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*HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH
AND SCHOOL v. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION—AN AFFIRMATION OF THE
MINISTERIAL EXCEPTION*

by

J.L.Yranski Nasuti, MDiv, JD, LL.M.*

Since the passage of the Civil Rights Act of 1964,¹ federal discrimination statutes have had a significant impact on employment law in the United States. Employment decisions may no longer be based on a person's membership in a protected class and employers may not retaliate against employees who seek to enforce their statutory rights. That is unless the employee works for a religious organization and falls within the "ministerial exception." In the case of *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (hereinafter *Hosanna-Tabor*),² the U.S. Supreme Court has held, as a matter of first impression, that employees who are deemed to be "ministers" are precluded from claiming protection under employment discrimination statutes when their employers are religious institutions.

I.

The Hosanna-Tabor Evangelical Lutheran Church (hereinafter *Hosanna-Tabor*), which is located in Redford, Michigan, is a member of the Missouri Synod of the Lutheran

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Church. As part of its mission Hosanna-Tabor operates a small elementary school that offers a “Christ-centered education” that helps parents by “reinforcing biblical principals [sic] standards.”³ As is the case for all schools within the Missouri Synod, Hosanna-Tabor employs two types of teachers—those who are “called” and those who are “lay.” A called teacher is one who has been chosen to his or her vocation by God through a particular congregation. In order to receive a call, a teacher typically completes a “colloquy” program at a Lutheran college or university. It is only after a teacher has taken eight theological courses, been endorsed by his or her local Synod district, and passed an oral exam administered by a faculty committee that the teacher may be called by a congregation. Once called a teacher is given the formal title of “Minister of Religion, Commissioned” and serves an open-ended term. A called teacher may also receive a special income tax housing allowance so long as the teacher is conducting activities “in the exercise of ministry.”⁴ If a person is hired to be a lay or contract teacher, he or she does not have to be trained by the Synod nor even be a member of the Lutheran Church. A lay teacher is appointed by the school board (without a vote by the congregation) and receives a one-year renewable contract.⁵ In the hiring process, preference is given to called teachers. This is true despite the fact that called and lay teachers generally perform the same services.

In 1999, Hosanna-Tabor hired Cheryl Perich to teach kindergarten as a lay teacher. At that time, Perich was already attending colloquy classes at Concordia College. Upon completing her course work in February 2000, she was called by the Hosanna-Tabor Evangelical Lutheran Church and was, thereafter, listed as a commissioned minister in the Lutheran Church—Missouri Synod. Perich’s responsibilities as a called teacher were the same as those that she had as a lay teacher.⁶ She taught math, language arts, social studies, science, gym,

art, and music. Four days a week she conducted a thirty minute religion class and one day a week she attended a chapel service with her students. She also led her class in prayer three times a day and, in her final year, joined her class in a devotional service for five to ten minutes each morning. Approximately twice a year, Perich, in rotation with other teachers (called and lay), led the chapel service. Over the course of a seven-hour school day, Perich spent approximately forty-five minutes in activities related to religion.⁷

Perich became ill while attending a Hosanna-Tabor golf outing in June 2004. As her doctors struggled to diagnose her condition, Perich and the school administrators agreed that it would be best for her to go on disability leave for the 2004-2005 academic year.⁸ In December, Perich notified the school's principal, Stacy Hoeft, that she had been diagnosed with narcolepsy and would be able to resume her teaching duties in two to four months (depending on how long it took to stabilize her condition with medication). During the next month the school informed Perich that it had decided to hire a substitute teacher to take over her responsibilities. (Up until that point, another teacher at Hosanna-Tabor had assumed responsibility for three grade levels in order to cover for Perich.) The school also asked Perich to begin discussing with her doctor what she would have to do in order to return to the classroom the following fall. Perich subsequently informed the school that when she returned, she would be fully functional through the use of medication. Two days later, Hoeft notified Perich by e-mail of a proposed amendment to the employee handbook that would request employees who had been on disability for more than six months to resign their calls so that the school could responsibly fill their positions.⁹ Employees who resigned because of disabilities would, however, not be precluded from seeking reinstatement of their calls if their health was restored. At that time Perich was told of the

proposed amendment, she had been on disability leave for over five months.

