California Assembly Committee on Judiciary

INFORMATIONAL HEARING

"Workers' Rights and Religious Employers after *Hosanna-Tabor*"

Milton Marks Auditorium
455 Golden Gate Avenue
San Francisco, CA 94102

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10:30 a.m. -12:00 p.m.

Hearing Background Paper
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Introduction

The hearing and background paper will consider the impact of the U.S. Supreme Court's decision in *Hosanna-Tabor v. EEOC* (2012) on the enforcement of employment discrimination laws in California. *Hosanna-Tabor* affirmed that the "ministerial exception" – a doctrine first articulated by the federal circuit courts in the 1970s – creates a constitutional bar on the ability of a "minster" to press an employment discrimination claim against his or her religious employer.[1] Because the term "minister," for purposes of the exception, includes non-ordained employees not usually considered ministers, the *Hosanna* decision creates a conflict between competing rights and interests. On the one hand, courts have long and consistently held that a religious organization has a First Amendment right to select ministers that profess its faith, free from government interference. On the other hand, the state has a compelling interest in protecting employees from unlawful forms of employment discrimination. Neither the Committee, nor this background paper, presume that there is an easy or unequivocal resolution to this conflict or what form, if any, such a resolution would take. The primary purpose of this informational hearing is, simply, to inform.

The conflicts created by *Hosanna-Tabor* are not abstract or speculative, especially in light of the San Francisco Archdiocese's announcement earlier this year that it will revise teacher contracts for the upcoming year to include a more specific "morality clause." According to press reports, the new contracts also designate, or at least strongly imply, that teachers are "ministers" insofar as Catholic education is inseparable from the spiritual mission of the Church.[2] Such a

[1] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC* (2012) 132 S. Ct. 694.

[2] At the time of this writing, there were conflicting reports as to whether or not teachers would be designated as "ministers" in the new contract. In February of this year, the contracts apparently did indeed make reference the

designation, if accepted by the courts, would have profound implications on the legal protections afforded to Catholic school teachers in the diocese. Last year, the Oakland diocese made a similar revision to contracts and faculty handbooks, as did dioceses around the nation, most controversially in Cleveland and Cincinnati. Spokespersons for the Catholic Church point out that teacher contracts have always contained morality clauses, and that the purpose of the more specific language in the revised contracts is to more precisely convey the Church's expectations to its teachers. Many teachers, parents, and community members, on the other hand, fear that the new clauses will permit the Church to fire teachers whose private conduct, in the opinion of the Diocese, does not conform with Church teachings – especially on controversial matters relating to gender identity, sexuality, abortion, and same-sex marriage.

The purpose of this hearing to allow members of the Assembly Judiciary Committee – the jurisdiction of which includes both employment discrimination and the First Amendment – to hear from both sides in the dispute. This background paper seeks to provide a broader context to the dispute. The paper is divided into three parts: Part I provides some background and an overview of the *Hosanna-Tabor* ruling. Part II provides an overview of employment discrimination law in California and the way that courts have applied both this law, and the ministerial exception. Part III looks very briefly at the related, but analytically distinct, issue of "morality clauses" and their enforcement against other public and private employees, especially teachers. While an effort to enforce a morality clause could prompt an employment discrimination action and thus implicate the "ministerial exception," it is important to keep in mind that a morality clause is a subject of contract law that is enforceable whether the ministerial exception applies to a particular employee, or not.

Part I:
Hosanna Tabor, Laws of General Applicability, And the "Ministerial Exception"

Background: The two religion clauses of the First Amendment, as applied to the states by the Fourteenth Amendment, prohibit any government actor – federal, state, or local – from enacting or enforcing any law "respecting the establishment of religion, or prohibiting the free exercise thereof." Most likely, the Establishment clause was originally intended to prevent the newly-created national government from establishing an official national church, akin to the Church of England. The Free Exercise clause, it appears, was originally intended to prohibit laws that persecuted people for practicing an unpopular religion. Over time, however, the Establishment clause expanded to mean not only that the government may not establish an official religion, but also to provide that the government may not take actions that support or favor one religion over

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teacher's role as minister and even suggested that their title was that of "teacher-minister." Newspaper reports in June, however, indicated that "minister" has been removed from the contract, at least as to any job title. As discussed below, whether the word "minster" is the contract, or even if the teachers' duties were expressly labeled as "ministerial," this would apparently not matter under *Hosanna-Tabor*. In making a determination as to whether an employee is a minster for purposes of the ministerial exception, a court will look not at the employee's title, but at his or her specific duties and functions. The title of "minster" may be a factor in that determination, but it is not dispositive of the matter.

another. Similarly, the Free Exercise clause has expanded to mean not only that the government may not persecute people for practicing their faith, but also to mean that the government may not do anything that unduly "burdens" the free exercise of religion or discriminates against a particular religion. According to historian Edwin Gaustad, the two clauses taken together provide a "double guarantee" – that government shall be "neutral" and that government may "neither hinder nor help" religion.[3] While the two clauses may, as an ideal, provide such neutrality, the courts have discovered that, in practice, they are in tension with each other, if not in outright conflict. For example, in one of the seminal cases of the twentieth century, the U.S. Supreme Court had to decide whether a local policy that subsidized transportation costs of students who were enrolled in private schools could be offered to religious schools. On the one hand, to provide the subsidy to religious schools could violate the Establishment clause by using public money to aid religious students, parents, and schools. On the other hand, to deny benefits to religious schools that were available to non-religious private schools could violate the Free Exercise clause by discriminating against, or placing an unequal burden on, religious schools.[4]

