Sword or Shield? Religious Hospitals, Secular Practitioners, and Expansion of the Ministerial Exception

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By: Joshua Wolford, Production Editor Vol. 110

At the intersection of two entrenched principles—freedom from workplace discrimination[1] and unfettered religious practice[2]—sits a doctrine called the ministerial exception.[3] The doctrine gives deference to religious institutions' internal employment practices regarding its "ministers," providing immunity from employment discrimination claims. First discussed in the aftermath of the Civil Rights Act of 1964,[4] the doctrine permeated lower courts for decades before the Supreme Court finally granted it ultimate legitimacy in 2012.[5]

Two distinct components comprise the doctrine. To avail itself of the ministerial shield, (1) the employer must be sufficiently religious in nature[6] and (2) the employee at issue must fall into the category of "ministers."[7] While the doctrine is not a license for any employer, claiming a tangential brush with religion, to fire anyone it pleases with impunity, it takes little imagination to envision how the lines are often blurred.

Just how wide is the "minister" umbrella? What types of employees can a religious employer fire[8] for an otherwise illegal reason[9] and still avoid a torrent of legal action by invoking the ministerial exception? Though the Circuits have fashioned their own criteria,[10] the overarching consideration "hinges on whether the court views the employee as important or unimportant to the [employer's] spiritual mission...."[11] When the Court gave the ministerial exception its blessing in *Hosanna-Tabor*, it declined to enumerate a clear test.[12] Now, eight years later, the Court has again refused to provide a clear test, but has expanded the doctrine nonetheless.

In July's *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court held that two elementary teachers at parish schools were "ministers" for the purposes of the exception, barring their discrimination claims.[13] The 9th Circuit had refused to apply the ministerial exception, holding the teachers played only small roles in the religious mission of the school, as opposed to leadership roles "mostly teaching religion from a book."[14] The Court, led by Justice Alito, reversed. Alito admonished the 9th Circuit (and the dissenters) for advocating a "rigid test,"[15] noting the Court's ruling in *Hosanna-Tabor* "called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception."[16]

The Court did, however, make it clear that an employee does not have to identify as a "minister" by name or title, be ordained, nor practice the religion at issue—and teachers at religious institutions plainly fall into the category of employees under the doctrine.[17] "What matters, at bottom, is what an employee does . . . [The exception] should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[18] Importantly, in determining the teachers fell under the exception, the Court emphasized that they "performed vital religious duties."[19]

While the Court suggests employee duties are paramount to its analysis, its focus appears to point elsewhere. The Court structures its decision on the foundation of the religious institution's own determinations—mainly how it views its employees' roles within its own religious framework. "While he purports to focus on employees, Justice Alito's test seems to distill to three questions: does the organization have a religious mission, does it perceive the employee to advance that mission, and do formal documents like employment agreements indicate a religious role?"[20]

This ruling's broad language, focus on the religious nature of the institution, deference to the employers' determinations regarding employees' roles, and emphasis on case-by-case determinations in lieu of a bright-line test, could swallow up hundreds of thousands of traditionally secular employees in its wake. Justice Sotomayor, dissenting in *Morrissey-Berru*, warned of as much.[21]

The most significant block of employees potentially affected are medical practitioners—doctors, nurses, technicians, and other clinical or laboratory staff—at religious hospitals.[22] There is little doubt that a religious hospital would easily meet the religious institution requirement,[23] and the argument for classifying secular medical practitioners as "ministers" would foreseeably amount to claiming they "perform vital religious duties" and are "important to the hospital's spiritual mission."[24] Perhaps a doctor, saving lives under the rules and guidelines of a Catholic or Jewish hospital, is quite literally doing

the Lord's work. Tangible proof of that spiritual connection is not hard to find. Medical practitioners at religious hospitals are more often than not required to agree to religious mission statements (i.e., Ethical and Religious Directives [ERDs] in Catholic-run institutions) as a requirement for employment.[25] That agreement could bolster any argument alleging those doctors, nurses, and technicians are a part of the hospital's "spiritual mission."

