

**RECOGNIZING *HOSANNA-TABOR*'S LIMITED SCOPE  
AND INAPPLICABILITY TO CLERGY SEX  
ABUSE LITIGATION**

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INTRODUCTION

Just over eight years have passed since the Supreme Court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*<sup>1</sup> The Court's decision confirmed the existence of the "ministerial exception" and narrowly applied it to Title VII of the Civil Rights Act of 1964, explaining "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision."<sup>2</sup> The Court included important limiting language:

The case before us is an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her. Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise.<sup>3</sup>

*Hosanna-Tabor*'s narrow scope is evident from the limiting language the Court so carefully layered into the opinion, and lower courts should abide by that limitation. From a jurisprudential perspective, "[f]ederal courts have authority under

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1. 565 U.S. 171 (2012).

2. *Id.* at 188.

3. *Id.* at 196.

the Constitution to decide legal questions only in the course of resolving ‘Cases’ or ‘Controversies.’”<sup>4</sup> And “[a]n ‘issue’ not presented before a lower court will not be preserved for appeal. Unpreserved issues . . . usually will not be considered.”<sup>5</sup> The issue before the Court in *Hosanna-Tabor* was, as the Court explicitly stated, whether a ministerial employee of a religious institution could challenge her religious employer’s decision to fire her.<sup>6</sup> It is all the Court considered, and all the Court decided.

This Article urges a narrow reading of the Court’s decision in *Hosanna-Tabor*, and a rejection of the application of the ministerial exception/Church Autonomy Doctrine when applied to clergy sex abuse litigation based on principles of jurisprudential decision-making and the general unworkability of the Church Autonomy Doctrine. It proceeds in three parts. Part I traces the Church Autonomy Doctrine’s history and dismisses it as an unworkable legal creation. Part II examines the Court’s reasoning in *Hosanna-Tabor* and concludes the court issued a narrow ruling on a specific employer-employee relationship rather than a sweeping endorsement of the church autonomy doctrine. Part III discusses dissonance between reasoning and holdings in judicial opinions, and why the narrow holding, rather than the arguably broader reasoning, of *Hosanna-Tabor* should control. And Part IV analyzes post-*Hosanna-Tabor* cases where courts have either expanded or limited the ministerial exception doctrine.

## I. THE UNWORKABLE CHURCH AUTONOMY DOCTRINE

Professor Douglas Laycock first introduced the Church Autonomy Doctrine nearly forty years ago.<sup>7</sup> According to Laycock, “churches have a constitutionally protected interest in managing their own institutions free of government interference.”<sup>8</sup> He explained the bifurcation of the Free Exercise

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4. *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (quoting U.S. CONST. art. III, § 2).

5. John F. Muller, *The Law of Issues*, 49 WAKE FOREST L. REV. 1325, 1327 (2014).

6. *See Hosanna-Tabor*, 565 U.S. at 196.

7. *See* Douglas Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

8. *Id.* at 1373.

clause into “the freedom to believe, which is absolute, and the freedom to act, which is necessarily limited.”<sup>9</sup> But he questioned this understanding, arguing it is “rigid, simplistic, and erroneous” and “[m]any activities that obviously are exercises of religion are not required by conscience or doctrine.”<sup>10</sup> Laycock cited cases he argued recognize this Church Autonomy Doctrine, cases all involving “disputes over control of church property, church organization, and entitlement to ecclesiastical office.”<sup>11</sup>

As he must, Professor Laycock acknowledged such autonomy “may be infringed for sufficiently compelling reasons.”<sup>12</sup> He contended “[a]lleged state interests in regulating internal church affairs—e.g., protection of church members and church workers from exploitation—are usually illegitimate and should not count at all.”<sup>13</sup> In drawing a distinction between “internal” and “external” church affairs, he explained “[a]n organization has no claim to autonomy when it deals with outsiders who have not agreed to be governed by its authority.”<sup>14</sup> Crucially, Professor Laycock conceded “there is no free exercise problem in holding churches responsible to outsiders under the ordinary rules of contract, property, and tort.”<sup>15</sup>

