

IT'S MY CHURCH AND I CAN RETALIATE IF I WANT TO: *HOSANNA-TABOR* AND THE FUTURE OF THE MINISTERIAL EXCEPTION

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I. INTRODUCTION

Imagine a world in which a parochial school teacher can be fired for reporting the sexual abuse of a child to the government. Now imagine that teacher cannot seek legal recourse because a so-called “ministerial exception” immunizes religious employers against lawsuits brought by their employees. Depending on how the Supreme Court rules in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,¹ that hypothetical world could become ours.

In *Hosanna-Tabor*, the Supreme Court will consider the applicability of antidiscrimination laws to religious organizations. More precisely, the Court will consider whether the ministerial exception bars parochial school teachers from filing antidiscrimination suits against their religious employers, even when their teaching duties are not functionally different from those of lay employees. *Hosanna-Tabor* thus implicates a complicated and conflicting set of constitutional interests. On the one hand, teachers have a constitutional right to be free from invidious discrimination. On the other, parochial schools have a right to the free exercise of their religion. Furthermore, Congress and the courts must work together to balance these interests while avoiding excessive government entanglement with religion.

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1. *Equal Emp't Opportunity Comm'n v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (U.S. Mar. 28, 2011) (No. 10-553).

This commentary will examine *Hosanna-Tabor* in all its complexity. After providing the factual and legal background, addressing the appellate court’s decision, and examining the arguments before the Supreme Court, the commentary will return to the previously posed hypothetical. This commentary will then conclude that, fortunately for parochial school teachers, such a hypothetical world is, at least for now, probably only hypothetical.

II. FACTS

Cheryl Perich, the respondent in the case at hand, began working for the Hosanna-Tabor Evangelical Lutheran Church and School (Hosanna-Tabor) in 1999.² As a contract teacher,³ she taught a full range of academic subjects, including math, science, gym, language arts, social studies, art, and music.⁴ She also taught a religion class four days a week, led her students in prayer three times a day, and led chapel services approximately twice a year on a rotating basis with the other teachers.⁵ In total, Perich spent about forty-five minutes per day on religious activities.⁶

In March of 2000, the Hosanna-Tabor church congregation approved Perich to be a “called” teacher.⁷ As a called teacher, she enjoyed open-ended employment, for-cause termination rights, and the title of “commissioned minister.”⁸ Though being called did require approval from the congregation and some additional religious education, her actual duties remained the same.⁹

Four years later, Perich was hospitalized after becoming ill during a summer church event.¹⁰ Hosanna-Tabor recommended that she take disability leave for the upcoming academic year, reassuring her that

2. *Id.* at 772.

3. Contract teachers at Hosanna-Tabor are lay teachers hired by the school board for one-year renewable terms. *Id.* Notably, Hosanna-Tabor did not require that its teachers be Lutheran. *Id.* at 773. In fact, non-Lutheran teachers had responsibilities identical to Lutheran teachers, and Hosanna-Tabor has employed at least one non-Lutheran teacher in the past. *Id.*

4. *See id.* at 772 (stating that Perich’s duties as a contract teacher and as a called teacher were identical).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* In contrast, those with the title “ordained minister” worked in the pastoral office and had the power to “preach the Word and administer the Sacraments.” Brief for Respondent Cheryl Perich at 4–5, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp’t Opportunity Comm’n*, No. 10-553 (U.S. Aug. 2, 2011), 2011 WL 3380507, at *4–5.

10. *Equal Emp’t Opportunity Comm’n*, 597 F.3d at 773.

her job would still be there when she returned to good health.¹¹ After nearly five months on disability leave, however, the school changed its tune. When Perich informed the school of her intention to return to work in February, the school principal expressed doubt that Perich would be healthy enough to return by then, despite assurances to the contrary from Perich's doctor.¹² Contemporaneously, the principal informed Perich that the school board intended to amend the school handbook, requesting that employees on more than six months disability leave resign their callings.¹³ The principal also reported to the congregation that Perich likely would not be "physically capable" of returning to work that year.¹⁴ In response, the board requested Perich's "peaceful resignation" in exchange for covering some of her medical expenses.¹⁵ Perich declined.¹⁶

Controversy erupted on February 22, 2005, the day Perich's doctor stated she could safely return to work.¹⁷ Perich arrived at the school ready to resume teaching, but the school had no position available for her.¹⁸ Perich feared that if she did not return to work the first day she was eligible, the school would construe a provision in the employee handbook to claim that she voluntarily terminated her employment.¹⁹ Accordingly, she refused to leave until the administration provided written acknowledgement of her presence that day.²⁰ Instead, the administration wrote her a letter stating that she provided improper notice of her return and asking her to remain on disability leave until it could develop a plan to accommodate her.²¹ When the school contacted Perich later that evening to suggest that she probably would be fired for her "disruptive behavior earlier that day," Perich stated that she would resort to legal means to protect herself if they could not come to an agreement.²²