Exempting Religious Groups and Persons from "Laws of General Applicability:" The conflict between the Free Exercise and Establishment clauses also arises when the courts consider whether to "accommodate" a religious duty or practice that would otherwise constitute a violation of the law. The general question raised by the "ministerial exception" is an old one and has been raised in many other contexts. The question is simply this: to what extent should religious persons or organizations be exempted from laws that apply to everyone else?

Clearly laws that intentionally target a particular religious belief or practice violate the Free Exercise clause. But what if a law has a secular purpose, is not intended to advance or inhibit any particular religion, but nonetheless unintentionally and incidentally interferes with some group's ability to freely exercise its religion? The U.S. Supreme Court first faced this question in 1879 in *Reynolds v. U.S.*, where the Court considered a Mormon polygamist's challenge to an anti-bigamy law enacted in what was then the Territory of Utah. The petitioner argued that his religion not only permitted, but in fact required, that Mormon men with the financial wherewithal and requisite spiritual fitness take multiple wives. The Court presented the conflict as one between the petitioner's undeniable free exercise rights, on the one hand, and the right of the government to regulate and preserve traditional marriage as a legal arrangement between *one* man and *one* woman, on the other. The Court ruled in favor of the government's interest in regulating marriage. Chief Justice Waite declared for the Court that a person's religious

[3] Edwin Gaustad, *Proclaim Liberty Throughout the Land: A History of Church and State in America*. (New York: 1999), p. x.

[4] *Everson v. Board of Education* (1947) 330 U.S. 1, 18. The Court held that to deny a religious organization the "benefits of public welfare legislation" when the benefits are available to similarly-situated private but non-religious organizations violates the First Amendment. We would not, the court reasoned, deny fire or police protection to a church just because the fire and police departments we, are funded by taxpayer money – religious people were, after all, taxpayers as well, and they paid schools taxes whether their children attended public school or not. The court ruled 5-4 in favor of upholding the subsidy, but the case is probably most noted for Justice Hugo Black's claim that the First Amendment erected a "wall of separation" between church and state (quoting Thomas Jefferson). Despite the "high and impregnable" wall, Black, a firm believer in the separation of church and state, upheld the subsidy because "state power is no more to be used so as to handicap religions than it is to favor them." For more recent acknowledgement of the "conflicting pressures" and "internal tension" see *Cutter v. Wilkinson* (2005) 544 U.S. 709, 719.

practices could not be an excuse for violating the law. To make the free exercise of religion "superior to the law of the land," Waite wrote, would "permit every citizen to become a law unto himself." The Court further justified its decision by distinguishing between religious "belief," which the Free Exercise clause protected, and "actions" which are subject to regulation, even if religiously motivated.[5]

Between the 1960s and 1990s, a number of decisions reached the U.S. Supreme Court that required modification of its ruling in *Reynolds*. *Sherbert v. Verner* (1963) was initiated by Adell Sherbert, a Seventh Day Adventist in South Carolina who was denied unemployment benefits because she refused to take a job that would have required her to work on Saturday. Unlike the polygamist in *Reynolds*, Sherbert had broken no laws – she simply refused to work on Saturday, her Sabbath. The Court held that where the law imposes a burden on a religious practice, the state must accommodate that practice unless there is some "compelling state interest" in *not* making the accommodation. In this case, exempting religious persons who celebrated the Sabbath from the rule requiring unemployment beneficiaries to accept "suitable employment" did not favor religion. No one would reasonably believe, Justice Brennan wrote for in the majority, that such a modest accommodation would be viewed as the "establishment of Seventh-day Adventist religion in South Carolina." Rather, it was a reasonable accommodation that removed an unfair burden to observant Seventh Day Adventists who cannot work on Saturdays which was not imposed on the majority of South Carolinians.[6]

In *Yoder v. Wisconsin* (1972), the U.S. Supreme Court held that it was similarly a reasonable accommodation to exempt the Amish from a compulsory education law that required all students to attend school until the age of 16. The Amish were willing to send their children to school through the 8th grade (when they were typically 14 years old), but they did not want to send their children to high school, where the Amish believed their children, at a particularly impressionable age, would be exposed to the corrupting influences of the modern world. The compulsory education requirement threatened the Amish way of life, as their children might meet and marry people of other faiths and move away from the community. The Court conceded that, in general, a state has a compelling interest in requiring the education of all children – whether it is to ensure an educated workforce, or to promote good citizenship – but there was not a particularly compelling interest in requiring the Amish to attend school for an additional two years if doing so interfered with their ability to practice and perpetuate their religion. The Court noted that Amish devotion to largely un-mechanized farming did not require an education beyond eighth grade, and as for the role of public schools in inculcating good citizenship, the Court noted that the Amish already seemed to be exemplary citizens. [7] As with *Sherbert*, the

[5] *Reynolds v. U.S.* (1879) 98 U.S. 145

[6] *Sherbert v. Verner* (1963) 374 U.S. 398. According to the Court, the proper question was "whether some compelling state interest enforced in the eligibility provisions of the . . . the statute [requiring a beneficiary to take "suitable employment"] justifies the substantial infringement of the appellant's First Amendment Right." (*Id.* at p. 406.)

