By a vote of 7-2, the U.S. Supreme Court held on July 8, 2020, that the “ministerial exception” under the religion clauses of the First Amendment forecloses employment-discrimination claims against religious schools by teachers with religious duties.

Prior to the court’s decision in Our Lady of Guadalupe School v. Morrissey-Berru, the Supreme Court had applied the “ministerial exception” only to employees with the title “minister” who had religious training. Without a “rigid formula” from the U.S. Supreme Court, lower courts had subsequently differed on how broadly to apply the exception. After Our Lady, the “ministerial exception” immunizes religious institutions from employment-discrimination claims by teachers — and perhaps non-teachers — with religious duties.

**Background**

In its 2012 decision in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, the U.S. Supreme Court adopted the “ministerial exception.” Hosanna-Tabor held that, under the First Amendment, religious institutions have discretion over whom they employ as “ministers,” unconstrained by anti-discrimination laws. So, for example, if a church wanted to fire its pastor based on gender or sexual orientation, it could do so, even though such discrimination would ordinarily be illegal. In that case, the court did not announce “a rigid formula” for application of the doctrine but found it relevant that the employee’s job title was “minister,” and that she had religious training and was responsible to teach religion and participate with students in religious activities, including worship and prayer.

**The Case**

To clarify the reach of the “ministerial exception,” in 2019 the U.S. Supreme Court granted certiorari on two appellate rulings from the 9th U.S. Circuit Court of Appeals that had construed the “ministerial exception” narrowly. In both cases, the 9th Circuit had held that teachers at religious schools who taught religion in the classroom and also worshipped and prayed with their students did not fall within the exception because they did not have the formal title of “minister,” had limited formal religious training and did not hold themselves out publicly as religious leaders. Accordingly, the 9th Circuit permitted the teachers to challenge their terminations under federal anti-discrimination laws.

**The Ruling**

The U.S. Supreme Court reversed the 9th Circuit’s holdings. Writing for the 7-2 majority, Associate Justice Samuel Alito explained that the “ministerial exception” was based on the religion clauses of the First Amendment, which “protect the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion.” The religion clauses, he noted, do not provide religious institutions “general immunity from secular laws,” but they do “protect their autonomy with respect to internal management decisions” that are essential to the institution’s mission.” A key component of that autonomy, he said, is “the selection of the individuals who play certain key roles.”

In Hosanna-Tabor, Justice Alito explained, the court adopted the “ministerial exception” and applied it to bar an employment-discrimination suit by a teacher at an Evangelical Lutheran school. Justice Alito explained that “[t]he circumstances that informed our decision in Hosanna-Tabor were relevant because of their relationship to Perich’s role in conveying the Church’s message and carrying out its mission.” Those circumstances, he said, “are not inflexible requirements and may have far less significance in some cases.”

In his opinion, Justice Alito adopted a functional test for application of the “ministerial exception.” The court did not identify a “checklist” of factors or a “rigid formula.” Rather, he noted: “What matters, at bottom, is what an employee does.” Because both teachers performed “vital religious duties” for a school that “expressly saw them as playing a vital role in carrying out” a religious mission, the “ministerial exception” applied.

In dissent, Associate Justice Sonia Sotomayor argued that the majority collapsed “Hosanna-Tabor’s careful analysis into a single consideration: whether a church thinks its employees play an important religious role.” She dissented because “that simplistic approach has no basis in law and strips thousands of schoolteachers of their legal protections.” She cautioned that the “Court’s conclusion portends grave consequences,” with “over a hundred thousand secular teachers whose rights are at risk.” She also speculated that the widening gyre of “ministerial exception” case law could ultimately swallow “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.”

**What Lies Ahead for Employees of Religious Employers?**

The U.S. Supreme Court has eschewed a “rigid formula” for application of the “ministerial exception.” Thus, lower courts are left to draw boundaries based on the newly announced principle from Our Lady. “What matters, at bottom, is what an employee does.” Importantly, this principle may even reach “secular” employees. That is, an employee need not be a practicing member of the religion for the exception to apply.

Notably, even passage of legislation such as the Equality Act — proposed legislation to bar anti-LGBTQ+ discrimination — will not restore civil rights protections to those employees covered by the “ministerial exception.” As explained in Our Lady, the exception is grounded in the First Amendment, and the U.S. Constitution trumps statutory law.

**Recommendations for Religious Employers Seeking to Apply the “Ministerial Exception”**

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Employers seeking to squeeze into the cleft created by the “ministerial exception” should consider the following steps, if appropriate and applicable:

1. Update foundational documents, employee handbooks and other policies to reflect the institution’s religious mission.

2. Ensure that employees covered by the exception have explicitly religious duties, including, for example, religious instruction or leading prayer.

3. Explain in a job description, offer letter and/or employment agreement how the duties of an employee contribute to the institution’s religious mission.

4. Tie performance reviews to religious standards, including, for example, personal modeling of the faith.

For additional information regarding the impact of this decision, contact the authors of this article or another member of the McGuireWoods labor and employment team.

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