On March 19, the school sent Perich a letter stating that due to her "insubordination and disruptive behavior," the board would request

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 774.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

that the congregation rescind her calling at its next voter's meeting.²³ The letter also asserted that Perich's "threat[] to take legal action" had "damaged, beyond repair" her relationship with Hosanna-Tabor.²⁴ On March 21, Perich's counsel informed Hosanna-Tabor that its actions constituted illegal discrimination.²⁵ Shortly thereafter, Hosanna-Tabor terminated Perich's employment.²⁶ In response, Perich filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).²⁷

On September 28, the EEOC filed a complaint in district court alleging that Hosanna-Tabor violated the Americans with Disabilities Act (ADA). The alleged violation occurred when Hosanna-Tabor terminated Perich's employment in retaliation for her threat to take protective legal action against unlawful discrimination.²⁸ Hosanna-Tabor responded that it terminated Perich's employment because her threat to pursue a legal remedy outside of the church's internal dispute-resolution process contradicted church doctrine.²⁹ Despite this claim, Hosanna-Tabor had not mentioned church doctrine or the church's dispute-resolution procedures in any of the letters written during the controversy.³⁰

Hosanna-Tabor moved for summary judgment on the theory that the district court had no jurisdiction to hear an employment-discrimination claim, the resolution of which would require the court to rule on matters of church doctrine that are protected by the First Amendment.³¹ The district court agreed and barred Perich's claim under the ministerial exception, primarily because Perich's official title at the time was "commissioned minister."³² Perich appealed.³³

23. *Id.*

24. *Id.*

25. *Id.* at 775.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See id.* at 781 ("Hosanna-Tabor has attempted to reframe the underlying dispute . . . to the question of whether Perich violated church doctrine by not engaging in internal dispute resolution.").

30. *Id.* at 782.

31. *See id.* at 775, 781 ("[C]ontrary to Hosanna-Tabor's assertions, Perich's claim would not require the court to analyze any church doctrine.").

32. *See id.* ("[T]he district court relied largely on the fact that Hosanna-Tabor gave Perich the title of commissioned minister and held her out to the world as a minister by bestowing this title upon her.").

33. *Id.* at 775.

III. LEGAL BACKGROUND

A. *The Americans with Disabilities Act*

In general, the ADA prohibits employers from discriminating against their employees on the basis of disability.³⁴ Its anti-retaliation provision forbids employers from retaliating against an employee because that employee opposed or brought a claim against unlawful practices.³⁵

The ADA provides two exceptions to its applicability to religious organizations. It explicitly allows religious organizations to give preference in employment decisions to members of a particular religion, and to require all applicants or employees to conform to the religious tenets of the organization.³⁶ The ADA's anti-retaliation provision, however, contains no exemptions for religiously motivated retaliation.³⁷ Accordingly, it is unclear whether an employer can lawfully retaliate against an employee who reports a potential ADA violation when the employer provides a religious reason for termination.

B. *Ministerial Exception*

At common law, courts also have provided protections for religious organizations. The ministerial exception exempts religious organizations from the application of antidiscrimination laws when that application might violate the principles of the First Amendment, such as the Establishment Clause or the Free Exercise Clause.³⁸ The exception ensures that antidiscrimination laws do not force religious organizations to make employment decisions that might contradict the tenets of their faith.³⁹ For example, the ministerial exception would prevent antidiscrimination laws from forcing the Catholic Church to hire female priests.⁴⁰

34. See 42 U.S.C.A. § 12112(a) (West 2011) (“No covered entity shall discriminate against a qualified individual on the basis of disability . . .”).

35. § 12203(a).

36. § 12113(d).

37. See § 12203(a) (failing to mention religious motive as an exception).

38. *Petruska v. Gannon Univ.*, 462 F.3d 294, 303–04 (3d Cir. 2006).

39. See *id.* at 304–07 (“The ministerial exception, as we conceive of it, operates to bar any claim, the resolution of which would limit a religious institution’s right to select who will perform particular spiritual functions.”).

40. *Cf. id.* at 307–08 (applying the ministerial exception to bar a female university chaplain’s gender discrimination claim).