Over the next few years, we will see whether the ministerial exception reaches out and grabs employees beyond teachers at parochial schools, or if it remains a relatively narrow doctrine. In other words, whether fears of emboldened religious hospitals discriminating at will prove "prescient, alarmist, or somewhere in-between."[26]

Here is the obvious question: the next time a physician or a nurse alleges age, disability, sex, or orientation discrimination against a religious hospital and the hospital claims the ministerial exception—how will the lower courts interpret the expanded doctrine? But looking outside the realm of litigation, another salient question emerges: how will hiring practices at religious institutions change in the shadow of a broader doctrine? It is no secret that religious advocacy organizations are already cognizant of the ministerial exception and are not shy about advising religiously affiliated institutions as to how to weaponize the doctrine.[27] For decades, the exception has served as a shield. Now, at the very least, the Court is signaling to religious hospitals they might try wielding it as a sword.

[1] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions . . . . [I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."); Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731, 1754 (2020) ("Title VII's effects have unfolded with far-reaching consequences . . . .").

[2] *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring) ("[T]he First Amendment's Free Exercise Clause . . . guarantees the free *exercise* of religion, not just the right to inward belief . . . [T]his Court has long explained that government may not devise mechanisms . . . designed to persecute or oppress a religion or its practices.").

[3] Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. Rev. 1, 3 (2011) ("In recent years, these two principles have collided. The result has been the 'ministerial exception.'").

[4] *See generally* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972).

[5] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 173 (2012) ("Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so . . . interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments.").

[6] This first prong is easier to analyze with uniformity, and it is quite broad. Though the Supreme Court has not specifically tackled this prong, courts across the country have held church-affiliated universities, church-operated schools, church-affiliated hospitals, and even non-profit religious corporations as meeting the spirit of a religious institution. *See* Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004) (collecting cases). A common test at the Circuit level involves asking whether the employer's "mission is marked by clear or obvious religious characteristics." *Id.*

[7] This second prong lends itself to much more ambiguity and is the subject of the Supreme Court's recent decision, discussed *infra* notes 13–20 and accompanying text.

[8] Firing is not the only issue, of course. The laws prohibiting the termination of members of a protected class also prohibit employers from using plainly discriminatory hiring practices. 42 U.S.C. § 2000e-2(a)(1).

[9] Most notably age, disability, genetic Information, national origin, pregnancy, race/color, religion, retaliation, sex, and for reporting workplace harassment. U.S. Equal Employment Opportunity Commission, *Discrimination by Type* (last visited Sept. 30, 2020), https://www.eeoc.gov/discrimination-type. And most recently sexual/gender identity, which the Court held as baked into sex discrimination. *See* Bostock, 140 S. Ct. at 1731.

[10] Lauren N. Woleslagle, *The United States Supreme Court Sanctifies the Ministerial Exception in Hosanna-Tabor v. EEOC Without Addressing Who Is A Minister: A Blessing for Religious Freedom or Is the Line Between Church and State Still Blurred?*, 50 Duq. L. Rev. 895, 905 (2012).

[11] *Id.*

[12] *Hosanna-Tabor*, 132 S. Ct. at 196 ("[T]here [will] be time enough to address the applicability of the exception to other circumstances if and when they arise.").

[13] In these consolidated cases, two fifth-grade teachers — one claiming age discrimination and the other claiming discrimination based on her pregnancy status — had sued Los Angeles-area Catholic schools. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2056–60 (2020).

[14] *See* Amy Howe, *Opinion Analysis: Court Rules That Catholic Elementary School Teachers Are "Ministers," Cannot Sue for Employment Discrimination*, ScotusBlog (Jul. 8, 2020), https://www.scotusblog.com/2020/07/opinion-analysis-court-rules-that-catholic-elementary-school-teachers-are-ministers-cannot-sue-for-employment-discrimination/.

