

*HOSANNA-TABOR V. EQUAL
EMPLOYMENT OPPORTUNITY
COMMISSION*

*James R. R. Van Eerden**

* *James is a senior Philosophy major with a concentration in Legal Studies from Greensboro, North Carolina. He will be commissioned as a Second Lieutenant in the United States Marine Corps and will attend law school before serving as a Judge Advocate General.*

I. INTRODUCTION

One of the most contentious debates among legal scholars centers on the interpretation of First Amendment liberties, particularly the liberties outlined in the Free Exercise and Establishment clauses. Many questions concerning religious liberty are rooted in the words of early American political architects. As justices and constitutional scholars defend their jurisprudential philosophies, discussion concerning these issues becomes increasingly vitriolic.

Despite the grievances often attributed to constitutional debates, the benefits from such exchanges contribute to public discourse and establish important guidelines for social interaction. As a mouthpiece for justice, the Supreme Court must speak out on vital concerns that impact culture by making logically defensible decisions on important issues. One such example is the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, which involves many hot button issues including religious liberty and employment discrimination.

II. FACTS OF THE CASE

The case *Hosanna-Tabor v. EEOC*, thereafter referred to as *Hosanna-Tabor*, involved a dispute between the plaintiffs, the Lutheran church and its subsidiary school, and the defendant, the Equal Employment Opportunity Commission acting on behalf of its client Cheryl Perich.

Beginning in 2000, Perich taught at Hosanna-Tabor Grade School in Redford, Michigan. The school operated under a con-

gregation affiliated with the Lutheran Church Missouri-Synod, which oversaw other similar schools and churches throughout the country. In June 2004, Perich was hospitalized for a medical condition later diagnosed as “narcolepsy” – a sleep disorder causing randomized and involuntary sleep patterns. The school provided Perich with full benefits and promised to reserve her position for after her recovery. In December of the same year, Perich’s doctor told her that she could return to work in several months, and Perich promptly communicated this information back to the school’s administration.

During this time, the school increasingly doubted Perich’s ability to fulfill her duties as a teacher and subsequently hired a replacement. On January 30th, 2005, at the behest of the school board and the Hosanna-Tabor congregation, the school requested Perich’s voluntary resignation.¹

The disgruntled Perich refused to tender her resignation, and the following day she appeared on school grounds claiming she was reporting for work per the guidelines outlined in her initial employment contract. She threatened to pursue legal recourse under the *Americans with Disabilities Act of 1990* if the employment dispute were not resolved. On April 10th, 2005, the Hosanna-Tabor congregation voted to terminate Perich’s employment contract, citing several reasons including long-term health concerns and disapproval of her repeated claims to pursue a legal remedy. After the *Equal Employment Opportunity Commission* (EEOC)

¹ Ira Lupu, David Masci & Robert Tuttle, *In Brief: Hosanna-Tabor v. EEOC - Church Unemployment Disputes and the “Ministerial Exception”*, The Pew Forum On Religion & Public Life 1 (2011).

filed a complaint on behalf of Perich, the District Court reviewed the case and sided against her. However, the Sixth Circuit Court of Appeals reversed the lower court's decision, and the Supreme Court decided to hear the case on March 28th, 2011.

III. NATURE OF THE CASE AND CENTRAL LEGAL ARGUMENT

The primary focus of this case revolves around "ministerial exception," which deals with fundamental First Amendment issues contained in the Free Exercise and Establishment clauses. The legal rationale behind the "ministerial exception" is that churches and other religious institutions should be allowed to freely employ their ministers without restriction from governmental authority. This legal doctrine is significant because Perich and the EEOC brought suit under a three-fold series of alleged violations that referenced the Americans with Disabilities Act, Title VI of the 1964 Civil Rights Act, and the Michigan's Persons with Disabilities Civil Rights Act. If upheld, the ministerial exception would nullify Perich's claims before the court and invalidate each of the three aforementioned violations.²

According to the decision by the United States Sixth Circuit Court of Appeals, the ministerial exception bars employment discrimination claims if the following qualifications are met: "(1) the employer must be a religious institution and (2) the employee must be a ministerial employee."³ According to the District Court, the Court of Appeals, and the Supreme Court, the first of these

2 *Id.* at 2.

3 *E.E.O.C. v. Hosanna-Tabor*, 597 F.3d 769, 778 (6th Cir. 2010), *rev'd*, 132 S.Ct. 694 (2012) [hereinafter *E.E.O.C.*].

two requirements was adequately met. According to the Sixth Circuit, "To qualify as a religious institution under the first prong, the employee need not be a traditional religious organization, such as a church, diocese, or synagogue, nor must it be an entity operated by a traditional religious organization."⁴ A prior case decided in 2004 by the Fourth Circuit Court of Appeals entitled *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.* established that the only requirement for a "religious organization" is that its "mission is marked by clear or obvious religious characteristics." Neither the Sixth Circuit nor the Supreme Court argued that Hosanna-Tabor was not a "religious institution" under this definition.