This exception is actually a specific application of the constitutional avoidance doctrine,⁴¹ which provides that courts should interpret statutes so that their application will not risk violating constitutional principles.⁴² Thus, the ministerial exception is an interpretive tool that courts use to limit the construction of statutes like the ADA in order to avoid potential conflict with the First Amendment.⁴³ In practice, that means courts will invoke the ministerial exception to bar lawsuits that *risk* violating First Amendment principles, even if after a more careful examination, the lawsuit would not *actually* violate the First Amendment.⁴⁴

Every circuit to have considered the issue has decided that, at the very least, applying antidiscrimination laws to the minister-church relationship would violate or risk violating the First Amendment.⁴⁵ But courts also agree that the ministerial exception should not apply to the *lay* employees of religious organizations because regulating those employees does not raise the same entanglement or free exercise concerns.⁴⁶ The question is: where do courts draw the line between ministers and lay employees?⁴⁷

41. See *Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) (“[T]he ministers exception is a rule of interpretation, not a constitutional rule . . .”).

42. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”).

43. See *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972) (applying the ministerial exception to avoid the risk of constitutional conflict between the First Amendment and an antidiscrimination statute).

44. See, e.g., *Nat’l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (“Accordingly, in the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”).

45. *Petruska*, 462 F.3d at 303–04 (“Every one of our sister circuits to consider the issue has concluded that application of Title VII to a minister-church relationship would violate—or would risk violating the First Amendment and, accordingly, has recognized some version of the ministerial exception.” (citing *McClure*, 460 F.2d at 560–61; *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1165–67 (4th Cir. 1985); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 327 (3d Cir. 1993))).

46. See, e.g., *Soriano v. Xavier Univ. Corp.*, 687 F. Supp. 1188, 1189 (S.D. Ohio 1988) (holding that an age-discrimination suit did not raise free exercise or establishment clause issues); *Grotke v. Canisius High Sch.*, No. 90-CV-1057S, 1992 WL 535400, at *1, *3 (W.D.N.Y. Apr. 11, 1992) (allowing suit by a lay teacher at a parochial school).

47. See *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006) (referencing a case that the court believes falls “just across the [ministerial versus lay] line . . .”).

In answering this question, most circuits have adopted a functionalist approach that examines the duties of the employee.⁴⁸ For example, one test asks whether the “primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.”⁴⁹ Stated differently, the test asks whether the employee’s position is “important to the spiritual and pastoral mission of the church.”⁵⁰ If it is, then the ministerial exception will apply. Even utilizing similar functionalist approaches, circuit courts have reached different results. For example, the Seventh Circuit held that the ministerial exception applied to a choir director but not to a piano tuner.⁵¹ In contrast, the Fifth Circuit held that the faculty and staff of a religious college were not ministers because they were not “intermediaries between a church and its congregation,” did not “attend to the religious needs of the faithful,” and did not “instruct students in the whole of religious doctrine.”⁵² According to that circuit, faculty and staff are not ministers under the ministerial exception simply by being “exemplars of practicing Christians.”⁵³

Even if a court finds that an employee’s duties are not primarily religious and do not bar the lawsuit outright, it must still take care to avoid judicial inquiry that could violate the First Amendment. The most common pitfall occurs when a religious employer offers a religious reason for the employment decision.⁵⁴ The Supreme Court

48. See *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1779 (2008) (“Nearly all circuits have adopted the Fourth Circuit’s articulation of the primary duties test.”).

49. *Rayburn*, 772 F.2d at 1169 (quoting Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1545 (1979)).

50. *Id.* at 1168–69 (citing *Equal Emp’t Opportunity Comm’n v. Sw. Baptist Seminary*, 651 F.2d 277, 283 (5th Cir. 1981)).

51. See *Tomic*, 442 F.3d at 1040–41 (affirming the dismissal of an age-discrimination suit brought by a choir director).

52. *Equal Emp’t Opportunity Comm’n v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980).

53. *Id.*; see also *Equal Emp’t Opportunity Comm’n v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986) (holding that teachers at a religious school were not ministers, even though the school considered its teachers part of its ministry); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396 (4th Cir. 1990) (holding that teachers and nuns teaching at a church-operated school were not ministers under the ministerial exception because they “perform[ed] no sacerdotal functions” and did not “serve as church governors,” even though they did teach biblical subject matter as part of the academic curriculum).

54. See, e.g., *Tomic*, 442 F.3d at 1040–41 (“*Tomic* would argue that the church’s criticism of his musical choices was a pretext for firing him, that the real reason was his age. The church would rebut with evidence of what the liturgically proper music is for an Easter Mass and *Tomic* might in turn dispute the church’s claim. The court would be asked to resolve a theological

has held that it is improper for courts to question the “truthfulness or validity of religious beliefs.”⁵⁵ In *McDonnell Douglas Corp. v. Green*,⁵⁶ however, the Supreme Court articulated a burden-shifting scheme that allows courts to ferret out the real reason for a termination without examining the wisdom of the proffered reason itself.⁵⁷ At least two circuits, and arguably three, have held this test can be applied to a religious organization’s employment decision without violating the First Amendment.⁵⁸