Perich immediately called Hoeft to her tell that she would be returning to work within the month. Hoeft became worried that Perich's early return would not be in the best interest of the students—especially since Perich had informed the school only a few days earlier of her continued inability to function fully. Three days later, at a meeting of the Hosanna-Tabor Evangelical Church, the school administration expressed concerns that Perich would not be able to return to teaching either that year or the next. Based on those representations, the congregation voted in favor of a resolution asking Perich to agree to a peaceful release agreement.¹⁰ Under the terms of the agreement, Perich would resign her call and the congregation would pay for a portion of her health insurance for the remainder of the calendar year. Perich rejected the congregation's offer and submitted a note from her doctor indicating that she would be able to return to work within a few weeks. Her refusal to submit a letter of resignation continued even after the school board urged her to reconsider her decision and informed her that it no longer had a position for her.

When Perich returned to the school on the morning of the first day she was medically cleared to work, she was immediately told by Hoeft to leave. That afternoon, Hoeft called Perich to tell her that it was likely that she was going to be fired. Perich responded by informing Hoeft that she had consulted with an attorney and was prepared to take legal action. The school board met that same night and subsequently informed Perich that it was reviewing the process for rescinding her call in light of her "regrettable" actions.¹¹ A case for termination was then presented to and accepted by the congregation. The two main grounds given for removing Perich's call were her "insubordination and disruptive

behavior” on the day she attempted to return to work and the damage “beyond repair” that she had done to her “working relationship” with the school by “threatening to take legal action.”¹²

Perich filed a charge with the Equal Employment Opportunity Commission (hereinafter EEOC) based on a wrongful termination claim under the Americans with Disabilities Act (hereinafter ADA).¹³ The ADA not only prohibits an employer from discriminating against a qualified employee based on a disability, but it also prohibits an employee from retaliating “against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].”¹⁴ The EEOC filed a lawsuit against Hosanna-Tabor in the U.S. District Court based on the claim that Perich had been fired in retaliation for threatening to sue under the ADA. Perich intervened in the case alleging similar claims of unlawful retaliation under the ADA and the Michigan Persons with Disabilities Civil Rights Act.¹⁵

Hosanna-Tabor filed a motion for summary judgment asserting a “ministerial exception” that precludes government interference with “quintessentially” religious matters. The Church argued that the First Amendment barred lawsuits when they involved employment relationships between religious organizations and their ministerial employees. It went on to claim that Perich was a ministerial employee and that the reason she was fired was based on the Synod’s religious belief that Christians should resolve their disputes internally. The U.S. District Court granted Hosanna-Tabor’s motion for summary judgment on the grounds that the church had treated Perich as one of its ministers long before the litigation began.¹⁶

On appeal, the U.S. Court of Appeals for the Sixth Circuit vacated the lower court decision and remanded the case instructing the trial court to consider the merits of the retaliation claims. Although the Circuit Court acknowledged that a ministerial exception would bar certain employment discrimination claims, it concluded that Perich's claim could proceed since she was not in fact a "minister."¹⁷

II.

A. Majority Opinion

When the U.S. Supreme Court justices heard oral arguments in the *Hosanna-Tabor* case, it was clear that many of the justices were trying to find a way to balance the government's concern for the victims of employment discrimination with the religious organization's concern that that same government not meddle in its internal affairs.¹⁸ Three months later those concerns were addressed by Chief Justice John Roberts in a unanimous opinion in favor of the Hosanna-Tabor Evangelical Church and School. In the concluding paragraph of his opinion, Robert wrote that "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. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."¹⁹ In such a case, the Establishment and Free Exercise Clauses of the First Amendment bar employment discrimination suits by ministers against their churches.