[7] *Wisconsin v. Yoder* (1972) 406 U.S. 205. The Court also argued that the law not only violated the free exercise rights of the Amish, but that it also violated a long-recognized right of parents to control the upbringing of their children. Justice William O. Douglas, writing in partial dissent, criticized the majority for not taking into account the interests of the children who, after all, might prefer to attend high school and experience the modern world; for Douglas, the children's interest deserved as much consideration as the parent's interest in preserving a way of life.

court once again held that the First Amendment required a state to exempt religious persons and groups from laws that unduly burdened their ability to practice their religion, unless the state identified a compelling interest for not providing the exception.

In 1990, the Court rather abruptly reversed this accommodating trend in *Employment Division v. Smith*. Like *Sherbert*, that case involved a state's denial of employment benefits. Unlike Adell Sherbert, however, Alfred Smith (and one his co-workers) was fired from his counseling job at a private drug rehabilitation facility because he had, as a practicing member of the Native American Church, ingested peyote as part of a religious ritual. Because Smith had been fired for misconduct, he was ineligible for unemployment benefits. Writing for the majority, Justice Scalia adopted a variation on the reasoning in *Reynolds*, the Mormon polygamy case, to distinguish between protected "beliefs" and unprotected criminal "conduct." Justice Scalia wrote: "We 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." Scalia distinguished previous accommodation cases by noting that they either did not involve a violation of criminal laws, or involved the Free Exercise clause in conjunction with some other right, such as the right of parents to direct the education of their children. Thus, Scalia and the majority held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[8] In addition, Scalia and the majority rejected the "strict scrutiny" standard required by *Sherbert* and *Yoder*, holding that, when it came to a "generally applicable law," the state did not need to show a "compelling" state interest in enforcing it.[9] Justice O'Connor's concurring opinion agreed with the outcome, but argued that the majority had erred in rejecting the "compelling interest" requirement. Because the rights guaranteed by the First Amendment in particular held a "preferred position" in our constellation of rights, their violation could only be justified by a compelling state interest. (O'Connor concurred rather than dissented because she believed that the state had a compelling interest in enforcing criminal drug laws.)[10]

Congress attempted to override *Smith* three years later with the Religious Freedom Restoration Act (RFRA), which was signed by President Bill Clinton. RFRA declared that the framers of the Constitution recognized the free exercise of religion "as an inalienable right;" that even religiously neutral laws "may burden free exercise as surely as laws intended to interfere with religious exercise;" that governments should not burden religious exercise without a compelling justification; that the *Smith* case had inappropriately eliminated that requirement; and that henceforth the compelling interest test as set forth in [*Sherbert* and *Yoder*] would be restored.[11] However, in *City of Boerne v Flores* (1997), the Supreme Court overturned RFRA, finding that although Congress has the power to *enforce* constitutional rights, it does not have the power to

[8] *Employment Division v. Smith* (1990) 494 U.S. 872, quotes at 878-881.

[9] *Id.* at 888.

[10] *Id*. at 902-909 (O'Connor, J., concurring.)

[11] Religious Freedom and Restoration Act, 42 U.S.C. Section 2000bb

declare what those rights are, or to determine the proper level of scrutiny; those tasks of interpretation fall to the judicial branch. [12]

With the rejection of RFRA, it appeared that the Court had accepted the *Smith* holding that the free exercise clause does not require religiously-motivated conduct to be exempted from "laws of general applicability." Not all commentators are satisfied with the distinction the Court drew between cases like *Smith*, and cases like *Yoder*. *Smith*, after all, did not overturn *Yoder* or even express much disapproval of it. In both cases, the religious challenger violated a law. Why, then, were the Amish exempted from a compulsory education law, but Smith was not exempted from a policy that denied unemployment benefits to persons who had been fired for "misconduct" that involved the exercise of religion? Was the difference, as Scalia suggested, that the Amish claimed both free exercise rights and parental rights? Was the difference that Smith's violation was a felony, while the violation of Wisconsin's compulsory education law was only a misdemeanor? Neither difference seems terribly persuasive.

If *Smith* and *Yoder* are both still good precedent, what does this mean for the "ministerial exception?" State and federal laws prohibiting employment discrimination on the basis of enumerated protected categories certainly seem to be "laws of general applicability." Are employment discrimination laws more like the compulsory education law in *Yoder*, or the felony drug law in *Smith*? Even if one were to apply the "compelling interest" test advocated by Justice O'Conner and the RFRA, it would seem that preventing unlawful discrimination in employment meets that standard; but, of course, in light of *Smith* and the Court's rejection of RFRA, a state need only meet the lesser burden of showing that the anti-discrimination law was "a valid law prohibiting conduct that the State is free to regulate." It may be, as noted below, that the critical difference was that the "ministerial exception" is rooted in *both* the Free Exercise clause and the Establishment clause.

Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC: In *Hosanna-Tabor*, the U.S. Supreme Court considered "whether the Establishment and Free Exercise Clauses of the First Amendment bar [an employment discrimination suit] when the employer is a religious group and the employee is one of the group's ministers."[13] At issue was the so-called "ministerial exception," a doctrine adopted by the several federal circuit courts holding that the First Amendment religion clauses effectively prohibit courts from inquiring into a religious institution's motive for terminating the services of one of its ministers or clergy. Although the different circuit courts have developed slightly different tests for determining when a religious employee qualifies as a "minister" for purposes of the exception, they all agree that the ministerial exception is "required" by both the Free Exercise and Establishment clauses of the First Amendment and that it prevents the application of state or federal anti-discrimination laws to the religious employer-minster relationship. Some courts have found the exception to be rooted more in the Free Exercise clause, holding that such laws, as applied to religious employers, infringe upon the religious group's freedom to shape its message by deciding who can

[12] *City of Boerne v Flores* (1997) 521 U.S. 507, especially 519-520. There is some question as to whether the RFRA may still be applied to federal laws. After *City of Boerne*, however, RFRA is void as to state and local laws, meaning that state and local laws that interfere with free exercise will not be held to strict scrutiny. (*See* Erwin Chemerinsky, Constitutional Law: Policies and Principles (3d ed., 2006), pp. 1264-1265.)

[13] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, (2012) 132 S. Ct. 694, 699.

disseminate that message. Other courts have reasoned that the ministerial exception is rooted in the Establishment clause, holding that a court's inquiry into the legitimacy of church's motives constitutes an "excessive entanglement" that breaches the proper separation of church and state. In either case, the results of applying the ministerial exception are harsh for the employee and his or her rights. If the court determines, as a preliminary matter, that the employee is a "minister," then the court's proper response is to grant summary judgment in favor of the employer, and the employee's "day in court" comes to an abrupt end.

In *Hosanna-Tabor*, the Supreme Court upheld the ministerial exception as a constitutionally-required affirmative defense to an anti-discrimination suit that was brought by a minister against his or her religious employer. However, the Court refused to provide a "rigid formula" – or seemingly any formula at all – for determining if an employee is a minister for purposes of the exception. It only held that, in this particular case, the trial court had reasonably concluded, under the totality of the circumstances, that Cheryl Perich was a minister. The facts included the following: (1) She was by her own reckoning a "called" (as opposed to a "lay") teacher; (2) She held a minister's certificate that required several additional courses in religion and theology; (3) She taught religious classes; (4) She held herself out to be a minister, including by filing a tax return that claimed a deduction available only to ministers; and (5) She led religious services. The Court did not say whether any one of these factors was critical to the determination of whether an employee was a minister, leaving the matter decidedly undecided.[14] Justices Alito and Kagan wrote separately to make the point that having or not having the title of "minister" was not dispositive. The title of "minister" might be a factor, but it was not a dispositive one, just as the absence of the title did not mean that the exception did not apply. Instead, nearly all of the justices seemed to accept a "functional" approach that considered *whether the employee's duties were critical to performing the mission and spreading the message of the religious group*.[15] Only one member of the Court – Justice Thomas – provided a clear (though not necessarily desirable) formula: if the church said that the employee was a minister, then the employer was minister.[16]

***Hosanna-Tabor* and *Smith*:** Neither the majority, nor the concurring, opinions in *Hosanna-Tabor* spent much time distinguishing its holding from the holding in *Smith* that the Free Exercise clause does not exclude religious practice from laws of general applicability. Justice Robert's majority opinion curtly rejected the contention of both the EEOC and Perich that *Smith* precludes the application of the ministerial exception. Roberts conceded that both cases involved "a valid and neutral law of general applicability," but he insisted that "a church's selection of its ministers is unlike an individual's ingestion of peyote." Robert's continued:

> *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. The contention that *Smith* forecloses the application of a ministerial exception rooted in the Religion Clauses has no merit. [17]

[14] *Hosanna-Tabor*, at 707-709.
[15] *Id.* at 711-715 (Alito, J., concurring.)
[16] *Id.* at 710-711 (Thomas, J., concurring.)
[17] *Id.* at 706.

That was all that Chief Justice Roberts had to say on the matter. His distinction is apparently rooted in the Establishment clause, rather than the Free Exercise clause – though Justice Roberts does not expressly state this. When Roberts states that *Smith* involved "outward physical acts," he was apparently not referring to the distinction between "beliefs" and "conduct" that was critical in *Reynolds* and *Smith*; discriminating on the basis of a protected category, after all, is also an outward act as opposed to a mere belief. Rather, the apt comparison for Roberts, apparently, is not between the conduct of unlawfully firing someone, on the one hand, and ingesting an unlawful substance, on the other. Rather, the critical difference is between a law that proscribes an individual's conduct (a Free Exercise issue) and one that allows the state to interfere with the internal governance of the Church (an Establishment Clause issue).

