

SUPREME COURT

2020 RELIGIOUS FREEDOM CASES

FIRST LIBERTY



HOW THE *BOSTOCK* CASE COULD IMPACT RELIGIOUS FREEDOM

QUICK FACTS

THE CASE: *Bostock v. Clayton County, Georgia*

THE COURT: The United States Supreme Court

OPINION ISSUED ON: June 15, 2020

THE HOLDING: Title VII of the Civil Rights Act of 1964's prohibition on sex discrimination in employment includes prohibitions on sexual orientation and transgender status discrimination.

IMPLICATIONS FOR RELIGIOUS FREEDOM

Title VII typically applies to all employers, including religious employers such as churches, synagogues, and religious schools, who have 15 or more employees. After the *Bostock* opinion, **we can expect increased litigation aimed at religious employers who hold faith-based standards related to sexual conduct or gender expression.**

However, the *Bostock* majority opinion acknowledges that **religious employers may be entitled to invoke three existing religious liberty protections:**

1. The First Amendment's ministerial exception,
2. Title VII's statutory exemption for religious employers,¹ and
3. The Religious Freedom Restoration Act (RFRA).

The inclusion of RFRA is noteworthy because it has not often been invoked in these kinds of cases. The *Bostock* opinion does not discuss the scope of these protections.

OTHER POTENTIAL IMPLICATIONS

The inclusion of sexual orientation and transgender status discrimination as a subset of sex discrimination could **impact a wide variety of other federal discrimination laws with similar wording.** Justice Alito's dissent details other implications including bathroom and locker room policies, woman's sports, housing, healthcare, free speech, and other constitutional claims. Slip Op. at *45-54. We can expect an increase in litigation on each of these issues.

Footnote 1: The statutory religious employer exemption is sometimes overlooked and its scope disputed. It is widely agreed that the exemption forbids bringing claims of religious discrimination against religious employers. First Liberty takes the position that it also protects the rights of religious employers to make employment decisions consistent with their religious beliefs, and thus can be invoked as a defense to other Title VII claims as well. See AG Memo on Religious Liberty, at *12a (Oct. 6, 2017).

COURT BREAKDOWN

MAJORITY: Gorsuch, Roberts, Ginsburg, Breyer, Sotomayor, and Kagan

DISSENT: Alito, Kavanaugh, and Thomas

RELATED UPCOMING CASE

The Supreme Court will soon release an opinion in another case (*Our Lady of Guadalupe v. Morrissey-Berru*), discussing the ministerial exception. In 2012, the Supreme Court unanimously recognized the right of religious organizations to choose their own ministers, leaders, and teachers of their faith. Consequently, the First Amendment bars courts from hearing claims concerning the employment relationship of these organizations with their ministers. The Supreme Court's opinion is expected to define who counts as a "minister." Along with *Bostock*, **this case will have implications for religious organizations' ability to maintain internal standards on issues of sexual conduct and gender expression.**



HOW THE *ESPINOZA* CASE COULD IMPACT RELIGIOUS LIBERTY

QUICK FACTS

THE CASE: *Espinoza v. Montana Department of Revenue*

THE COURT: The United States Supreme Court

OPINION ISSUED ON: Opinion issued on June 30, 2020

THE HOLDING: The Free Exercise Clause prohibits Montana from excluding religious schools from participating equally in the state's scholarship program for low-income students.

ABOUT THE CASE

Montana established a scholarship tax credit program to provide tuition assistance to low income families, helping parents send their children to the private school of their choice. Because some parents chose to send their children to religious schools, the Montana Supreme Court ended the scholarship program altogether, citing the state constitution's prohibition on state funding of religious organizations. Under *Espinoza*, it is unconstitutionally discriminatory to exclude religious schools from participating equally in a government benefit solely because of the schools' religious character.

IMPLICATIONS FOR RELIGIOUS LIBERTY

Espinoza will impact school choice programs across the country. If a state provides scholarships, tuition assistance, or other benefits to students attending private schools, it cannot exclude faith-based schools from participating in the programs on equal footing with secular private schools.¹

The decision extends the landmark *Trinity Lutheran* decision, which held that a church could not be excluded from a neutral government program designed to improve childrens' playgrounds on the basis of the church's religious status. The *Espinoza* opinion held that prohibited religious status discrimination was also at issue here. Because of the improper religious "status" discrimination, it did not matter whether the state's goal was to prevent religious organizations from aiding religious "uses."

Espinoza rejects arguments often used to justify excluding religious schools from neutral school choice programs, such as general anti-establishment interests. The Court distinguished a prior case that allows states to refuse to fund the theological training of pastors.