Roberts began his analysis of the First Amendment religion clauses by recalling significant moments in Anglo-American

history where there had been controversies between church and state over appointments to religious offices.²⁰ He postulated that it was because of these kinds of controversies that “the founding generation sought to foreclose the possibility of a national church.”²¹ This was accomplished through the inclusion of the Religion Clauses in the First Amendment of the Bill of Rights. The Establishment Clause precluded the government from being involved in the appointment of ministers and the Free Exercise Clause similarly prevented the government from interfering with a religious group’s right to select its own ministers.²²

In his attempt to review prior Supreme Court decisions involving the Religion Clauses, Roberts was not surprised to find so few cases involving issues relating to the interference by the government in the ministerial selection process. He credited this phenomenon to a general understanding of the Religion Clauses—as well as to the absence of employment regulatory laws prior to the 1960s.²³ He did, however, find support for his belief “that it is impermissible for the government to contradict a church’s determination of who can act as its ministers”²⁴ in a number of cases involving disputes over church property.

In the nineteenth century case of *Watson v. Jones* (hereinafter *Watson*),²⁵ the U.S. Supreme Court declined to question a decision by the Presbyterian Church involving church property that was located in Louisville, Kentucky. The General Assembly of the Presbyterian Church had awarded the property to an antislavery faction over the objections of a proslavery faction. The Court based its decision on the grounds that “whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final,

and as binding on them.”²⁶

Eighty years later, in the case of *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America* (hereinafter *Kedroff*),²⁷ the Supreme Court was asked to decide who had the right to use a particular Russian Orthodox cathedral in New York City. Following the Bolshevik Revolution in 1917, many of the Russian Orthodox churches in North America split from the Supreme Church Authority of the Russian Orthodox Church in Moscow (which was thought to have become a tool of the Soviet government.) The separation from the mother church in Russia included the establishment of an autonomous administration for the North American Russian Orthodox Church. The Russian Orthodox churches in North America consequently argued that the right to use the cathedral in New York belonged to an archbishop elected by them. The Supreme Church Authority in Russia, on the other hand, claimed that that right belonged to an archbishop appointed by the patriarch in Moscow. Under New York statutory law (known as Article 5-C), Russian Orthodox churches in New York were required to recognize the authority of the governing body of the North American churches.²⁸ The U.S. Supreme Court, ruling in favor of the Supreme Church Authority in Russia, found the state law to be unconstitutional on the grounds that it “directly prohibit[ed] the free exercise of an ecclesiastical right, the Church’s choice of hierarchy.”²⁹

The right of a church to select its own hierarchy was reaffirmed in *Serbian Eastern Orthodox Diocese for United States and Canada v. Milivojevich* (hereinafter *Milivojevich*),³⁰ another case involving the issue of who should have control over a diocese, including its property and assets. Dionisije Milivojevich had been removed as the bishop of the American-Canadian Diocese after a dispute with church hierarchy. He sued the church in an Illinois state court claiming that the

proceedings leading to his removal violated the church's laws and regulations. The U.S. Supreme Court reversed the state court's decision in favor of Milivojevich on the grounds that hierarchical religious organizations have a First Amendment right "to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters."³¹ Consequently the decisions of those tribunals had to be recognized as binding by civil courts. It was therefore unconstitutional for a court to undertake "the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals."³²

Roberts then turned to the primary issue that differentiated *Hosanna-Tabor* from *Watson*, *Kedroff*, and *Milivojezich*--whether a religious organization's freedom to select its own ministers could be restricted by employment discrimination statutes. Although this was a matter of first impression for the Supreme Court, it was one that had been addressed by the Courts of Appeals for many years.³³ Their uniform approach had been to recognize the existence of a "ministerial exception" that was based on the First Amendment and that precluded ministers from bringing claims against religious institutions based on anti-discrimination employment legislation. The Supreme Court agreed with the Circuit Courts that such an exception was necessary since it ensured that the members of a particular religious group, and not the government, could best decide which ministers "will personify its beliefs."³⁴ That was why it would be a violation of the Religion Clauses of the First Amendment for the government to invoke Title VII of the Civil Rights Act to compel the Catholic Church or an Orthodox Jewish Seminary to ordain women.³⁵

A more difficult issue for the Court to decide was that of

who was covered by the ministerial exception. Roberts noted that every Circuit Court that had considered the scope of the exception had concluded that it was not limited the heads of religious congregations—the priests, the ministers, and the rabbis. While he agreed with that conclusion, he declined to provide any “rigid formula” for deciding when an employee qualifies as a minister. He stated instead that “it was enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.”³⁶