The proper test for a violation of the Establishment Clause is the so-called "Lemon test" from *Lemon v. Kurtzman*. A law (or its application) is valid so long as (1) it is motivated by a secular purpose; (2) does not substantially advance or hinder religion; and (3) its enforcement does not create an "excessive entanglement" between Church and State.[18] The consensus among the several circuit courts in creating and developing the "ministerial exception" appears to be that without the exception the courts would be forced to inquire into matters of faith and second guess the Church's determination as to who is best suited to represent and spread that faith. This is why once a court determines that an employee is a "minister," the proper response is to stop the inquiry and grant a religious employer's motion for summary judgment. Anything else, presumably, would cause "excessive entanglement."

In summary, a fair reading of the case law discussed above suggests three conclusions relevant to the issues before this Committee:

First, notwithstanding the holding in *Smith* that the Free Exercise clause does not excuse violations of a "law of general applicability," the ministerial exception precludes a "minister" from bringing an employment discrimination action against his or her religious employer. Presumably this is because, as applied to ministers, employment discrimination laws implicate both the Free Exercise clause, and the Establishment clause. At any rate, simply asserting that employment discrimination statutes are laws of general applicability does not settle the issue. The courts have unequivocally concluded that the "ministerial exception" is a constitutionally-required exception to employment discrimination laws. The *Hosanna* decision was not only clear on that point, it was unanimous.

Second, the absolutely critical determination in an employment discrimination action against a religious employer is whether the employee qualifies as a "minister" for purposes of the exception. The U.S. Supreme Court expressly refused to lay down a rule for when an employee becomes a minister, but the several circuit courts appear to have adopted some variation of a "functional" approach. That is, the particular title given to an employee may be a factor, but it is by no means conclusive. Someone who is merely labeled a minister is not necessarily covered by the exception; yet someone who lacks the title may nonetheless be covered. Rather than looking at titles, a court will consider whether the employee's duties

[18] *Lemon v. Kurtzman* (1971) 403 U.S. 602.

amount to the "functional equivalent" of a minister's duties.[19] The employee's primary duties must somehow involve carrying out the spiritual mission of the religious organization in a significant way. While *Hosanna-Tabor* rejected a "stopwatch" approach that simply counts how much of an employee's workday involves performing spiritual, as opposed to secular, tasks, the courts have recognized that many religious employees do some combination of spiritual and secular duties. In applying this to teachers in parochial schools, the mere fact that teachers may lead prayers or attend religious services with students is usually not enough to conclude that a teacher is a minister in any meaningful sense. Instead, the courts have developed a number of factors: Does the employee teach primarily religious subjects? Does the employee's position require special religious training? Is the employee ordained or commissioned? Does the employee play a significant role in religious ceremonies or in communicating the faith? Does the employee hold himself or herself out as a minster?

Finally, if a court determines that the ministerial exception applies, the results can be harsh. If the exception applies, the court's inquiry into the allegation of discrimination ends and the court will typically grant summary judgment to the religious employer. Even though the primary purpose of the ministerial exception is apparently to prohibit the state from second-guessing religious organizations *on matters of faith*, the summary nature of the proceeding means that a religious employer may, in fact, have discriminated for reasons that have nothing to do with religion and the "minister" who was subjected to such discrimination would have no recourse. The apparent rationale for this harsh result is that once one makes the commitment to become a minister, one is effectively consenting to have the religious organization, not the state, govern the employment relationship.

Part Two:

Employment Discrimination Law in California and Religious Employers

Federal Anti-Discrimination Law and Religious Employers: Employees in California are protected from discrimination by both federal and state law. Title VII of the federal Civil Rights Act of 1964 (Title VII) prohibits an employer from discriminating against an employee on the basis of his or her race, color, religion, sex, or national origin. In 1978, Congress defined "sex" to include conditions of pregnancy – i.e. to discriminate against an employee because she was pregnant was essentially to discriminate against her because of her sex. Most recently, the EEOC ruled that "sex" discrimination includes sexual orientation and gender identity discrimination as well, thus extending protections to LGBT employees.[20] Independent of, and in addition to, the "ministerial exception" is the statutory exception for religious employees in Title

[19] *Hosanna*, at 714-715. The Ninth Circuit U.S. Court of Appeals has joined this consensus among the federal circuit courts. (*Alcazar v. Corp. of Catholic Archbishop of Seattle* (2010) 627 F. 3d 1288.

[20] U.S. Equal Employment Opportunity Commission. *[Doe] Complainant v. Anthony Foxx, Secretary, Department of Transportation (Federal Aviation Administration Agency*), Appeal No. 012013380, July 16, 2015.

VII. Specifically, Title VII exempts "a religious corporation, association, educational institution, or society *with respect to the employment of individuals of a particular religion* to perform work connected with the carrying out by such corporation, association, educational institution, or society of its activities."[21] Courts have held that this statutory exemption does not, however, exempt religious institutions from liability for all discrimination; it only applies to discrimination based on religion. The Title VII religious exception merely "indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination." [22] There is, in other words, an important distinction between the ministerial exception and the statutory exception in Title VII. The exception in Title VII exempts only religiously-based discrimination claims, but applies to all employees. The court-made ministerial exception, on the other hand, allows all types of discrimination, but applies only to ministerial employees.

