious employers unwarranted freedom to discriminate.

The dissent argued that the four-factor test was appropriate and necessary, finding that *Hosanna-Tabor’s* well-rounded approach ensured that a church could not categorically disregard generally applicable antidiscrimination laws for nonreligious reasons.

Furthermore, Justice Sotomayor noted that “[b]y analyzing objective and easily discernable markers like titles, training, and public-facing conduct, *Hosanna-Tabor* charted a way to separate leaders who ‘personify’ a church’s ‘beliefs’ or who ‘minister to the faithful’ from individuals who may simply relay religious tenets.”

The dissent was deeply troubled by the majority’s choice to emphasize function over all else.

Indeed, given the majority’s description of the religious organization’s view as “important,” the dissent noted that “one cannot help but conclude that the Court has just traded legal analysis for a rubber stamp.”

The dissent expressed further concern that religious organizations might designate virtually every employee as having a job that is ministerial in nature.

With respect to the specific facts of the underlying cases, the Court ignored the fact that both teachers spent most of their time teaching secular subjects, did not have religious titles (even though such titles were used by others in the religion), and were not required to be a member of the religion to hold their positions.

Here, the dissent argued that prior case law, upon which *Hosanna-Tabor* was based, regularly found that such teachers were not held to be “ministers.”

The majority’s opinion, according to the dissent, disturbs this well-settled law. Further, given the dispute about the facts, the dissent argued that, at a minimum, the federal anti-discrimination claims should have been permitted to proceed.

TAKEAWAY

The Court's opinion does not provide a bright-line test for determining the application of the ministerial exception, though it does hold that function will be at the center of any future analysis.

According to the majority, courts need not defer to religious organizations' opinions about the nature of a particular job, but the organizations' opinions may be persuasive, and will certainly be viewed as "important."

Furthermore, while *Morrissey-Berru* focused on teachers responsible for religious education, how the Court will treat

claims made by employees in non-educational positions is still up for debate.

Notes

¹ 140 S.Ct. 1731.

² 565 U.S. 171 (2012).

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