Roberts went on to highlight a number of factors that contributed to the Court’s conclusion that Perich was in fact covered by the ministerial exception. Many of those factors had to do with her call and commissioning. Hosanna-Tabor held her out to be a called minister with a role distinct from other members of the congregation.³⁷ She was accorded the title of “Minister of Religion, Commissioned.”³⁸ When she received her call, she was tasked to perform her office “according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures.”³⁹ At her commissioning, the congregation prayed that God “bless [her] ministrations to the glory of His holy name, [and] the building of His church.”⁴⁰ The congregation also periodically reviewed her “skills of ministry” and “ministerial responsibilities” and provided her with “continuing education as a professional person in the ministry of the Gospel.”⁴¹ Prior to receiving her call, she had spent six years completing eight college-level theology courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher in order to obtain the endorsement of her local Synod district. She subsequently passed an oral exam by a faculty committee at the Lutheran college and she was commissioned by the Hosanna-Tabor congregation.⁴²

Perich actions also indicated that she considered herself to be a minister. She accepted the call.⁴³ She claimed a special housing allowance on her taxes that was only available to those earning compensation “in the exercise of the ministry.”⁴⁴ In a letter that she sent to the Synod following her termination, she affirmatively stated that “I feel that God is leading me to serve the teaching ministry . . . I am anxious to be in the teaching ministry again soon.”⁴⁵ The Court concluded that she considered her teaching duties to include the conveying of the Church’s message and the carrying out of its mission.⁴⁶

Roberts then addressed the three errors that the Court of Appeals committed when it concluded that Perich was not a minister covered by the ministerial exception. The first was the court’s failure to assign any relevance to the fact that she was a commissioned minister.⁴⁷ The second was the weight it gave to the fact that lay teachers performed the same religious duties as Perich.⁴⁸ The final error was the court’s emphasis how much of Perich’s teaching time was allocated to secular duties as opposed to religious duties.⁴⁹ On the later point, Roberts disagreed with the EEOC’s suggestion that the ministerial exception should only apply to employees who perform exclusively religious functions. If that were the case, the heads of religious congregations would not qualify as ministers since their duties typically include a mix of religious and secular functions including the raising of money, the supervising of non-religious personnel, and the overseeing of the maintenance of church property.⁵⁰ In fact, the amount of time that an employee devoted to religious functions might be less relevant than the nature of those religious functions.⁵¹

In the original complaint, Perich had sought a variety of remedies including reinstatement to her teaching job as well as frontpay. Since Perich was covered by the ministerial

exception, her request for reinstatement was inappropriate on the grounds that to do so would violate Hosanna-Tabor's First Amendment right to select its own ministers. The Court similarly rejected her request for frontpay since it would also "operate as a penalty on the Church for terminating an unwanted minister, and would be no less prohibited by the First Amendment than an order overturning the terminations."⁵²

Roberts also addressed Perich's claim that Hosanna-Tabor's alleged theological reason for discharging Perich was only a pretext for getting rid of an employee with a disability. He concluded that if an employee was covered by the ministerial exception, that employee would not prevail even if he or she could establish that the termination was for a non-theological reason. In ministerial exception cases, that exception is the affirmative defense to an otherwise cognizable claim.⁵³ The reason for that is because "the exception instead ensures that the authority to select and control who will minister to the faithful—a matter "strictly ecclesiastical"—is the church's alone."⁵⁴

The opinion ended with a brief reference to the "parade of horrors" that Perich and the EEOC claimed would result if the Court recognized the ministerial exception.⁵⁵ While Roberts did not offer the Court's view with regard to the appellants' concerns, he did note those of Hosanna-Tabor.⁵⁶ Finally, Roberts acknowledged that the only thing that had been decided in the *Hosanna-Tabor* case was that the ministerial exception barred employment discrimination lawsuits. The Court left until a future time the issue of whether the ministerial exception could be applied to other types of lawsuits including actions brought by employees against their religious employer for breach of contract or tortious conduct.⁵⁷

B. Concurring Opinions

Although Roberts' opinion was joined by all nine members of the Court, Justices Clarence Thomas and Samuel Alito (joined by Elena Kagan) each submitted concurring opinions that focused on the question that Roberts chose not to address. That question was who actually qualifies to be a minister under the ministerial exception.