The primary area of contention involved the second requirement for ministerial exceptions, the provision that "the employee must be a ministerial employee." In the initial ruling on the case, the District Court concluded that Perich's title and duties as a "commissioned minister" fulfilled the second part of the ministerial exception requirement. In a unanimous decision, the Sixth Circuit Court of appeals disagreed and vacated the lower court's order to enter summary judgment on behalf of the defendant. The Supreme Court subsequently issued a Writ of Certiorari to hear the case after Hosanna-Tabor appealed the lower court's ruling.

IV. SUPREME COURT HOLDING

In its first ruling on the ministerial exception concerning an employment dispute, the Supreme Court decided in favor of Hosanna-Tabor and reversed the Sixth Circuit Court of Appeals

4 *Id.*

decision. Speaking on behalf of a unanimous court, Chief Justice John Roberts said, "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."⁵ He concludes, "The church must be free to choose those who will guide it on its way."⁶

In order to understand the contributing factors that led to the decision, it is important to first identify the primary arguments advanced by the Sixth Circuit which preceded the Supreme Court's ruling. According to the Sixth Circuit, Perich was not considered to be within the reach of the ministerial exception because her duties as a school employee were predominantly secular. Writing on behalf of the court, Justice Clay explained that Hosanna-Tabor traditionally hired two types of teachers: "lay teachers" and "called teachers." The "lay teachers" were hired by the school for a determined period of time and were instructed to perform specific duties if the school was not able to procure a sufficient number of "called teachers."⁷

Clay noted that although some substantial differences existed between the requirements of each position, there was no functional difference. Both "lay teachers" and "called teachers" performed essentially the same duties. As such, Clay argued that it

5 Hosanna-Tabor v. E.E.O.C., 132 S.Ct. 694, 710 (2012) [hereinafter Hosanna-Tabor].

6 *Id.*

7 E.E.O.C., *supra* note 3 at 772.

would be improper to consider Perich a “minister” since a similar designation could be ascribed to any employee of Hosanna-Tabor, either “lay” or “called.” Since at least one of the “lay teachers” was not even a confessing member of the Lutheran church, this would be a rather absurd and certainly inaccurate label.

Although Perich initiated prayer, taught religion class four days a week, and led a chapel service twice per year, Clay argues that her time spent on these activities was far less than the time Perich spent on her secular duties as a teacher of non-religious subjects. To clarify Perich’s religious duties, Clay adds the caveat that “teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not. In all, the record supports the district court’s finding that activities devoted to religion consumed approximately forty-five minutes of the seven hour school day.”⁸ Furthermore, the Sixth Circuit argues that Perich taught a majority of classes using secular textbooks, and she rarely injected religious commentary into her lectures.

The Supreme Court reversed and remanded this decision. On behalf of the Court, Chief Justice Roberts appealed to the robust principles of religious liberty upheld in the Constitution. Citing President James Madison, Roberts suggested that “the Religion Clauses ensured that the new Federal Government . . . would have no role in filling ecclesiastical offices.”⁹ Roberts clarified that he would not adopt a rigid formula concerning the requirements of

8 *Id.* at 779.

9 Hosanna-Tabor, *supra* note 5 at 696-97.

"being a minister" but that in this particular instance, because of the circumstances of her employment, Perich qualified as such.

V. ANALYSIS OF THE DECISION

The Court's decision in *Hosanna-Tabor* lacked a substantive methodological approach and a clear rational foundation. Perhaps most conspicuously, the Court failed to answer several key legislative claims that Perich presented. Consequently, although the Court provided plausible constitutional support on behalf of *Hosanna-Tabor*, far too many questions remain unanswered.

Perich's claim that the ministerial exception does not permit religious institutions from explicitly disobeying laws is supported by a credible body of legal precedent that Chief Justice Roberts largely avoided discussing. The claim is coherent in a general sense since the historic concept of justice entails the idea that "no man is above the law." Both societies and the legal systems which provide their support will erode if institutions (religious or otherwise) can claim permanent and complete exemption from established legal norms.

The Supreme Court upholds this view in a 1990 decision entitled *Employment Decision v. Smith*. In *Smith*, the Court determines that although the First Amendment protects religious institutions and individuals from laws that would specifically preclude them from engaging in their religious practices or beliefs, the "free exercise" clause does not exonerate religious groups from culpability who violate the laws that generally apply to all institutions and groups in a society.

In *Smith*, the Court ruled that two plaintiffs, Alfred Smith and Galen Black, were rightfully dismissed from their jobs as drug rehabilitation counselors for their use of the hallucinogen "peyote" as part of a religious practice in their church. Justice Antonin Scalia provided the Court's majority opinion:

Respondents in the present case, however, seek to carry the meaning of 'prohibiting the free exercise [of religion]' one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.¹⁰

Scalia concludes:

They assert, in other words, that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as 'prohibiting the free exercise [of religion]' by those citizens who believe support of organized government to be sinful than it is to regard the same tax as 'abridging the freedom . . . of the press' of those publishing companies that must pay the tax as a condition of staying in

10 *Emp't Div., Dept. of Human Res. of Or. v. Smith*, 494 U.S. 872, 878 (1990).