Professor Marci Hamilton called the church autonomy doctrine “absurd, because no entity in the United States’ system of judgment is autonomous from the law.”<sup>16</sup> In criticizing Professor Mark Chopko’s argument favoring a “free space for a Bishop—free of the demands of government officials, insurers, church bureaucrats, litigants, and anyone else who would force a

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9. *Id.* at 1388 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *EEOC v. Pac. Press Publ. Ass’n*, 482 F. Supp. 1291, 1307-08 (N.D. Cal. 1979).

10. *Id.* at 1390.

11. *Id.* at 1394.

12. *Id.* at 1374.

13. Laycock, *supra* note 7, at 1374.

14. *Id.* at 1406.

15. *Id.* For further elaborations of the Church Autonomy Doctrine in the 21st century, see Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 83 (2009); Thomas C. Berg, *Ministers, Minimum Wages, and Church Autonomy*, 9 ENGAGE 135, 136 (2008); Mark E. Chopko, *Continuing the Lord’s Work and Healing His People: A Reply to Professors Lupu and Tuttle*, 2004 BYU. L. REV. 1897, 1919 (2004).

16. Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 233 (2007).

particular decision or approach on a Bishop,”<sup>17</sup> she argued “neither [he] nor Laycock seem to apprehend the folly of immunizing institutions and their leaders from social accountability . . . .”<sup>18</sup> In her critique of the Church Autonomy Doctrine, Professor Hamilton drew a powerful and apt comparison:

No one would sanction a First Amendment theory that would permit the murder of others to occur without accountability to society. There is hardly more reason to defend a First Amendment theory that would forbid society from using the law to deter religious organizations from permitting, aiding and abetting, and furthering the childhood sexual abuse of children by their clergy, employees, and volunteers.<sup>19</sup>

The idea of internal church affairs and external conduct subjecting the Church to liability is mythological. After all:

Everything about clergy abuse happens inside the religious organization—the victim, usually a member of the church, is acquainted with the perpetrator through his role as clergy, the reporting of the abuse to the hierarchy (or other members) occurs within the organization, as does the subsequent cover up, and all of the proof is held within the organization’s employment files.<sup>20</sup>

Professor Hamilton continued her blistering criticism of the Church Autonomy Doctrine, persuasively arguing “[t]here is very strong reason to doubt the soundness of a doctrine that would protect churches from legal liability based on their need for self-determination.”<sup>21</sup> And when one articulates the point out loud, its

17. *Id.* at 235 (quoting Mark E. Chopko, *Shaping the Church: Overcoming the Twin Challenges of Secularization and Scandal*, 53 CATH. U. L. REV. 125, 125 ack. (2003)).

18. *Id.*

19. *See id.* at 231; *see also* Janna Satz Nugent, Comment, *A Higher Authority: The Viability of Third Party Tort Actions Against a Religious Institution Grounded on Sexual Misconduct by a Member of the Clergy*, 30 FLA. ST. U. L. REV. 957, 974-75 (2003) (“For example, laws prohibiting murder would have no application to human sacrifices performed pursuant to some religious practice.”); John Trevor Wood, Note, *Causes of Action in Missouri Against the Church and Clergy for Sexual Misconduct in Gibson v. Brewer*, 65 UMKC L. REV. 1027, 1050 (1997) (“The First Amendment fear factor is disappearing, and the protection of children is taking the front seat in clergy sexual misconduct cases. ‘Religion and the First Amendment does not serve as the defense it once did. Courts seem to be finally adopting the notion that an abuse of trust by clergy, which amounts to an abuse of the religion, never has and never should have special status in tort law.’”).

20. *See* Hamilton, *supra* note 16, at 237.