Thomas' three paragraph opinion suggested that if the courts were going to uphold the Religion Clauses' guarantee that religious organizations were autonomous in matters of internal governance (including their selection of ministers), then the courts had to be willing to "defer to the religious organization's good-faith understanding of who qualifies as its minister."⁵⁸ He was particularly concerned that any attempt to establish a bright-line test or multi-factor analysis would disadvantage religious groups whose beliefs, practices, and membership were less traditional.⁵⁹

Alito's concurring opinion, on the other hand, embraced the idea of establishing some specific criteria for determining who should be covered by the ministerial exception. He began by rejecting the suggestion that the ministerial exception should only apply to those employees who had been formally ordained or been given the title of "minister."⁶⁰ One reason for his conclusion was that most religious groups, other than Protestants, do not refer to their clergy as ministers. Another reason was that while the concept of ordination may be a common practice in many Christian churches and in Judaism, it is not so in all Christian denominations or in other religions. That being the case, when a court applied the ministerial exception, it needed to pay far more attention to the actual functions that were performed by the people working for religious organizations. Alito went on to identify three general

categories of employees whose functions were essential to practically all religious groups—“those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation.”⁶¹ The ministerial exception was applicable in *Hosanna-Tabor* because of the substantial role Perich played in “conveying the Church’s message and carrying out its mission.”⁶² That she also taught secular subjects did not matter since she “played an important role as an instrument of her church’s religious message and as a leader of its worship activities.”⁶³ Alito concluded by rejecting the need to engage in a pretext inquiry for cases where the ministerial exception applied. Such an inquiry would force the court or jury to make a judgment about church doctrine. The adjudication of doctrinal questions would require the trier of fact to not only to judge what a church really believed but also how important that belief was the church’s mission. This would be result in an unacceptable course of action that would “pose grave problems for religious autonomy.”⁶⁴

III.

The Supreme Court’s ruling in *Hosanna-Tabor* was unequivocal--ministerial employees are barred from suing their religious employers based on alleged violations of discrimination laws. The decision was, in fact, an affirmation of a ministerial exception that had been applied by the Circuit Courts for many years. In this case, the Religion Clauses of the First Amendment trumped the civil rights statutes. Unfortunately, by not directly addressing the issue of who is considered a minister for the purposes of the ministerial exception, the Court left many religious organizations and their employees scratching their heads. The deferential approach

proposed by Thomas does not⁶⁵ seem to be something that his fellow justices felt comfortable endorsing. That would suggest that attempts by religious organizations to characterize all of their employees as ministers will not insulate them from litigation arising out of claims of employment discrimination. At the same time, the Court was equally reluctant to accept Alito's functional test for determining which employees were covered by the ministerial exception.

The fact that the Supreme Court justices unanimously agreed that the discrimination claim could not succeed in *Hosanna-Tabor* was based on a particular set of facts. Perich had not only applied for and received the title of "called minister" but she had subsequently used that status to receive government relief in the form of a tax benefit. What *Hosanna-Tabor* did not address were those instances where the employee had never affirmatively sought ministerial status. Would the Court be so willing to accept the employer's claim for a ministerial exception when the employee in question had neither sought ministerial status nor conceived of his or her job in a catechetical context? One place where this issue might arise would be in the area of higher education. What would *Hosanna-Tabor* mean for a professor who teaches at a college or university that follows a particular religious tradition, has a mission statement that reflects particular religious values, and also affirms the value of academic freedom? Would the validity of that institution's claim for a ministerial exception with regard to a particular professor depend on that person's discipline? Would the claim be treated differently if the professor taught theology or religious studies—even though the professor was considered a lay person within the canonical structure of the institutional church? Would such a designation be appropriate for a professor in other fields such as biology or business law? Would it apply to a professor in any discipline who participated in service-learning courses co-sponsored by

the school's campus ministry program? Or would the employee be able to challenge the institution's claim of a ministerial exception on the grounds that calling the employee a minister was merely a pretext for avoiding liability for illegal discriminatory actions?

