Opinion

News



The U.S. Supreme Court is seen in Washington May 3. The court heard arguments May 11 about fired Catholic school teachers where schools said they have a ministerial exception to discrimination laws. (CNS/Reuters/Will Dunham)



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The U.S. Supreme Court on Monday heard two cases that both relate to the ministerial exception, the idea that certain employees of religious organizations have no right to sue their employers for wrongful termination because civil law has no business interfering in the internal workings of a religious organization. As in previous cases, the issues raised are many and, regrettably, too many on the political and religious left get those issues wrong.

The issue before the court is a little more complicated this time than it was when they heard the *Hosanna-Tabor* v. *EEOC* case in 2012. Then, a unanimous court ruled that a teacher at a religious elementary school could not sue the Evangelical Lutheran Church that fired her after she became sick, claiming the employment non-discrimination section of the Americans with Disabilities Act (ADA).

The teacher in that case was clearly in a ministerial position. She had been invested in her job in a religious ceremony, taught religious classes at least a few times a week and led her students in prayer. If those are not ministerial tasks, what are? So, the decision before the court was who decides who should minister in a church? They rightly concluded: The church, not the government.

These new cases are a little murkier, involving two plaintiffs, both former Catholic school teachers, one who also brings suit under the ADA and the other alleging age discrimination. Given the unanimous decision in *Hosanna-Tabor*, the plaintiffs' lawyers are not arguing there should be no ministerial exception, but that not everyone who works at a religious organization should be covered by that exception. This time the proximate question is marginally different: Who qualifies as a minister? In the end, though, we face the same underlying question, namely, who decides?

Arguing before the court on behalf of the teachers was Stanford law professor Jeffrey Fisher, who unintentionally gave the game away when he said, "The school's argument would strip more than 300,000 lay teachers in religious schools across the country of basic employment law protections and necessarily included in this number are teachers who teach *so-called* secular classes" (emphasis mine). That

"so-called" is the key. In a religious school, what qualifies as "secular," and who but the religious organization that founded and sustains the school gets to make that call?

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It can be argued that 2+2=4 and that carbon dating proves the Earth is not 7,000 years old, no matter the religion of the teacher or the students, and so being a mathematics or science instructor is not a "ministerial" position. There are two objections. First, the significance of science and math within the overall sense of what constitutes education is surely an issue with enormous religious significance and we all tend to get it wrong with great frequency. How many times during this pandemic have you heard someone say, "I believe the science?" No one "believes" science. The whole point of science is that it is not an object of belief, it is something you can demonstrate.

More importantly, anyone who thinks about the culture of a religious school will know that sometimes it is the math teacher who really exemplifies those personal and intellectual traits we associate with our religion. Sometimes it is the janitor who is the real soul of a school, armed as he or she often is with the institutional memory of the place. Creating a culture is a team effort, and so while you could have a "secular subject" there really should not be any such thing as a "secular class" in a religious school.

In an article at Vox, Ian Millhiser clearly sympathizes with the effort to restrict the ministerial exception. He admits that defining who is a minister is hard, even if it was easy in *Hosanna-Tabor*. But consider the argument he assembles to distinguish these cases from that one:

> In *Biel* and *Morrissey-Berru*, by contrast, these factors point in different directions. Both involve teachers who spent some time every week teaching Catholic religion to their students. But both of these teachers have secular degrees (although one did take "catechist courses" provided by Los Angeles's Catholic archdiocese). Both women were also classified by their schools as "lay employees."

Suddenly, Catholic liberals who resist and resent the ministerial exception have to ask themselves if all that post-conciliar talk about "the priesthood of all believers" was real or not. Do you junk it in order to achieve a desired result in these employment cases?

At the end of the day, the real trump card, no pun intended, is this: If the remedy for an injustice done to an employee at a religious institution is to entangle the federal government in the employment decisions of that religious institution, it is a remedy that is worse than the injustice. Let us be clear: Those who wish to overturn the ministerial exception or limit it extensively are asking that William Barr be empowered to involve himself in these decisions. That is not a hypothetical. He is the U.S. Attorney General, and you would be vesting his Justice Department with the ability to reach into our church. Is that really a good idea?

I have a better idea. The Catholic Church should follow its own teaching and allow its employees to unionize. In the collective bargaining process, they can introduce certain issues into the contract negotiations. As well, the Catholic Church should create a canonical process to hear cases like the two heard by the Supreme Court on Monday. It would keep the government out of it, allow for the redress of grievances and save a lot of money in legal fees! That said, if a principal, or a pastor or a bishop wants to be a jerk, the U.S. Constitution gives them the right to be a jerk, and no processes can prevent it. But, let's all agree to leave the government out of it.

[Michael Sean Winters covers the nexus of religion and politics for NCR.]

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