Anti-Discrimination Law in California: California is an "at-will" employment state, meaning that in the absence of a contract providing otherwise, the law presumes that all private employment relations are "at will." An employee can be terminated for any reason or for no reason at all. However, no employee, even an at-will employee, can be fired for an unlawful reason, or a reason that violates a public policy embodied in a statutory or constitutional provision.[23] Most important for the purpose of this hearing and background paper, California's Fair Employment and Housing Act (FEHA) prohibits an employer from discriminating against any applicant or employee on the basis of "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status." Discrimination may include refusal to hire, termination, or any other adverse action against an employee in terms of promotion, compensation, or other conditions of employment. In order to state a claim under FEHA, the employee must be a member of a protected class who has suffered an adverse employment action under circumstances suggesting that the employer acted with a discriminatory motive. [24]

FEHA, like Title VII, also contains exceptions for religious employers that are independent of the court-minted ministerial exception. First, FEHA defines "employer" to expressly exclude "a religious association or corporation not organized for private profit." That is, the church or

[21] 42 U.S.C. § 2000e-1(a). (Emphasis added.)

[22] *Boyd v. Harding Academy of Memphis* (6th Cir. 1996) 88 F.3d 410, 413; *Kelly v. Methodist Hospital of Southern Cal.* (2000) 22 Cal.4th 1108, 1119-1120.

[23] Labor Code Section 2922; *McCarthy v. R.J. Reynolds* (2011) 819 F. Supp. 2d 923.

[24] Government Code Section 12940 (a). One of the more troublesome implications of Hosanna-Tabor is that it seems to create a very direct conflict with state anti-discrimination law. The California courts have said that, to state a claim under FEHA, the plaintiff needs to show that he or she was a member of a protected class, was qualified for the position, suffered an adverse employment action, and that there were "circumstances suggesting that the employer acted with discriminatory motive." (*Rope v. Auto-Chlor* (2013) 220 Cal. App. 4th 635.) *Hosanna Tabor* appears to shut the door on such the claim if the employee is deemed a minister because it shuts the door on any inquiry into the employer's motive.

religious group itself is not an employer and thus not subject to FEHA.[25] However, FEHA does apply to a nonprofit public benefit corporation, such as a school, hospital, or charitable organization that is formed by, or affiliated with, a particular church or religious organization. Those affiliated organizations are indeed employers within the meaning of FEHA and are thus subject to anti-discrimination laws. However, there is one significant exception: affiliated religious organizations may discriminate *on the basis of religion*, meaning primarily that they may hire members of their own religion without fearing liability for discrimination based on religion, which is otherwise one of the protected categories under FEHA.[26]

California Case Law on the Ministerial Exception and FEHA: For the most part, California courts have followed the federal courts, applying the ministerial exception to claims brought under FEHA just as the federal courts have applied it to actions arising under Title VII. More often than not, an employee who brings a claim under FEHA also brings a claim under Title VII. Like the federal courts, the California courts have noted that the ministerial exception applies to both state and federal law and find that it is constitutionally required. For example, in *Schmoll v. Chapman University*, a California Court of Appeal held that applying FEHA to a church-affiliated university's modification of a chaplain's terms of employment would involve "excessive entanglement" between church and state. That is, it would require the court to inquire into the good faith of the university's reasons for cutting the chaplain's hours and adjudging the university's own perception of its ministerial needs. The First Amendment, the court concluded, barred judicial review of such an employment relationship because the state had no compelling interest in overriding the university's interest in deciding how best to use the chaplain to meet its spiritual needs. [27]

While the *Chapman University* case involved a chaplain who most would agree qualified as a "minister," a more recent California Court of Appeal case shows that the courts are willing to extend the exception more broadly. In *Henry v. Red Hill Evangelical Lutheran Church* the court considered the case of a preschool teacher who was fired by her church employer because she was living her boyfriend and raising their child out of wedlock. Sara Henry's complaint alleged unlawful discrimination on the basis of sex and marital status under FEHA and Title VII, as well as a claim for wrongful termination in violation of public policy. The court first held that because the pre-school was not a separate legal entity from the church, it did not qualify as an "employer" under FEHA. As to the claims under Title VII, the court claimed that if the church had fired Henry for becoming pregnant it would have violated Title VII's prohibition on sex discrimination (which had defined "sex" discrimination in 1978 to include pregnancy discrimination); however, the court found that the church had fired Henry not because she was pregnant per se, but because she had violated the church policy and fundamental beliefs by living

[25] *Taylor v. Beth Eden Baptist Church* (2003) F. Supp. 2d 1074, holding that a church pastor was exempt from liability for sexual discrimination under FEHA because the church was not an employer. In this case, the court did not even need to go to the "ministerial exception" because the church was not employer under FEHA. However, the court did suggest that minister would have been liable for sexual assault since ministerial does not exempt a church or pastor from *criminal* liability.