IV. APPELLATE COURT HOLDING

The Sixth Circuit vacated the lower court’s decision to bar the suit under the ministerial exception and remanded with instructions to rule on the merits of the retaliation claim.⁵⁹ The court accepted the trial judge’s factual findings, but disagreed with the judge’s legal conclusion that Perich was a minister for the purposes of the ministerial exception.⁶⁰ The Sixth Circuit concluded that because Perich’s duties were identical to her duties as a lay teacher, and lay teachers at Hosanna-Tabor were not even required to be Lutheran, she was not a minister for the purposes of the ministerial exception.⁶¹ Further evidence convinced the concurring judges that the ministerial

dispute.”).

55. *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170 (2d Cir. 1993) (citing *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 886–87 (1990)).

56. 411 U.S. 792 (1973).

57. *Id.* at 802; *DeMarco*, 4 F.3d at 170 (“Under the rule of *McDonnell Douglas*, when an employee establishes a prima facie discrimination claim, the burden shifts to the employer to proffer a legitimate, non-discriminatory reason for the challenged employment action. If the employer contends that its action was motivated by a reason other than age, the burden of production then shifts back to the employee to prove that the articulated purpose is mere pretext for discrimination.” (internal citations omitted)).

58. *See DeMarco*, 4 F.3d at 170–72 (holding that applying the *McDonnell Douglas* test to an employment-discrimination case between a parochial school teacher and the parochial school would not raise serious First Amendment concerns); *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 329 (3d Cir. 1993) (holding that courts can “determine whether the religious reason stated by [the school] actually motivated the dismissal” without violating the First Amendment); *Tomic*, 442 F.3d at 1041 (barring judicial inquiry into a church’s employment decision after distinguishing the facts in that case from those in *DeMarco*). *But see Nat’l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979) (denying the National Labor Relations Board jurisdiction over parochial school teachers, no matter how religious or secular their duties, because of “the critical and unique role of the teacher in fulfilling the [religious] mission of a church-operated school”).

59. *Equal Emp’t Opportunity Comm’n v. Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769, 782 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (U.S. Mar. 28, 2011).

60. *Id.* at 780–81.

61. *Id.*

exception should not apply to this case: “[T]he school itself did not envision its teachers as religious leaders, or as occupying ‘ministerial’ roles.”⁶²

After determining that the ministerial exception did not apply, the court remanded the case to the district court to answer three main questions. First, was Perich disabled within the meaning of the ADA?⁶³ Second, did Perich oppose a practice that was unlawful under the ADA?⁶⁴ And third, did Hosanna-Tabor violate the ADA in its treatment of Perich?⁶⁵ The court stated that the First Amendment would not prevent the trial court from inquiring into “whether a doctrinal basis actually motivated Hosanna-Tabor’s actions” because “Perich’s claim would not require the court to analyze any church doctrine.”⁶⁶

V. ARGUMENTS

A. *Petitioner Hosanna-Tabor’s Arguments*

Hosanna-Tabor argues that the ministerial exception bars Perich’s claim for a variety of reasons. First, Hosanna-Tabor frames the ministerial exception more expansively than the Sixth Circuit by maintaining that the exception applies to discrimination suits brought by employees who “perform important religious functions,” rather than only those employees whose primary duties are religious in nature.⁶⁷ The church views the Sixth Circuit’s application of the primary duties test and corresponding analysis as “mechanistic,” unable to account for “the concept of an ecclesiastical office,” and “not serv[ing] the purpose[] of the ministerial exception.”⁶⁸

Next, Hosanna-Tabor argues that Perich performed the kind of important religious functions that merit the application of the ministerial exception.⁶⁹ Perich taught religion classes, led worship and

62. *Id.*

63. *Id.* at 781.

64. *Id.*

65. *Id.* at 782.

66. *Id.* at 781–82 (citing *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 170–71 (2d Cir. 1993) (utilizing the *McDonnell Douglas* burden-shifting scheme to inquire into the actual reason for a religious employee’s termination without questioning the wisdom or reasonableness of the proffered reason for that termination)).

67. Brief for the Petitioner at 2, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp’t Opportunity Comm’n*, No. 10-553 (U.S. Jun. 13, 2011), 2011 WL 2414707, at *2.