If the Chief Justice was looking for consensus in this case, he was successful—but only to the limited extent that all of the justices were willing to acknowledge a ministerial exception. His inability to suggest future guidelines for who qualifies as a minister may indeed be the consequence of a Court that was “reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister.”⁶⁶ On the other hand, it may also be the result of a genuine disagreement among the justices which will only be resolved as additional cases work their way through the legal process.

ENDNOTES

¹ 42 U.S.C. §2000e *et seq.*

² 132 S. Ct. 694 (2012).

³ *Supra*, note 2, at 699.

⁴ *Supra*, note 3, at 883 (citing Def's Mot. for Partial Sum. J., Ex. Q.)

⁵ *Supra*, note 2, at 699-700.

⁶ *Supra*, note 3, at 883-884.

⁷ *Id.* at 884.

8 *Id.* at 884.

9 *Id.* at 884.

10 *Id.* at 884.

11 *Id.* at 885.

12 *Id.* at 885.

13 104 Stat. 327, 42 U.S.C. §12101 *et seq.* (1990).

14 *Id.* at §12203(a).

15 Mich. Comp. Laws §37.1602(a) (1979).

16 *Supra*, note 3, at 892.

17 *Equal Employment Opportunity Commission v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F. 3rd 769, 784 (6th Cir., 2010).

18 During oral arguments, the justices expressed broad concerns over questions of how to determine whether an employee is a “minister” and whether it is possible to withhold a ministerial exception when the employment decision was not based on a dispute over religious doctrine but was instead a pretext for an illegal employment practice. On the other hand, the justices also raised questions on narrower matters such as how to apply the ministerial exception when all of the members of a particular church are considered to be “ministers.”

19 *Supra* note 2, at 710.

20 He pointed to the first clause of the Magna Carta--which provides that

“the English church shall be free, and shall have its rights undiminished and its liberties unimpaired”—including the right to freely elect its own officials. Subsequent practice demonstrated that that right “may have been more theoretical than real” in many cases. *Id.* at 702. He then noted changes that had been made under the reign of Henry VIII—including the designation of the monarch as the supreme head of Church with the authority to appoint the high officials of the Church. Eventually the assertion of this power by the monarchy caused a number of early colonists (the Puritans to New England and William Penn to Pennsylvania and Delaware) to flee England in order to be free of the control of the Church of England. *Id.* at 702. Even in the southern colonies where the Church of England was firmly established, controversies arose over the right of the colonial governor and the Bishop of London to appoint clergy in Virginia and North Carolina. *Id.* at 703.

21 *Id.* at 703.

22 *Id.* at 703. Roberts then referred to two events involving James Madison, the primary architect of the religion clause in the First Amendment. In the first, Secretary of State Madison cautioned President Thomas Jefferson not to advise the first Roman Catholic bishop in the United States, John Carroll, on whom to appoint to direct the affairs of the Catholic Church in the newly acquired Louisiana territory—since the selection of church “functionaries” was an “entirely ecclesiastical” matter that should be left to the Church’s own judgment. (Citing “Letter from James Madison to Bishop Carroll” (Nov. 20, 1806), reprinted in 20 RECORDS OF THE AMERICAN CATHOLIC HISTORICAL SOCIETY 63 (1909). In the second case, President Madison vetoed a bill incorporating the Protestant Episcopal Church, in what was then the District of Columbia, on the grounds that the bill, which among other things included rules and procedures for the election and removal of the Church’s clergy, “exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that ‘Congress shall make no law respecting a religious establishment.’” 22 Annals of Cong. 982-9823 (1811).

23 *Id.* at 704.

24 *Id.* at 704.

25 80 U.S. 679, 13 Wall. 679, 20 L.Ed. 666 (1972).

26 *Supra*, note 2, at 727.

27 344 U.S. 94, 73 S. Ct. 143 (1952).

28 New York State statute not only defined which groups constituted the “Russian Church in America” but it also specifically noted that while the churches may have been “subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow,” they were now “an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held in Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.” Religious Corporations Law, § 5, 50 McKinney’s N.Y. Laws §105. The statute went on to state that every Russian Orthodox church in New York is subject to the jurisdiction of the Russian Church in America even if it had been incorporated before the creation of the Russian Church in America and that the trustees of every Russian Orthodox church had “the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America . . . and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America.” *Id.* at §107.