21. *Id.*

fragility and untenability become instantly clear. How can covering up child abuse be within a “constitutionally protected sphere” beyond the reach of the secular judicial system? In closing, Hamilton credits Church reforms not on its autonomy from secular judicial intervention, but precisely *because* of secular judicial intervention.<sup>22</sup>

Adding to Professor Hamilton’s critique, Professor Carmella explained the history of the Religion Clauses, writing, “[t]he Religion Clauses were born of ‘social necessity’—to ensure a social environment in which people of different faiths ‘might live together in peace.’”<sup>23</sup> Protecting a heterogeneous faith environment is laudable and sensible. Creating a full-fledged carveout from judicial oversight is dangerous and nonsensical. While it is true “the application of tort law, and particularly duty principles, must avoid abridging the free exercise of religion or entangling church and state”<sup>24</sup> there is no impregnable “sphere of activity with ‘independence from secular control or manipulation,’ a sphere where ‘civil courts exercise no jurisdiction.’”<sup>25</sup> Professor Carmella argued no “salutary goals are promoted by the application of autonomy principles to situations where decisions of ecclesiastical authorities ignore[] the devastating human cost of the illegal actions of their employees.”<sup>26</sup>

As Professors Hamilton and Carmella argued, the Church Autonomy Doctrine, at least as an absolute immunity from liability for clergy sex abuse, is unworkable and untethered from reality. This is especially so because, as Professor Hamilton discussed, all of the related documents, reports, and indicia of abuse are housed within the church.<sup>27</sup> “Everything about clergy

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22. *Id.* at 245 (“None of the reforms embraced to date by the Catholic Church were taken as a result of autonomous actions. Rather, they were triggered by scandal and litigation, and there is good question how effective they have been, as evidence of further abuse and cover up continues to appear.”).

23. Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 8 (2017) (quoting JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 62, 69 (2005)).

24. Victor E. Schwartz & Christopher E. Appel, *The Church Autonomy Doctrine: Where Tort Law Should Step Aside*, 80 U. CIN. L. REV. 431, 433 (2011).

25. *Id.* at 453.

26. Carmella, *supra* note 23 at 54.

27. *See* Hamilton, *supra* note 16, at 236-37.

abuse happens inside the religious organization” which means the line between internal and external church affairs, the line Professors Laycock clings to, is erased.<sup>28</sup>

Clinging to such an artificial delineation as internal and external ignores the realities of a church’s relationship with its clergy, its members, and the general public. One hypothetical Professor Laycock seems to acknowledge is not subject to a free exercise problem is something like an automobile crash. Professor Laycock conceded “[I]n general, there is no free exercise clause problem in holding churches responsible to outsiders under the ordinary rules of contract, property or tort.”<sup>29</sup> This acknowledgment supports the proposition an auto accident between a member of the church, say, a church youth group leader and a third-party, would be subject to normal tort law.<sup>30</sup> There, a factfinder might need to examine church records detailing vehicle maintenance, insurance, licensure of employees, and other “internal” documents. The same is true of a breach of contract claim, something else Professor Laycock conceded is appropriate as an external matter, not shielded by the Church Autonomy Doctrine.<sup>31</sup> The same internal decisions, records, and workings of the Church would play an important role in the adjudication of the claim.

This argument by no means questions the applicability of ecclesiastical abstention when it comes to pure matters of faith. When “the highest ecclesiastical authority in each church promulgates [something] as the faith and practice of that church” such decision is entitled to judicial recognition and abstention.<sup>32</sup> But there are no “theological doctrines” at play when a secular court evaluates clergy misconduct and whether the clergy’s supervisor knew about the misconduct, attempted to cover up the misconduct, and allowed the misconduct to occur.

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28. *Id.* at 237.