68. *Id.*

69. *Id.*

prayer, held ecclesiastical office as a minister, and was “the primary instrument for communicating the faith to her students.”⁷⁰

Finally, Hosanna-Tabor claims that a failure to apply the ministerial exception to this case would result in excessive government entanglement with religion for three reasons.⁷¹ First, Hosanna-Tabor rearticulates its proffered reason for firing her, stating that she “violated church teaching” by filing a civil action instead of making use of the church’s internal dispute-resolution system.⁷² Second, Hosanna-Tabor emphasizes that it was the church congregation who found her “unfit for ministry” and chose to terminate her.⁷³ Finally, Hosanna-Tabor reasons that allowing the claim to proceed on the merits would necessarily involve courts in religious questions better left for the church to decide.⁷⁴ The church fears that permitting the claim to proceed could result in an order to employ a teacher whose disruptive behavior makes her unfit to teach its students about Lutheran doctrine.⁷⁵ Such state action, it argues, is particularly offensive to the First Amendment.⁷⁶

B. Respondent Perich’s Arguments

In response, Perich argues that neither the ministerial exception nor the First Amendment should bar her claim. She raises three main arguments. First, she emphasizes the government’s compelling interest in ending invidious discrimination in employment.⁷⁷ This not only frames the debate as a battle of competing interests rather than absolute rights, but reminds the Court that a decision barring Perich’s claim will have the effect of permitting the kind of invidious discrimination that Congress has sought to eliminate.

Second, Perich argues that the First Amendment does not prevent the application of generally applicable and religiously neutral antidiscrimination laws to the facts of this case.⁷⁸ Perich examines, one by one, the Establishment Clause,⁷⁹ the Free Exercise Clause,⁸⁰ and the

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 2–3.

77. Brief for Respondent Cheryl Perich, *supra* note 9, at 17.

78. *Id.* at 20–22.

79. *Id.* at 49–57.

right of expressive association.⁸¹ She argues that not one of these important First Amendment principles is at risk of abrogation in discrimination suits when the employee in question has functions equivalent to a lay person.⁸² If the First Amendment is not at risk of violation, then the ministerial exception need not and should not apply.⁸³

Third, Perich directly attacks Hosanna-Tabor's definition of the ministerial exception.⁸⁴ According to Perich, if the ministerial exception applied to bar claims from any employee who, according to the church, served "important religious functions," then many teachers, administrative staff, and social workers would be "without the protection from discrimination and retaliation that Congress intended to afford them."⁸⁵ Furthermore, antidiscrimination laws are not the only laws that would be "unearthed," according to Perich.⁸⁶ Anti-retaliation provisions in a variety of neutral and generally applicable laws, varying from minimum wage to health and safety regulations, would be rendered powerless over religious organizations.⁸⁷ As Perich states, "a religious organization . . . has no constitutional entitlement to become a law unto itself."⁸⁸

C. Federal Respondent's Arguments in Support of Perich

Speaking for the EEOC, the United States wrote a brief in support of Perich, making four main arguments. First, the United States claims that Congress fully intended the anti-retaliation provision of the ADA to apply to all employers, including religious employers.⁸⁹ Second, it states that the only real question is whether the anti-retaliation provision would be unconstitutional as applied to the facts of this case.⁹⁰ According to the United States, because the First Amendment would not bar a claim on these facts, the anti-

80. *Id.* at 42–48.

81. *Id.* at 28–41.

82. *Id.* at 20–22.

83. *Id.*

84. *Id.* at 19–20.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 20.

89. Brief for the Federal Respondent at 10–11, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp't Opportunity Comm'n*, No. 10-533 (U.S. Aug. 2, 2011), 2011 WL 3319555, at *10.

90. *Id.* at 11.

retaliation provision applies.⁹¹ Third, the United States argues that excepting religious organizations from the anti-retaliation provision would severely undermine many religiously neutral, generally applicable laws and is simply not demanded by any part of the Constitution.⁹² It concludes that constitutional questions arising from litigation between religious employers and their employees is “best resolved on a case-by-case basis” rather than through the “adoption of the petitioner’s overly broad prophylactic rule” that is “contrary to this Court’s normal method of as-applied constitutional decision-making.”⁹³

VI. ORAL ARGUMENT

At oral argument, the Court appeared to have differences of opinion over two main questions.⁹⁴ First, what is an appropriate way to determine who is and who is not a minister for the purposes of the ministerial exception? Second, could a court inquire into the real reasons for termination without risking violation of the First Amendment?

With regard to the first issue, Justices Scalia⁹⁵ and Alito⁹⁶ seemed ready to give great deference to the church’s own determination of who is and who is not a minister. Chief Justice Roberts, however, appeared to question that idea, wondering how that test would work with a church that claimed all of its members were ministers of the faith.⁹⁷ Other Justices, such as Justices Ginsburg and Sotomayor, pressed Hosanna-Tabor’s counsel for a definition of minister and hinted that the correct test probably is one that looks to the employee’s duties rather than the employee’s official title.⁹⁸

With regard to the second issue, Justice Alito seemed ready to conclude that it was impossible to perform any such inquiry without

91. *Id.*

92. *Id.* at 14.