business.¹¹

Scalia's rationale in this decision supports Perich's claims since the Americans with Disabilities Act (ADA) was both constitutionally justified and "not specifically directed" at Hosanna-Tabor, the Lutheran Church, or religion in general. The legislation applied broadly to all institutions and should not have been so readily dismissed by the court.¹²

Perich also has a legitimate claim that her role as a teacher at *Hosanna-Tabor* involved disproportionately less religious teaching than secular teaching, thus disqualifying her as a true "minister" of the faith. According to the Court of Appeals opinion authored by Justice Clay, "Perich taught secular subjects using secular textbooks commonly used in public schools, and she can only recall two instances in her career when she introduced religion into secular subjects."¹³ If Perich's duties included only 45 minutes of religious teaching in a seven-hour school day and her testimony supports the claim that religion was integrated sparingly into her class instruction, then she should be excluded from being characterized as a "minister" under the law.

Although the *Smith* case provided general legal credence to her arguments, Perich also wielded the support of specific provisions outlined in the ADA. Evidence produced during trial showed that *Hosanna-Tabor* rationalized its termination of Perich on the

11 *Id.*

12 Oswald Eckstein, *A Delicate Balance: The Free Exercise Clause and the Supreme Court*, The Pew Forum On Religion & Public Life 1 (2007).

13 *Id.* at 3.

basis that she had “damaged beyond repair” her relationship with the institution by “threatening to take legal action.”¹⁴ The letter also made specific references to her perceived insubordination and disruptive behavior that stemmed almost entirely from her threat to pursue legal action.

In defense of Perich, the EEOC referenced a retaliation clause embedded in the ADA that precludes employers from targeting employees who appeal to the ADA for protection. According to the ADA, employers are prohibited from “discriminating against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge...under [the ADA].”¹⁵ If the religious organizations were exempt from the ADA, this clause would have little significance. However, according to a House Report released to clarify the applicability of this piece of legislation:

Religious organizations are not exempt from title 1 of the ADA or [these regulations]. A religious entity is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria.¹⁶

Because the ADA retains enforceability amongst religious institutions, Hosanna-Tabor’s actions are not legally justifiable.

14 *Id.* at 6.

15 Legislative Counsel, Mich., 1 www.tcs.org/sfelp/PersonsDisability220.pdf.

16 *Id.* at 2.

Not only does the federally enforceable ADA create questions about the Supreme Court's ruling, but so does a state-wide law entitled *Michigan's Persons with Disabilities Civil Rights Act* (PDCR). Whereas the ADA can be applied only to entities with 15 or more employees, the PDCR covers businesses with 15 or less and is more localized in its jurisdictional reach and descriptive purpose. According to section 102(1) of the bill:

The opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right.¹⁷

Because of the broad coverage of the ADA and the more specific qualifications of the PDCR, Hosanna-Tabor was effectively cornered by two pieces of comprehensive legislation.

In addition to these more substantive claims, Perich had legitimate qualms about the Hosanna-Tabor's termination procedure. For example, before Perich applied for a disability leave of absence during the 2004-2005 school year, she wanted to ensure that her position was secure pending clearance from her doctor and a healthy status update. The Court of Appeals confirmed, "The principal of Hosanna-Tabor, Stacy Hoeft, informed Perich that she would 'still have a job with Hosanna-Tabor when she regained her health.'"¹⁸

17 MICH. COMP. LAWS ANN. § 37.1102(1) (West 2012).

18 E.E.O.C., *supra* note 3 at 773.

During her recovery process, Perich provided Hoeft with meticulous health reports and maintained a constant stream of communication. In February 2005, Perich's doctor provided written notification that Perich's health was sufficient to resume unrestricted day-to-day work. However, Hoeft and the Hosanna-Tabor school board still expressed their growing disinterest in Perich and subsequently denied her request to resume her responsibilities as a teacher at the school.

Although there was no written, legally actionable contract agreed upon by Hoeft and Perich during their initial discussion, it is clear that Hoeft verbally committed to Perich's return. At a minimum, Hoeft's failure to fulfill her promise to Perich undermines the credibility of Hosanna-Tabor as an institution and creates doubt about the legitimacy of its status as a constitutionally protected religious institution.

VI. CONCLUSION

As the first landmark Supreme Court case involving the ministerial exception, *Hosanna-Tabor v. EEOC* is immensely significant. Although First Amendment freedoms are essential--including the freedom of religion as supported by the Establishment and Free Exercise clauses--there must be a reasonable limit on the latitude granted by the federal government. If all restrictions are lifted from religious institutions, religious employees lose guaranteed protection of employment abuse. *Hosanna-Tabor* provides

a compelling case study of the cancerous nature of interpreting constitutional rights.

To end his opinion, Chief Justice Roberts explains that the decision of the Court has no bearing on other claims by non-ministerial employees who allege employment discrimination. According to Roberts, "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."¹⁹

Indeed, the ruling in *Hosanna-Tabor* is likely a foreshadowing of what is certain to be a continued legal debate surrounding the nexus of religious and employment discrimination claims.

19 *Hosanna-Tabor*, *supra* note 5.