

Hosanna-Tabor: A Big Victory for Religious Freedom

Written by IRFA

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The US Supreme Court announced on January 11, 2012, a stunning victory for religious freedom. Unlike most church-state decisions, this one was unanimous. The nine justices together administered a sharp rebuff to the federal government, which had argued against the principle upheld by the Supreme Court. That principle is the right of religious organizations to choose their own leaders. Thus the decision vindicated the religious freedom of religious organizations—distinct from the usual focus on the religious rights of individuals. And here the freedom of religious organizations was upheld against a claim of discrimination.

All of this is noteworthy and praiseworthy. But the case was about a “ministerial” employee. What does the decision mean for parachurch organizations and their staff?

The case, *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Opportunity Employment Commission*, centered on the validity of the “ministerial exception.” That’s a judge-created concept that prevents a religious institution from being second-guessed—charged with discriminatory action—if it fires, refuses to hire, or doesn’t promote a “ministerial” employee.

Here the employee was a commissioned teacher in a church-operated school. She taught secular subjects, but was specially trained in theology, called by the congregation, and conducted religious activities. The federal government said the school violated the Americans With Disabilities Act when it fired her and that there is no “ministerial exception” that broadly shields religious institutions from such a charge of discrimination. To defend their leadership decisions, churches, no different than secular groups must rely on the First Amendment’s right of association.

Not so, said the unanimous Supreme Court. “Requiring 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. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.” That’s a violation of both the Free Exercise Clause, “which protects a religious group’s right to shape its own faith and mission through its appointments,” and the Establishment Clause, “which prohibits government involvement in such ecclesiastical decisions.” The First Amendment “gives special solicitude to the right of religious organizations.” The government’s contrary view is “remarkable” and erroneous.

Thus, the Court said, while “the interest of society in the enforcement of employment discrimination statutes is undoubtedly important, . . . so too is the interest of religious groups in who will preach their beliefs, teach their faith, and carry out their mission.” The important cause of curbing discrimination does not justify denying the right of religious institutions to pick their leaders.

Note those terms: not only preaching but teaching and carrying out a religious group’s mission.

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And note that the Court backed up the decisions of a school involving a teacher. The freedom of religious organizations to choose their leaders without government interference extends beyond churches and clergy. But how far beyond?

Consideration of religion in employment decisions outside of churches usually rests not directly on the ministerial exception but rather on the “religious exemption” that Congress wrote into our premier national employment law, Title VII of the 1964 Civil Rights Act. Here Congress said that it isn’t discrimination for a religious organization—a faith-based school, charity, hospital, etc.—to consider religion when deciding who to hire and fire. (This freedom is sometimes limited when government funds are involved.) This is a statutory right that covers all employees of a religious organization. It was not at issue in Hosanna-Tabor.

And yet Hosanna-Tabor has a bearing on this statutory religious hiring freedom. It has a bearing, too, on the desire of religious student clubs to choose without interference those leaders they regard to be faithful in belief and conduct.

Recall the Court’s stress on the special freedom, anchored in the Religion Clauses, of religious organizations to choose leaders, distinct from the rights of of secular organizations. This has broad consequences, as Michael Stokes Paulsen says: “Student religious groups, at state university campuses and at public schools, are religious communities, too. So are para-church ministries and many other types of religious organizations. They, too, have the right to control the selection of those who personify their beliefs, and to share their on faith and mission through their decisions.” (Paulsen, “Hosanna in the Highest!” Public Discourse, Jan. 13, 2012. <http://www.thepublicdiscourse.com/2012/01/4541>

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So the Supreme Court’s robust defense of the autonomy of religious organizations gives firmer ground to defend the freedom of religious clubs and charities to choose their own leaders, not withstanding society’s “undoubtedly important” interest in combating invidious discrimination.

Yet securing pluralism and religious freedom in our society requires another step beyond this ringing defense of the internal freedom of faith-based organizations. We need, too, a renewed constitutional defense of the varied ways of serving society that organizations guided by differing convictions seek to offer. In our day, those diverse ways—the pro-life hospital, the drug treatment program that counts on religious transformation, the adoption agency that works with married families—are too often simply labeled as discriminatory. But their freedom to serve differently must be upheld just as much as Hosanna-Tabor upheld their right to be governed differently.