93. *Id.*

94. Transcript of Oral Argument, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp’t Opportunity Comm’n*, No. 10-553 (U.S. Oct. 5, 2011).

95. *See id.* at 10 (Scalia, J.) (“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.”).

96. *See id.* at 15 (Alito, J.) (“But I thought with a lot of deference to the church’s understanding of whether someone is a minister?”).

97. *See id.* at 13 (Roberts, C.J.) (“Every one of our adherents stands as a witness to our beliefs. And that—you know, not every church is hierarchical in 20 terms of different offices.”).

98. *See id.* at 26 (Ginsburg, J.) (“So, the commission is irrelevant. It’s—it’s her job duties that count.”).

courts questioning church doctrine.⁹⁹ Justice Breyer, alternatively, suggested a more limited, statutory-based holding whereby the Court would order the district court to determine whether the ADA's religious conformity exception applies to this case.¹⁰⁰ Justice Ginsburg seemed to agree and questioned why the doctrinal rule against filing civil lawsuits for discrimination was not in the employee handbook.¹⁰¹ Even Justice Scalia seemed initially confused when counsel for Hosanna-Tabor suggested a court would be permitted to consider whether the title of minister was a "sham," but not whether the proffered reason for termination was mere pretext.¹⁰² Considering that Justices Kennedy,¹⁰³ Ginsburg,¹⁰⁴ and Sotomayor¹⁰⁵ appeared dismissive of the idea that Perich be prevented her day in court over a question of jurisdiction, Justice Breyer's suggestion may predict the Court's disposition.

VII. ANALYSIS AND LIKELY DISPOSITION

A. *Analysis*

The issue before the Court is whether the ministerial exception applies to bar Perich's antidiscrimination suit against Hosanna-Tabor. Because the ministerial exception is an application of the constitutional avoidance doctrine, the first question is whether the application of the ADA's anti-retaliation provision to the facts of this case raises a serious risk of violating the First Amendment. If there is no serious risk of violating the First Amendment, then there is no need to apply the constitutional avoidance doctrine and, therefore, no need to apply the ministerial exception. No ministerial exception

99. See *id.* at 51 (Alito, J.) ("I still don't see how the—the approach that the Solicitor General is recognizing—is recommending could—can eliminate the problems involved in pretext.").

100. *Id.* at 18–19.

101. See *id.* at 21 (Ginsburg, J.) ("But the handbook doesn't tell her, if you complain to the EEOC about discrimination, then you will be fired.").

102. See *id.* at 12 (Scalia, J.) ("Is a sham different from a pretext?").

103. See, e.g., *id.* at 9 (Kennedy, J.) ("But you're asking for an exemption so these issues can't even be tried.").

104. See, e.g., *id.* at 23 (Ginsburg, J.) ("Mr. Laycock, you, in order, I think, to dispel the notion that nothing is permitted, in your reply brief you say there are many suits that could be brought that would not be inappropriate. . . . But I don't understand how those would work if the policy is you're a minister; if you have quarrels with the church or a co-worker, we have our own dispute resolution, and you don't go outside.").

105. See, e.g., *id.* at 5 (Sotomayor, J.) ("Under your theory, nothing survives if the individual is a minister, no claim, private claim.").

means that Perich's claim should be permitted to proceed on the merits, just as the Sixth Circuit ordered.

Under traditional appellate-level ministerial-exception analysis, Perich's claim probably should not raise serious First Amendment concerns because Perich's employment fails both the primary duties test and the important religious duties test endorsed by *Hosanna-Tabor* in its own brief. Indeed, her primary duties both as a contract teacher and a called teacher were to teach secular subjects. The Sixth Circuit may have been mechanistic to tabulate the exact proportion of the day dedicated to secular activities, but *Hosanna-Tabor* does not dispute that the actual time spent on the secular activities far exceeded the time spent on religious ones. Even the Seventh Circuit, the defender of the "hands off approach," has recognized that the First Amendment did not bar an employment-discrimination suit by a math teacher who had "minor religious duties" that included "leading the students in prayers and taking them to mass."¹⁰⁶ With regard to the important religious duties test, no matter how many times *Hosanna-Tabor* reiterates that Perich had some religious duties—and no matter how important it considers those duties—it fails to distinguish Perich's duties from those of its lay teachers. The argument that Perich is a minister because she had important religious duties is not convincing when, in fact, she had identical duties to lay teachers who were not required to be Lutheran.

