BENCH MEMOS

LAW & THE COURTS

Religious Autonomy Should Be Key in Determining the Scope of the Ministerial Exception in *Morrissey-Berru v. Our Lady of Guadalupe School* and *Biel v. St. James School*

By VICTORIA DORFMAN, TODD GEREMIA, ANTHONY DICK & KAYTLIN ROHOLT LANE | May 14, 2020 12:57 PM

LISTEN TO THIS ARTICLE

The U.S. Supreme Court in Washington, D.C., June 11, 2018 (Erin Schaff/Reuters)

On Monday, the Supreme Court heard oral argument in two cases that concern the proper scope of the "ministerial exception," *Morrissey-Berru v. Our Lady of Guadalupe School* and *Biel v. St. James School*. Both cases involve fifth-grade teachers at Catholic elementary schools whose duties included teaching devotional theology and leading their students in devotional practices, such as daily prayer. In a prior article, we urged the Supreme Court to grant certiorari in *Our Lady of Guadalupe* for the reasons outlined in our cert-stage amicus brief, which we filed on behalf of a group of distinguished religious-liberty scholars. As we explained in our brief, the ministerial exception protects the autonomy of religious organizations to select those who perform significant religious functions, including religion teachers and others who help transmit the faith. The Supreme Court granted certiorari in both cases, and we filed a merits amicus brief on behalf of 15 scholars, discussing in great detail the historical antecedents of the Religion Clauses and the principles, especially of religious autonomy, that they embody. During Monday's consolidated oral argument, it became clear that religious autonomy will be the key to the Court's resolution of these cases.

At oral argument, Justice Kavanaugh cited our merits amicus brief for the proposition that religious autonomy is rooted in the Free Exercise and Establishment Clauses of the First Amendment. Justice Alito similarly suggested that the term "ministerial exception" should be "jettisoned," because the central issue in these cases is religious autonomy. This focus on religious autonomy is not surprising, because the principle of non-interference in religious affairs that the ministerial exception embodies has deep roots in our constitutional tradition. The phrase "ministerial exception" was coined in an early Fourth Circuit decision, and it stuck, but it has long been recognized that the phrase is much narrower than the rule. Courts have applied the exception to priests, rabbis, and imams as well as ministers, and to music directors, organists, cantors, communications directors, kosher supervisors, professors of canon law, and teachers of religion.

As we explained in our amicus brief, most members of the Founding generation embraced the Lockean view that religious institutions must be free to control their membership and internal affairs. Locke called for "a precise boundary-line" between the affairs of civil government and the affairs of religion, which vested in the church "the power to remove any of its members who break its rules." The Lockean view of religious autonomy found expression in the Free Exercise and Establishment Clauses of the First Amendment, which the Founders understood to broadly prohibit the federal government from interfering with the internal governance of the church, including the selection of religious personnel with significant responsibilities. In the words of James Madison, "the selection of [religious] functionaries . . . is entirely ecclesiastical," and thus the government should not be involved in the selection or removal of key religious personnel. Thomas Jefferson took the same view, declaring that "church-discipline" is "never to be enforced by the public authority," and thus religious organizations "must settle their differences in their own way, provided they commit no breach of the peace." The Supreme Court's decisions, including in *Hosanna-Tabor*, embody this constitutional tradition of religious autonomy.

This autonomy to select key religious personnel covers all employees who perform significant religious functions, not just those who are ordained members of the clergy. During oral argument, the teachers' lawyer argued that lay employees, including lay teachers, should not be covered by the ministerial exception. But this limitation has no basis in our constitutional tradition, *Hosanna-Tabor*, or the 40 years of lower court precedent applying the ministerial exception. Even before the Court's decision in *Hosanna-Tabor*, lower courts understood that the ministerial exception protected religious groups' autonomy to hire and fire lay employees who performed important religious functions. Here are a few illustrative examples. Twelve years prior to *Hosanna-Tabor*, the Fourth Circuit held that the exception covered a lay music teacher at a Catholic school because the "functions of the position" were "important to the spiritual and pastoral mission" of the school. Eight years prior

to *Hosanna-Tabor*, the Eastern District of Wisconsin held that a lay teacher at a Native-American school was subject to the ministerial exception, even though she did not teach religion full time, because she was required "to integrate Native American culture and religion" into her classes. Three years prior to *Hosanna-Tabor*, the Supreme Court of Wisconsin chose a "functional" over a "quantitative" approach and applied the ministerial exception to a first-grade teacher who taught a daily religion class in a Catholic school. And since *Hosanna-Tabor*, federal courts have consistently applied the ministerial exception to lay employees who were not full-time teachers of religion. In the *Grussgott* case, for example, the Seventh Circuit held that an "ostensibly lay" teacher at a Jewish school was covered by the exception because she taught the faith to the next generation. And in *Ciurleo*, the Eastern District of Michigan held that the exception applied to a lay first-grade teacher at a Catholic school who taught religion for only 20-30 minutes per day.

A religious group's autonomy to choose its key religious personnel is similarly not confined only to the hiring and firing of religious "leaders." At oral argument, the teachers' lawyer contended that the ministerial exception should cover only those employees who perform leadership roles, but *Hosanna-Tabor* itself rejected that position: "Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree." And of course, to her students a teacher *is* a leader, and if she teaches them religion, or leads them in prayer or worship, she is a religious leader.

Instead of focusing on an employee's title, the focus in these cases must be on the functions performed by those who work for religious bodies. As Justice Alito explained in his *Hosanna-Tabor* concurrence, the First Amendment protects the ability of religious groups to engage in "certain key and other religious ceremonies and rituals, as well as the critical process of communicating the faith." Religious groups must accordingly "be free to choose the personnel who

are essential to the performance of these functions." Since *Hosanna-Tabor*, lower courts have crystalized around the functional approach adopted by Justice Alito's *Hosanna-Tabor* concurrence. But even before *Hosanna-Tabor*, lower courts have consistently applied this functional approach for decades.

We filed amicus briefs advocating for the functional approach in two such cases. In *Fratello v. Archdiocese of New York*, the Second Circuit recognized that the "most important consideration" in a ministerial exception case is whether, and to what extent, an employee performs "important religious functions." Because the plaintiff in *Fratello*, a lay principal in a Roman Catholic school, conveyed the school's Roman Catholic message and carried out its mission, the Second Circuit concluded that she was a minister within the meaning of the exception. In doing so, the Second Circuit embraced the position in our brief, citing writings of the scholar signatories. Similarly, in *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, the Third Circuit dismissed a pastor's employment discrimination claim against his former church because the resolution of his claim would limit the church's "right to choose who will perform particular spiritual functions." It did so, relying on *Fratello*'s analysis. Indeed, until the Ninth Circuit's outlier decisions in *Our Lady of Guadalupe* and *Biel*, the Courts of Appeals have uniformly applied a functional approach that covers all employees with significant religious responsibilities.

This functional approach ties the ministerial exception's scope to its purpose of safeguarding religious autonomy. Only by focusing on an employee's functions can the Court protect, as it did in *Hosanna-Tabor*, "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." In deciding these cases, the Court should accordingly focus on the functions the teachers performed, not on their titles or their status as "lay" teachers. As Justice Alito explained in his *Hosanna-Tabor* concurrence, this approach will ensure that churches remain free "to exercise the religious liberty that the First Amendment guarantees."