29. See Laycock, *supra* note 7, at 1406.

30. See *id.*; see also *supra* note 14 and accompanying text.

31. See *id.*

32. Roman Catholic Diocese of Jackson v. Morrison, 905 So. 2d 1213, 1251 (Miss. 2005) (Smith, C.J., Dissenting) (quoting *Mt. Helm Baptist Church v. Jones*, 30 So. 714, 716 (Miss. 1901)); see also Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-09 (1976); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 107-08 (1952).

The Church Autonomy Doctrine cannot be extended to absolutely inoculate religious institutions from clergy abuse-related claims. The Supreme Court explicitly refused to extend any such protection when, in 2012, it decided *Hosanna-Tabor*, affirming the applicability of the ministerial exception to employment disputes between clergy and their religious institutional employer.<sup>33</sup> Just as Professor Hamilton dismissed Professor Laycock's Church Autonomy Doctrine as unsound and absurd, so too must *Hosanna-Tabor*'s reasoning be dismissed as unsound and unworkable in the practical realities of church liability, and the decision limited to its holding.

## II. EXAMINING THE COURT'S *HOSANNA-TABOR* REASONING

Cheryl Perich, a Michigan schoolteacher hired by the Hosanna-Tabor Evangelical Lutheran Church and School, sued the school when it fired her for “insubordination and disruptive behavior.”<sup>34</sup> A doctor had diagnosed Ms. Perich with narcolepsy, and when she met with the school to discuss her employment status and her return from medical leave, the school's principal, Stacey Hoeft, told Ms. Perich the school filled her position with a contract teacher.<sup>35</sup> The school board made clear it wanted Ms. Perich to resign, and when she refused, and when principal Hoeft told Ms. Perich the board would likely fire her, Ms. Perich contacted an attorney.<sup>36</sup>

Litigation commenced, and the Equal Opportunity Employment Commission (EEOC) sued Hosanna-Tabor, alleging it fired Ms. Perich in retaliation for Perich's threat to sue the school for violating her rights under the Americans with Disabilities Act.<sup>37</sup> Hosanna-Tabor moved the district court for summary judgment, asserting the “ministerial exception” and Ms. Perich should have resolved her dispute internally with the church rather than pursuing litigation.<sup>38</sup> The district court agreed and

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33. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 202 (2012).

34. *Id.* at 177-79.

35. *Id.* at 178.

36. *Id.* at 178-79.

37. *Id.* at 180.

38. *Id.*

granted Hosanna-Tabor's motion for summary judgment; the U.S. Court of Appeals for the Sixth Circuit reversed and remanded, concluding while the ministerial exception exists, Ms. Perich did not fall within its ambit as a schoolteacher.<sup>39</sup>

This factual scenario exclusively limited the issue before the Supreme Court to whether the ministerial exception applied with respect to lawsuits by employees against religious employers.<sup>40</sup> The Supreme Court explained the "Courts of Appeals have uniformly recognized the existence of a 'ministerial exception,' grounded in the First Amendment, that precludes application of such legislation [like Title VII] to claims concerning the *employment relationship between a religious institution and its ministers*."<sup>41</sup> The Court could have taken a broader approach in framing the issue.<sup>42</sup> It did not. In contrasting *Hosanna-Tabor* with *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>43</sup> the Court explained *Hosanna-Tabor* "concerns government interference with an *internal church decision that affects the faith and mission of the church itself*."<sup>44</sup> After concluding a ministerial exception does exist, in applying it to this case, the Court reasoned "[w]e are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister."<sup>45</sup>

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39. *Hosanna-Tabor*, 565 U.S. at 180-81.

40. *Id.* at 188.

41. *Id.* (emphasis added).