Nevertheless, the Supreme Court may have created a categorical rule barring courts jurisdiction over employment disputes involving parochial school teachers.¹⁰⁷ In *National Labor Relations Board v. Catholic Bishop of Chicago*,¹⁰⁸ the Court used the constitutional avoidance doctrine to deny the National Labor Relations Board jurisdiction over parochial school teachers, regardless of how religious or secular their duties, because "[T]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school."¹⁰⁹ Though *Catholic Bishop* was not an antidiscrimination case, such a sweeping rationale would

106. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1041 (7th Cir. 2006) (analyzing the holding of *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993), which did not perform a ministerial-exception analysis specifically, but nonetheless performed a constitutional-avoidance analysis).

107. *See Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979).

108. *Id.*

109. *Id.*

suggest that serious First Amendment questions are raised in an employment-discrimination case concerning any parochial school teacher, regardless of other facts. Furthermore, *Catholic Bishop* suggested that mere “inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission” would be enough to raise serious First Amendment questions.¹¹⁰ That *Hosanna-Tabor* claims it fired Perich for religious reasons would therefore raise even more concerns in the eyes of the *Catholic Bishop* Court. And if inquiry itself raises concerns, then applying the *McDonnell Douglas* scheme to determine the actual reason for the termination may itself be barred by the ministerial exception. As such, there is little doubt that under *Catholic Bishop*, the facts of *Hosanna-Tabor* do raise serious First Amendment concerns.

Because the *Catholic Bishop* rationale and the traditional appellate-level ministerial-exception analysis conflict, it is unclear whether allowing Perich’s claim to proceed on the merits would raise a serious First Amendment concern. On the one hand, the broad language of the *Catholic Bishop* decision suggests that Perich’s discrimination suit against *Hosanna-Tabor*, a parochial school, categorically raises serious First Amendment concerns. On the other, *Catholic Bishop* was decided more than thirty years ago and more recent appellate-level ministerial-exception analysis suggests that the ministerial exception should not apply because Perich does not qualify as a minister.¹¹¹

Assuming then, *arguendo*, that allowing Perich’s claim to proceed does raise serious First Amendment concerns, the constitutional avoidance doctrine requires the Court to construe the ADA in a way that avoids conflict with the First Amendment, unless such a construction is plainly contrary to Congress’s intent. The second question then becomes whether Congress expressed a clear intention

110. *Id.* at 502. *But see DeMarco*, 4 F.3d at 170–71 (2d Cir. 1993) (distinguishing *Catholic Bishop* on the basis that antidiscrimination actions “do not require [the same kind of] extensive or continuous administrative or judicial intrusion” into church matters that the National Labor Relations Board does).

111. *See, e.g., Equal Emp’t Opportunity Comm’n v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986) (holding that teachers at a religious school were not ministers, even though the school considered its teachers part of its ministry); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1396 (4th Cir. 1990) (holding that teachers and nuns teaching at a church-operated school were not ministers under the ministerial exception because they “perform[ed] no sacerdotal functions” and did not “serve as church governors,” even though they did teach biblical subject matter as part of the academic curriculum).

to apply the statute at issue to facts like these. Here, it is undisputed that Congress intended the ADA as a whole to apply to religious organizations. It is not clear, however, that Congress intended the statute to apply to scenarios like this one, where strong facts indicate that the employer's stated reason for terminating employment is merely a cover for what was really discrimination on the basis of disability.

The ADA exempts religious organizations from its application in only two ways: (1) religious organizations may give preference to members of their own religion in hiring decisions, and (2) they may require employees to conform with the tenets of the organization's faith.¹¹² As previously discussed, it is unclear whether Congress intended these two exceptions to apply to the anti-retaliation provision. By arguing that Perich was fired because her threat to pursue a legal remedy contradicted Lutheran doctrine, Hosanna-Tabor can make a colorable argument that the statute contemplates and indeed permits such action under the conformity exception. Without any clear expression by Congress that the conformity exception does not apply to the anti-retaliation provision, the Court could bar Perich's claim and avoid confronting the underlying First Amendment conflict that would arise if it allowed her claim to proceed.

But there is one crippling problem with applying the constitutional avoidance doctrine at this point in the analysis: the real reason for firing Perich is in dispute and has not yet been subject to a finding by a trial court. Whether Perich was terminated because she was disabled or because she failed to abide by Lutheran doctrine is critical to determining whether Congress intended the ADA to apply here. If Hosanna-Tabor fired Perich because she failed to abide by Lutheran doctrine, then Hosanna-Tabor may terminate Perich under the religious conformity exception to the ADA. If, however, Hosanna-Tabor's stated religious justification for the termination is merely a cover for what was really invidious discrimination on the basis of disability, then the religious conformity exception does not apply. The Court would have no choice but to allow Perich's claim and to confront the underlying First Amendment conflict. Accordingly, a factual dispute must first be resolved before any court can evaluate whether Congress clearly intended the ADA to apply to facts like

112. 42 U.S.C.A. §§ 12112(a), 12113(d), 12203(a) (West 2011).

these, even if it intended the ADA to apply to religious organizations in general. A prudent action would be to remand, instructing the trial court to apply the *McDonnell Douglas* test to determine the actual reason Hosanna-Tabor fired Perich. Once that fact has been established, the trial court can finish the constitutional-avoidance analysis and decide whether the ministerial exception bars Perich's claim.