[26] Government Code Section 12926.2 (a)-(f))

[27] *Schmoll v. Chapman University* (1999) 70 Cal. App. 4th 1434.

with a man and having their child out of wedlock. Finally, the court rejected both the Title VII claim and the termination against public policy claim on the grounds that both were barred by the ministerial exception because Henry was not so much a teacher of academic subjects as a spiritual leader who introduced young children to Christianity and religious doctrines and led them in prayer. The preschool was located in the church and operated not as independent school, but as part of the church's ministry. For these reasons, the court concluded that Henry was a "minister" covered by ministerial exception.[28]

In short, the California courts apply the ministerial exception in the same way that federal courts do and in a manner that is consistent with *Hosanna-Tabor*. California courts see the ministerial exception as a constitutionally-required bar on employment discrimination actions brought by a minister against his or her church. Like the federal courts, California courts have been reluctant to establish any bright line rule as to when an employee becomes a "minister" for purposes of the exception, but clearly, as the *Henry* case shows, the employee does not need to be a "minister" in the usually understood sense. In one way, the California courts seem to take a more expansive view of the ministerial exception than the view the U.S. Supreme Court took in *Hosanna-Tabor*. In *Henry* the court applied the ministerial exception not just to actions under FEHA and Title VII, but also to an action alleging wrongful termination against public policy, which, as a wrongful termination action, is an action in either contract or tort. The majority in *Hosanna-Tabor*, however, refused to say whether the ministerial exception applied to actions arising in contract or tort. Finally, in California as elsewhere, the critical issue appears to be the initial determination of whether or not the employee qualifies as a "minister." Once this finding is made, the employer prevails on summary judgment and the employee never gets his or her day in court.

Part Three:
Morality Clauses in Religious and Non-Religious Contexts

Distinguishing the Ministerial Exception and Morality Clauses: Although press reports on the Catholic schools contract controversy in San Francisco and elsewhere often conflate the "ministerial exception" affirmed by *Hosanna-Tabor* and the revised "morality clauses" proposed by the San Francisco Archdiocese, the two terms (and their substance) speak to different areas of the law. The ministerial exception is a constitutionally-required exception to the application of employment discrimination laws, and it applies whether or not the employee is subject to a contract with a morality clause. Conversely, a morality clause is enforceable as a matter of contract law, and it can be enforced even if the ministerial exception does not apply. To be sure, the enforcement of a morality clause *may implicate* the ministerial exception if a religious employee claims that termination pursuant to a morality clause violated an anti-discrimination law; but it is important to keep these matters distinct, because even if the courts were to do away with the ministerial exception, religious employees could still be terminated for violating a morality clause in an employment contract. Morality clauses, after all, are used and enforced in all manner of employment contracts – public or private, religious or non-religious. Often, a morality clause (or a "code of ethics") is used to protect the reputation of the employer, or the

[28] *Henry v. Red Hill Evangelical Lutheran Church* (2011) 201 Cal. App. 4th 1041

integrity of the employer's mission. Other times, morality clauses are premised on the idea that certain conduct, even in one's private life, are so egregious as to make one unfit for certain kinds of employment. For example, two police officers in Florida were recently fired when it was learned that they were members of the Ku Klux Klan.[29]

Moreover, private parochial teachers are not the only type of teachers who can be fired for what their employers deem immoral conduct. Public school teachers – on the assumption that they are role models, as well as teachers – are typically contractually bound to abide by morality clauses or codes of ethics. In addition, with or without a contractual provision, Section 44932 of the California Education Code permits the firing of teachers for "immoral conduct."[30] The statute does not define "immoral conduct," apparently assuming that, like obscenity, we know it when we see it. As a result, religious employers are no different than other employers (public or private) in this regard, and their morality clauses would be likewise enforceable even in the absence of a ministerial exception.

However, while the broad language of Section 44932 would seem to permit termination for any conduct that fits the school board's definition of "immoral conduct," the California Supreme Court has long interpreted this provision to require the immoral conduct be such that it makes the person "unfit to teach."[31] Courts interpreting Section 44932 have generally dismissed terminations when the conduct was purely private (so long as it did not involve the violation of a criminal statute) and there was no evidence that the conduct was widely known among students, parents, or co-workers. However, most recently teachers have been fired when their private conduct found its way onto social media or the Internet. In one case, a middle school teacher was fired – and her termination upheld – when online videos surfaced showing that she was moonlighting as a pornographic actress. In another recent case, a teacher was fired when parents and co-workers discovered that he had posted nude pictures of himself on Craigslist in advertisements seeking casual sexual encounters.[32]

While it is useful to consider morality clauses (or statutes having the same effect) that govern public teachers for purposes of comparison, it is important to keep in mind that public teachers – like public employees more generally – have more employment protections than private teachers. Because a public school is a state actor, it generally cannot impose conditions of employment on

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[29] *Florida Cops Fired over Racist Texts, KKK Video,* Huffington Post, March 22, 2015.

[30] Education Code Section 44932. Specifically, Section 44932 lists as one of the grounds for termination: "Immoral conduct including, but not limited to, egregious conduct." "Egregious conduct" is in turn defined as immoral conduct that is the basis for offenses in Education Code Sections 44010 or 44011 (sex and drug related crimes0 or Penal Code Section 11165.2 to 11165.6, inclusive, of the Penal Code (child abuse and neglect and reporting). Other related grounds that could occur outside of the workplace but still be a basis of termination include "dishonesty," conviction of specified crimes, or alcoholism or drug abuse if the makes the employee unfit to teach.