42. See, e.g., Michael Evan Gold, *Levels of Abstraction in Legal Thinking*, 42 S. ILL. U. L.J. 117, 121 (2018) ("When the issue in a case can be framed at various levels of abstraction, framing the issue at a particular level can affect the outcome of the issue or its effect on other parties."); Phillip M. Kannan, *But Who Will Protect Poor Joshua Deshaney, A Four-Year-Old Child with No Positive Due Process Rights?*, 39 U. MEM. L. REV. 543, 548 (2009) ("The way that the courts frame issues can influence or even determine the outcome of cases."); Erin Casper Borissov, Note, *Global Warming: A Questionable Use of the Political Question Doctrine*, 41 IND. L. REV. 415, 443 (2008) ("By framing the issue so broadly, the district court was able to expand the reach of any potential judicial decision well beyond the specific parties and allegations of the complaint."); David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 854 (2004) ("[J]udges control the framing of issues before the court . . . ."); Jane B. Baron & Richard K. Greenstein, *Constructing the Field of Professional Responsibility*, 15 NOTRE DAME J. L. ETHICS & PUB. POL'Y 37, 63 (2001) ("It is well understood that the framing of the issue affects which rules and facts will be deemed relevant, as well as what remedies might be available.");

43. 494 U.S. 872 (1990).

44. *Hosanna-Tabor*, 565 U.S. at 190. (emphasis added).

45. *Id.*



The Court goes on to analyze Ms. Perich's role in the church and whether she qualified as a minister.<sup>46</sup>

The Court made crystal clear, both through its reasoning and its express limitation, it *only* considered the ministerial exception in the context of a church employee, one determined by the Court to be a "minister," suing her religious employer for violations of employment law.<sup>47</sup>

### III. DIVORCING THE REASONING FROM THE HOLDING: HOSANNA-TABOR'S NARROW HOLDING SHOULD CARRY THE DAY DESPITE A BROADER REASONING

The Court's narrow holding should carry the day, not its arguably broader reasoning. Scholars critical of the Court's sometimes divorced reasoning and holding point out a similar approach. For example, in critiquing the Court's decision *Bethel School District v. Fraser*,<sup>48</sup> one commentator complained "[t]he Court's reasoning was applied in a haphazard fashion, failing at points to incorporate the elements of the doctrinal tests which are traditionally used in resolving first amendment questions."<sup>49</sup> In the commentator's view, "the Court did not—but should have—employed a time, place, and manner analysis to support its decision" supporting the school district's First Amendment right to restrict speech.<sup>50</sup> In other words, the Court took a short cut: it reached the proper holding, but it employed "haphazard" reasoning without relying upon established First Amendment tests to support the holding.

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46. *See id.* at 190-95.

47. *See* Angela C. Carmella, *Catholic Thought on the Common Good: A Place for Establishment Clause Limits to Religious Exercise*, 15 U. ST. THOMAS L.J. 546, 575 (2019). Carmella remarks that:

Had courts uniformly adopted an autonomy stance on the tort actions in sex abuse cases, the impact nationwide would have had nothing to do with increased religious freedom. Instead, thousands of situations of clergy sex abuse would have gone unaddressed. With no legal accountability, churches would not have made efforts at reform. An entire class of individuals suffering great harm from clergy abuse in religious institutions would have been deprived of legal recourse, while those suffering harms from employee abuse in secular institutions would have claims that were legally cognizable and redressable.

*Id.*

48. 478 U.S. 675 (1986).

49. John C. Polifka, Note, *Bethel School District v. Fraser: A Legitimate Time, Place, and Manner Restriction on Speech in the Public Schools*, 32 S.D. L. REV. 156, 156 (1987).