B. Likely Disposition

The Supreme Court is likely to affirm the holding of the appellate court. Affirming would allow the Supreme Court to avoid confronting the underlying constitutional question. As Justice Breyer stated at oral argument, Congress foresaw this difficult question arising whenever the ADA was applied to religious organizations and it therefore provided a religious conformity exception to the ADA's general applicability. On remand, if the trial court finds that the exception applies, then Perich's suit would be barred without the Supreme Court ever addressing the underlying constitutional question. If the trial court finds the exception does not apply, the Supreme Court need not grant certiorari again unless it wants to make a ruling on the ministerial exception or the constitutional question. Upholding the Sixth Circuit's decision would also leave intact the traditional appellate-level ministerial-exception analysis that the majority of Justices at oral argument seemed to support. Affirmation, therefore, would represent something less than a monumental shift in the Court's jurisprudence, something consistent with what some would describe as a minimalist court.¹¹³

To be sure, affirming the Sixth Circuit would not be uncontroversial. Upholding the decision would send the matter back to the district court to inquire into the actual reason Hosanna-Tabor fired Perich—without, of course, questioning the wisdom or reasonableness of church doctrine. This, in effect, would hold that judicial inquiry into the motives behind religious organizations' employment decisions to determine whether the ministerial exception applies does not by itself raise serious First Amendment questions. Such a holding is supported by at least two circuits,¹¹⁴ but would

113. Jonathan H. Adler, *Making Sense of the Supreme Court*, VOLOKH CONSPIRACY (July 2, 2010, 9:58 AM), <http://volokh.com/2010/07/02/making-sense-of-the-supreme-court/>.

114. See cases cited *supra* note 58.

depart from the language in *Catholic Bishop*, which suggests that such judicial inquiry *would* raise serious First Amendment concerns. Accordingly, it likely would draw a dissent from the conservative Justices, who at oral argument expressed disfavor for pretextual inquiries.¹¹⁵

Reversal, however, would mean the majority of the Court believes Perich's claim should be barred, either by application of the ministerial exception or because allowing Perich's claim to proceed would actually violate the First Amendment. If oral argument is any indication, the Court does not seem to be leaning in this direction. Justices Ginsburg, Sotomayor, and Kennedy expressed disapproval at the suggestion that Perich's claims should not be heard.¹¹⁶ Furthermore, reversal would require the Court either to formulate its own ministerial exception or to bar the lawsuit as an actual violation of the First Amendment. Yet, at oral argument, the Court gave off an air of paralysis over both the underlying constitutional matter and how it might formulate a test for determining who is and who is not a minister.¹¹⁷

But perhaps most compellingly, if the Court barred Perich's claim at this point without first remanding to determine the actual reason for her termination, it would send a signal that a religious organization need only claim religious reasons for firing an employee to avoid liability under religiously neutral and generally applicable antidiscrimination laws. This not only offends basic notions of fairness but would, in effect, critically undermine the Fourteenth Amendment's assurance of equal protection under the law.¹¹⁸ Indeed, at oral argument, Justice Sotomayor seized upon this problem by offering a hypothetical: what about a teacher who is fired by a religious employer for reporting sexual abuse to the government?¹¹⁹ Counsel for Hosanna-Tabor reluctantly responded that should a case like that arise, it would be appropriate for the Court to carve out a

115. See, e.g., Transcript of Oral Argument, *supra* note 94, at 22 (Alito, J.) ("Mr. Laycock, doesn't this inquiry illustrate the problems that will necessarily occur if you get into a pretext analysis?").

116. See *supra* statements by Justices in notes 103, 104, 105.

117. See generally *id.*

118. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (explaining that pretextual analysis "protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights"); *Equal Emp't Opportunity Comm'n v. Fremont Christian Sch.*, 781 F.2d 1362, 1370 (9th Cir. 1986) ("[C]hurches are not—and should not be—above the law.").

119. Transcript of Oral Argument, *supra* note 94, at 5.

child-abuse reporting exception to the ministerial exception.¹²⁰ In doing so, counsel all but conceded the point: not even Hosanna-Tabor would want to live in the world it seeks to create.

For these reasons, the Supreme Court is likely to affirm the Sixth Circuit, remanding the case to the trial court and allowing Perich's claim to proceed on the merits with the careful instructions of the Sixth Circuit.

120. *Id.* at 6.