29 *Supra*, note 28, at 119.

30 426 U.S. 692, 96 S. Ct. 2372 (1976).

31 *Id.* at 724.

32 *Id.* at 720.

³³ See *Natel v. Christian and Missionary Alliance*, 878 F. 2d 1575, 1578 (1st Cir. 1989); *Rweyemamu v. Cote*, 520 F. 3d 198, 204-209 (2nd Cir. 2008); *Petruska v. Gannon University*, 462 F. 3d 294, 303-307 (3rd Cir. 2006); *EEOC v. Roman Catholic Diocese*, 213 F. 3rd 795, 800-801 (4th Cir. 2000); *Combs v. Central Texas Annual Conference*, 173 F. 3d 343, 345-350 (5th Cir. 1999); *Hollins v. Methodist Healthcare, Inc.*, 474 F. 3d 223, 225-227 (6th Cir. 2007); *Schleicher v. Salvation Army*, 518 F. 3d 472, 475 (7th Cir. 2008); *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, 929 F. 2d 360, 362-363 (8th Cir. 1991); *Werft v. Desert Southwest Annual Conference*, 377 F. 3d 1099, 1100-1104 (9th Cir. 2004); *Bryce v. Episcopal Church*, 289 F. 3d 648, 655-657 (10th Cir. 2002); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F. 3d 1299, 1301-1304 (11th Cir. 2000); *EEOC v. Catholic University*, 83 F. 3d 455, 460-463, 317 U.S. Appl. D.C. 343 (DC Cir. 1996).

³⁴ *Supra* note 2, at 706.

³⁵ Roberts rejected as untenable the EEOC's suggestion that religious organizations could defend against employment discrimination claims based on a First Amendment right to freedom of association rather than freedom of religion. *Id.* at 706.

³⁶ *Id.* at 707.

³⁷ *Id.* at 707.

³⁸ *Id.* at 707, citing App. 42.

³⁹ *Id.* at 707, citing App. 42.

⁴⁰ *Id.* at 707, citing App. 43.

⁴¹ *Id.* at 707, citing App. 49.

⁴² *Id.* at 707.

43 *Id.*, at 707.

44 *Id.* at 708, citing App. 220.

45 *Id.* at 708, citing App. 53.

46 *Id.* at 708.

47 *Id.* at 708. Roberts thought that it was significant that Perich had not only been commissioned as a minister but had also undergone significant theological training in preparation for a position with a recognized religious mission.

48 *Id.* at 708. That lay teachers performed the same duties as Perich was relevant to, but not dispositive of, the issue of whether the ministerial exception applied to her. Roberts also noted that lay teachers were only hired when called teachers were unavailable.

49 *Id.* at 708.

50 *Id.* at 709.

51 *Id.* at 709.

52 *Id.* at 709.

53 *Id.* at 709.

54 *Id.* at 709.

55 The plaintiffs alleged two categories of horrors. In the first, churches might be able to retaliate against a ministerial employee who reported criminal misconduct by the church or testified against the church's interests before a grand jury or in a criminal trial. In the second, churches might invoke the ministerial exception in order to violate employment laws with regard to the hiring of children or aliens who were not authorized to

work in the United States. *Id.* at 710.

⁵⁶ Tabor-Hosanna response was that ministerial exception would neither bar criminal prosecutions of religious organizations from interfering with law enforcement investigations and proceedings nor bar the government from enforcing general laws restricting eligibility for employment. To support its claim, Tabor-Hosanna noted that the lower courts have been applying the ministerial exception for over 40 years and it had “not given rise to the dire consequences predicted by the EEOC and Perich.” *Id.* at 710.

⁵⁷ *Id.* at 710.

⁵⁸ *Id.* at 710.

⁵⁹ *Id.* at 711.

⁶⁰ *Id.* at 711.

⁶¹ *Id.* at 712.

⁶² *Id.* at 715.

⁶³ *Id.* at 715.

⁶⁴ *Id.* at 715.

⁶⁵ *Id.* at 707.