50. *Id.*

Another commentator critiqued the Court's holding/reasoning mismatch in *Walz v. Tax Commissioner of City of New York*.<sup>51</sup> In failing to sufficiently apply an Establishment Clause analysis to a potentially problematic tax decision—in fact, only addressing the issue in a footnote—the commentator argued “[t]he brevity of the Court’s discussion [of the Establishment Clause analysis] demonstrates its feebleness.”<sup>52</sup> The issues presented “rais[ed] more of an Establishment Clause argument than the Court was willing to entertain” and the Court’s result struggled to find legitimacy because of the foundational cracks in the reasoning.<sup>53</sup>

An excellent discussion of the relative importance of the Court’s reasoning lies in Professor Wells’ analysis of the legitimacy of Supreme Court decisions. Professor Wells begins by noting Judge Richard Posner’s dismissal of a decision’s reasoning as “‘professional varnish’ and a ‘mask,’ behind which the real work of deciding cases takes place.”<sup>54</sup> The “work horses and the show horses of constitutional argument,” Professor Wells argues, are the two types of reasoning: “(a) those that do the work of deciding the cases, and (b) those that are put forward for the purpose of creating an impression of judicial deference to text and history.”<sup>55</sup>

The Court providing reasoning is important because it “demonstrates that the majority has satisfied the requirements of legal legitimacy.”<sup>56</sup> But “[t]he attentive reader of [Supreme Court] opinions sometimes finds that the reasons the Court stresses do not fully account for the outcome . . . .”<sup>57</sup> Further, Professor Wells explains Justices may apply different types of reasonings in different cases. “One line of reasoning will better satisfy the demands to fidelity to law, while another provides the

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51. 397 U.S. 664 (1970).

52. Michael K. Ryan, Note, *A Requiem for Religiously Based Property Tax Exemptions*, 89 GEO. L.J. 2139, 2157 (2001).

53. *Id.* at 2157-59.

54. Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1012 (2007) (quoting Richard A. Posner, *Forward: A Political Court*, 119 HARV. L. REV. 31, 44, 52, 88 (2005)).

55. *Id.* at 1012.

56. *Id.* at 1020.

57. *Id.* at 1022.

public with a rationale it prefers.”<sup>58</sup> In these circumstances, the Court must “decide which to sacrifice or subordinate.”<sup>59</sup>

But these decisions, these alternative types of rationales, underscore the relative low value of reasoning. If the Court must choose between fidelity to law or a publicly palatable rationale, how can spectators rely on an opinion’s rationale? Rather, relying on the Court’s holding is a much more satisfying, predictable, and safe approach. With the understanding of the gyrations and machinations of vote collecting, and with nobody else in the room where it happens, relying on the Court’s holding allows parties to know how to conduct their affairs.<sup>60</sup>

The Court’s decision in *Hosanna-Tabor* is no exception; the Court holds narrowly but reasons broadly. Chief Justice Roberts, writing for the Court, begins his analysis by writing “[c]ontroversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta.”<sup>61</sup> He continues with a discussion of the Puritans fleeing to New England, divisions between religious factions in the South, and, eventually, the First Amendment.<sup>62</sup> The Court indeed found a ministerial exception exists and “[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision.”<sup>63</sup> And it roots this exception in both the Free Exercise and Establishment Clauses.<sup>64</sup>

The greatest dissonance in the opinion’s reasoning comes when Chief Justice Roberts distinguishes *Hosanna-Tabor* from *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>65</sup> In *Employment Division*, the Court considered whether the Free Exercise Clause permitted a state to include “religiously inspired peyote use” within its general criminal

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58. *Id.* at 1024.

59. *Id.*

60. *See, e.g., The Room Where it Happens, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atlantic Records 2015) (“No one really knows how the game is played/The art of the trade/How the sausage gets made . . . No one really knows how the/Parties get to yesssss/The pieces that are sacrificed in/Ev’ry game of chesssss . . .”).

61. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182 (2012).

62. *Id.* at 182-84.

63. *Id.* at 188.

64. *Id.* at 188-89.