[15] The "rigid" test looked for three employee attributes — a ministerial title, some formal religious education, or self-description as a minister— and "then, in order to check the conclusion suggested by those factors, [asked] whether the employee performed a religious function." *Morrissey-Berru*, 140 S. Ct. at 2068.

[16] *Id.* at 2067.

[17] *Id.* at 2063–65.

[18] *Id.* at 2064.

[19] *Id.* at 2066.

[20] See Elizabeth Sepper, *Ever-Expanding Immunity for Religious Institutions Augurs Trouble for Worker Protections*, Am. Const. Soc'y: Expert F. (Jul. 14, 2020), https://www.acslaw.org/expertforum/ever-expanding-immunity-for-religious-institutions-augurs-trouble-for-worker-protections/. Furthermore, "[i]t is important, not how workers think of themselves, but that that their schools saw them as playing a vital part in carrying out the mission of the church." *Id.* (internal quotations omitted).

[21] Sotomayor expressed concern for the "rights of countless coaches, camp counselors, *nurses*, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions," noting "[a]ll these employees could be subject to discrimination for reasons completely irrelevant to their employers' religious tenets." *Morrissey-Berru*, 140 S. Ct. at 2082 (Sotomayor, J., dissenting) (emphasis added).

[22] "Assuming staffing rates are stable between religious non-profit hospitals and others . . . over 670,000 workers [are] employed by religious non-profit hospitals to provide health care to patients, and thus to further the

religious based mission of the organization." Brief for Center for Inquiry et al. as Amici Curiae Supporting Respondents, Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (Nos. 19-267 & 19-348), at 16.

[23] See Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 362 (8th Cir. 1991); Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 310 (4th Cir. 2004); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223 (6th Cir. 2007).

[24] Brief for Center for Inquiry et al., *supra* note 22, at 16-17 ("All of these health care and social service programs can claim their employees are acting to spread their religious mission in the same way as would a teacher at a religious school. The expansive ecclesiastical immunity sought by petitioners would then apply to all such workers. Millions of American employees would thus be removed from the coverage of civil rights employment laws."); *see also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2375 (2020) (noting a Catholic nursing home is "called by their faith to care for their elderly residents" and "endeavor[s] to treat all residents as if they were Jesus [Christ] himself."); Sepper, *supra* note 20 ("While the Supreme Court's decision was specific to religiously affiliated elementary and secondary schools, its reasoning easily transfers to other religious organizations.").

[25] See Judy Stone, *Healthcare Denied At 550 Hospitals Because Of Catholic Doctrine*, Forbes (May 7, 2016), https://www.forbes.com/sites/judystone/2016/05/07/health-care-denied-at-550-hospitals-because-of-catholic-doctrine/#3026f0345ad9.

[26] M. Scott LeBlanc, *U.S. Supreme Court Widens Exception from Discrimination Laws for Religious Institutions*, Nat'l L. R. (Jul. 16, 2020), https://www.natlawreview.com/article/us-supreme-court-widens-exception-discrimination-laws-religious-institutions.

[27] See, e.g., Alliance Defending Freedom, *Protecting Your Ministry from Sexual Orientation & Gender Identity Lawsuits: A Legal Guide for Southern Baptist and Evangelical Churches, Schools and Ministries* 12 (2015), https://www.slideshare.net/bobfox47/protecting-your-ministryadferlc ("When feasible, a religious organization should assign its employees duties that involve ministerial, teaching, or other spiritual qualifications – duties that directly further the religious mission . . . . Employees with some duties usually performed by [or associated with] clergy are more likely to be viewed as 'minister-like' by the courts. Consequently, courts are more likely to apply the ministerial exception to employment law claims based on alleged discrimination . . . . Employee job descriptions should also include the religious grounds for limiting employment opportunities, especially if the limitations involve any categories protected by law [such as religion or sex].").

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