[31] *Morrison v. State Board of Education* (1969), 1 Cal. 3d 214; *Petit v. State Board of Education* (1973) 10 Cal. 3d 29 (1973)

[32] *In the Matter of Stacie Halas*, Commission of Professional Competence, Oxnard School District, OAH No. 2012051091 (January 2013); *San Diego Unified School District v. Commission of Professional Competence (Frank Lampedusa, Real Part in Interest)* (2011) 194 Cal. App. 4th 1454.

its employees that infringe upon the employee's constitutional rights, unless the conduct is such that it clearly disrupts the educational mission of the school.[33] This is not true of teachers at private schools. In the absence of a statute expressly prohibiting a private employer from interfering with a private employee's constitutional rights, it is impossible for a private employer to violate an employee's constitutional rights for the simple reason that the private employee is not a state actor. While private teachers, therefore, have fewer protections than public teachers, private teachers at religious schools have even fewer protections. Or perhaps more accurately, a private religious employer may counter the employee's asserted rights by invoking countervailing rights in the religion clauses of the First Amendment.[34]

Conclusion

The announcement earlier this year by the San Francisco Archdiocese that it will amend teacher contracts to include revised "morality clauses" and express or implied language that teachers are "minsters" or essential instruments of the Church's spiritual mission, could have significant implications in light of *Hosanna-Tabor* and California case law that is seemingly consistent with *Hosanna-Tabor*. While California has robust employment discrimination laws, such laws do not apply if the courts find that teachers are effectively "ministers" for purposes of the ministerial exception. As noted above, this designation is crucially important because if the ministerial exception is applied, the employee receives no protection from employment discrimination laws. Once a court determines that the exception applies, it will not inquire any further into the allegations of discrimination or its motives, but will instead grant a religious employer's motion for summary judgment.

On the other hand, it is important not to overstate the impact of *Hosanna-Tabor*. In making its ruling, the U.S. Supreme Court made it clear that merely labeling a teacher (or any other employee) a "minister" will not, by itself, ensure application of the ministerial exception. This designation may be one factor in a court's determination of whether the employee is a minister,

[33] The key case governing the free speech rights of public employees is *Pickering v Board of Education* (1968) 391 U.S. 563. On the development of the Pickering test see *Mt. Healthy City School District v. Doyle* (1977) 429 U.S. 274; and *Connick v. Myers* (1983) 461 U.S. 1983; *Rankin v. McPherson* (1987). According to Professor Erwin Chemerinsky, taken together these cases create a three-step analysis: (1) The employee must prove that an adverse employment action was motivated by the employee's speech, at which point the burden shifts to the employer to prove that the adverse would have been taken even in the absence of the speech. (2) The speech must be on a "matter of public concern." (3) The court must balance the employee's speech rights against the employer's interest in an efficiently operating workplace. *See* Chemerinsky, *supra* at 1112-1113.

[34] When public employees are fired and punished for speech that is deemed detrimental to the employer, the adverse action raises a First Amendment issue, but whether the employee will prevail on a First Amendment challenge depends on whether the employee was speaking on a public matter and the extent to which, under all of the circumstances, the speech interfered with the ability of the employee to perform his or her job. However, the First Amendment free speech provision expresses a guarantee only against action taken by the government. (*Hudgens v. N.L.R.B.* (1976) 424 U.S. 507, 513.) The First Amendment does not provide any protection if it is "a private corporation or person who seeks to abridge the free expression of others." (*Id.*) *See also Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72.

but the court will still look to see if the teacher's role is the "functional equivalent" of a minister. Unless a teacher has special religious training, teaches classes about the religion or theology of the religious institution, or leads religious services in a way that goes beyond that of other teachers, it seems unlikely that the court would conclude that the teacher was a minister for purposes of the exception.

For those teachers who are not deemed ministers, they would still most likely be subject to any morality clauses in their employment contracts that call for termination if the teacher's conduct outside of the school reflected badly on the Church, or its mission. In this regard, however, teachers in private religious schools are not in a radically different position from other private employees, or even public employees.

Finally, it should also be noted that it is difficult if not impossible for the Committee, without information about the most recent revisions to the contract between the San Francisco archdiocese and its teachers, to speculate on what precisely would constitute a violation of the morality clause. Based on a sampling of contract provisions available to Committee staff from other parts of the country, these provisions, and especially their enforcement, seem to focus on public stances that are contrary to Church teachings, as opposed to private conduct that may conflict with those teachings. For example, a teacher who made high-profile statements to the press or in public forums criticizing the Church on these issues or advocating positions at odds with Church teachings might be more likely to face an adverse action than a teacher who violated those teachings in his or her private life. Furthermore, the handful of cases where the Church has acted on such clauses seem to come from other states. Indeed, most of the recent, publicly-reported cases of teachers who have been terminated for "immoral conduct" in California have involved public teachers who, as noted above, were terminated because their "immoral conduct" brought into question their "fitness to teach."