65. 494 U.S. 872 (1990).

prohibition on use of the drug.<sup>66</sup> The Court acknowledged free exercise of religion “often involves not only belief and profession but the performance of (or abstention from) physical acts . . . .”<sup>67</sup> Justice Scalia, writing for the Court, emphatically stated “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”<sup>68</sup>

In distinguishing *Hosanna-Tabor* from *Employment Division*, Chief Justice Roberts acknowledged the Americans with Disabilities Act is a valid and neutral law of generally applicability—just like the ban on peyote consumption in *Employment Division*—“[b]ut a church’s selection of its ministers is unlike an individual’s ingestion of peyote. [*Employment Division v. Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself.”<sup>69</sup>

This seems more like the disparate treatment at issue in *United State Department of Agriculture v. Moreno*,<sup>70</sup> where the Court held “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.”<sup>71</sup> Without considering the political views and differences between indigenous people in Oregon and a Lutheran church in Michigan, one is hard-pressed to see how *Employment Division* and *Hosanna-Tabor* result in opposite outcomes.

#### IV. HOSANNA-TABOR DOES NOT EXTEND THE MINISTERIAL EXCEPTION DOCTRINE TO CLERGY ABUSE CASES

Since *Hosanna-Tabor*, courts around the country have expanded the ministerial exception doctrine/church autonomy doctrine in various contexts. In *In re Catholic Diocese of*

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66. *Id.* at 874.

67. *Id.* at 877.

68. *Id.* at 878-79.

69. *Hosanna-Tabor*, 565 U.S. at 190.

70. 413 U.S. 528 (1973).

71. *Id.* at 534 (finding law was “intended to prevent so-called ‘hippies’ and ‘hippie communes’ from participating . . .” in a neutral and generally applicable governmental benefits program, and the law violated the Equal Protection Clause).

*Wilmington, Inc.*,<sup>72</sup> a former employee of the Catholic Diocese of Wilmington intervened in the bankruptcy proceedings asserting his entitlement to “pension and sustenance, based on a Canonical action between [the former employee] and the Diocese before the Vatican.”<sup>73</sup> The Plan Administrator objected and asserted the Diocese could not be liable for any of the claims.<sup>74</sup> The bankruptcy court judge conducted an exhaustive historical analysis of the ministerial exception, ending with the Supreme Court’s decision in *Hosanna-Tabor*.<sup>75</sup> He applied the ministerial exception, upon the Plan Administrator’s motion, and concluded the bankruptcy court could not grant relief to the former employee “after his removal from the active ministry.”<sup>76</sup>

And in *In re Archdiocese of Milwaukee*,<sup>77</sup> the court reached substantively the same decision. It applied *Hosanna-Tabor* to a former priest seeking back pay resulting from his wrongful termination as a Catholic priest.<sup>78</sup> The court denied the former priest’s request, holding “[s]ince the church alone decides the employment and termination of its ministers, this Court cannot find the [Archdiocese of Milwaukee] liable for making a decision that [the former priest] disputes.”<sup>79</sup>

Presciently, courts applying *Hosanna-Tabor* in cases of clergy sex abuse have refused to extend its holding. In *Doe #2 v. Norwich Roman Catholic Diocesan Corp.*,<sup>80</sup> the diocesan defendants argued *Hosanna-Tabor*’s “language ‘eviscerates’ the holding of *Smith* and the Connecticut Superior Court cases that have relied upon it.”<sup>81</sup> The court disagreed. It explained “the Supreme Court explicitly states that ‘[t]he case before us is an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her.’”<sup>82</sup> The Connecticut Superior Court concluded “*Hosanna-Tabor* simply stands for the

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72. 513 B.R. 639 (Bankr. D. Del. 2014).

73. *Id.* at 642-43.

74. *Id.* at 643.

75. *Id.* at 644-48.

76. *Id.* at 650-51.

77. 515 B.R. 579 (Bankr. E.D. Wis. 2014).

78. *Id.* at 580.

79. *Id.* at 584.

80. 56 Conn. L. Rptr. 460, 2013 WL 3871430 (Conn. Super. Ct. July 8, 2013).

81. *Id.* at \*3.

82. *Id.* (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012)).

proposition that a minister is barred from bringing an employment discrimination lawsuit against her employer” and because of *Hosanna-Tabor*’s “limiting language,” the court “is unwilling to extend the holding . . . beyond its facts.”<sup>83</sup> It explicitly explains “the allegations of failure to warn and negligent supervision are not clearly precluded by *Hosanna-Tabor*” and the court could not strike these counts under the First Amendment.<sup>84</sup>

Similarly, in *Doe v. Roman Catholic Bishop of Orange*,<sup>85</sup> the United States District Court for the Central District of California refused to extend *Hosanna-Tabor* to claims arising from a priest’s alleged sexual abuse. The court was “not persuaded that *Hosanna-Tabor* precludes Plaintiff’s claim for negligent hiring, retention, and supervision arising out of alleged sexual abuse and harassment . . . .”<sup>86</sup> In holding its decision did not impermissibly entangle the court with religious decisions, it explained:

Sadly, the Diocese of Orange characterizes Plaintiff’s case as merely an “employment law dispute” and attempt to distinguish her case from a child sexual abuse case. It claims that in child abuse cases, unlike adult cases, there is a conflict of “two titanic policy considerations—a church’s Constitutional right to select and control its ministers, and the belief that protecting children is a paramount policy consideration.” The Diocese of Orange also argues that there is a “civil and parochial divide in acceptable sexual behavior” with adults because “sexual contact between a consenting adult and a priest is prohibited by religious doctrine and practices, but offends no civil law.” These distinctions between a child abuse case and this case are not relevant and are poor attempts to minimize Plaintiff’s deeply disturbing allegations. The Diocese of Orange is ignoring Plaintiff’s allegations that Father Kim *sexually abused her without her consent*, and is essentially implying that the safety, security, and bodily integrity of women in the church are not paramount policy considerations. The Diocese of Orange’s argument is meritless. The Court need not say anything more.<sup>87</sup>

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83. *Id.*

84. *Id.*

85. No. 17-01424, 2018 WL 6118442 (C.D. Cal. Feb. 12, 2018).

86. *Id.* at \*3.

87. *Id.* at \*5 (citations omitted).

This comprehensive explanation of why the court does not interfere in internal ecclesiastical decisions of the diocese fits properly into the narrow holding of *Hosanna-Tabor*. Or, rather, it appropriately does *not* fit into *Hosanna-Tabor*. Several other courts have reached the same conclusion.<sup>88</sup>

### CONCLUSION

The Supreme Court, as it should, addressed the facts of the case before it when it decided *Hosanna-Tabor*. It recognized the ministerial exception (as part of the church autonomy doctrine) as applied to a ministerial church employee suing the church employer over employment-related claims. That is all it did. Courts have appropriately recognized the limited scope of *Hosanna-Tabor* and should continue to recognize its inapplicability to clergy sex abuse cases. If and when the case or controversy presents itself to the Supreme Court, it may rule on the expandability of the doctrine. But until then, churches may not use *Hosanna-Tabor* to defend lawsuits over sexual abuse.

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88. See, e.g., *Givens v. St. Adalbert Church*, 56 Conn. L. Rptr. 585, 2013 WL 4420776, at \*8 (Conn. Super. Ct. July 25, 2013) (“[T]he *Hosanna-Tabor* court cautioned that its ruling was applicable only to an employment discrimination suit brought on behalf of a minister and specifically stated that it expressed no view on whether the ministerial exception would bar other types of suits . . . .”); *Lopez v. Watchtower Bible and Tract Soc’y of New York, Inc.*, 246 Cal. App. 4th 566, 599 (Cal. Ct. App. 2016) (The ministerial exception “is not applicable here. The ministerial exception applies to bar an action by a clergy member against a religious institution. Watchtower has not cited, nor are we aware of, any decisions extending this rule to preclude a third party action against a religious organization for the tortious conduct of its agents. And the law appears to be to the contrary.”) (citations omitted).