COURT BREAKDOWN

MAJORITY: Roberts, Thomas, Alito, Gorsuch, and Kavanaugh

DISSENT: Ginsburg, Kagan, Breyer, Sotomayor

OTHER POTENTIAL IMPLICATIONS

Thirty-eight states have "Blaine Amendments" similar to the provision in the Montana constitution that limit state aid to religious organizations. Although *Espinoza* did not categorically invalidate these Blaine Amendments, it significantly limits their scope. The ruling will enable more faith-based organizations to be eligible for government benefit programs.

Footnote 1: The only way for such a program to survive is if it satisfies "strict scrutiny," which is a heavy burden requiring the state to prove that it is furthering a compelling interest by narrowly tailored means.

HOW THE *OUR LADY OF GUADALUPE* CASE COULD IMPACT RELIGIOUS FREEDOM

QUICK FACTS

THE CASE: *Our Lady of Guadalupe School v. Morrissey-Berru*

THE COURT: The United States Supreme Court

OPINION ISSUED ON: July 8, 2020

THE HOLDING: The First Amendment protects the right of religious schools, places of worship, and other religious ministries to choose who performs vital religious duties. Courts are therefore required to stay out of employment disputes involving teachers of faith at religious schools.

WHAT IS THE MINISTERIAL EXCEPTION?

The First Amendment's "ministerial exception" protects churches' right to choose their ministers. It is the recognition that secular courts shouldn't be in the business of overseeing employment disputes between a church and its ministers. The First Amendment protects religious organizations' right to make their own decisions about matters of faith, doctrine, and internal governance.

The exception applies to more than just places of worship, such as churches, synagogues, and mosques. It also protects religious schools and other religious ministries and their right to choose their leaders and teachers of faith. The exception is usually invoked in cases involving principals and teachers at religious schools, worship musicians, and leaders of religious congregations.

WHAT ARE THE IMPLICATIONS FOR RELIGIOUS LIBERTY?

Today's decision clarified that religious organizations retain the freedom and autonomy to make employment decisions regarding ministers and all who teach or lead on matters of faith. Thus, schools are free to decide who fills these positions without interference from secular courts.

Today's decision reinforced 2012's unanimous decision upholding the constitutionality of the ministerial exception in *Hosanna-Tabor*. In addition to the ministerial exception, other religious liberty protections may be available for religious employers, including Title VII's statutory exemption and the Religious Freedom Restoration Act (RFRA).

COURT BREAKDOWN

MAJORITY: Alito, Roberts, Thomas, Breyer, Kagan, Gorsuch, Kavanaugh

DISSENT: Sotomayor, Ginsburg

KEY QUOTE

"When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."

HOW THE *LITTLE SISTERS OF THE POOR* CASE COULD IMPACT RELIGIOUS FREEDOM

QUICK FACTS

THE CASE: *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*

THE COURT: The United States Supreme Court

OPINION ISSUED ON: July 8, 2020

THE HOLDING: Administrative agencies may consider the how their actions impact religious freedom. The Supreme Court upheld the religious and moral exemptions to the Affordable Care Act's contraceptive mandate.

WHAT'S AT ISSUE IN THIS CASE?

The Obama Administration interpreted the Affordable Care Act to mandate that employers provide contraceptive coverage. Some religious employers, such as a group of Catholic nuns that serve the elderly called the Little Sisters of the Poor, objected to facilitating contraceptive coverage through their health insurance plans. Others, including Evangelical Christian and pro-life employers, objected to facilitating abortifacient drugs, such as Plan B.

When Trump took office, his administration concluded that employers with religious or moral objections may opt out of providing coverage. Some states sued, arguing that the Trump Administration wasn't permitted to create these exemptions. This decision upholds the right of administrative agencies to consider how their actions impact religious freedom.

HASN'T THIS CASE ALREADY BEEN DECIDED?

The Supreme Court previously decided two related cases. *Hobby Lobby* upheld the right of small, for-profit businesses with sincere religious beliefs to decline to pay for contraceptive coverage, though coverage would still be provided. In *Zubik*, the issue was whether the government was required to fully exempt employers like the Little Sisters of the Poor. The Court ordered the government to see if there was a way to provide coverage without using the Little Sisters' health plans.

COURT BREAKDOWN

MAJORITY: Thomas, Roberts, Alito, Gorsuch, Kavanaugh, with Breyer and Kagan concurring

DISSENT: Sotomayor, Ginsburg

WHAT ARE THE IMPLICATIONS FOR RELIGIOUS LIBERTY?

The court reaffirmed that the Religious Freedom Restoration Act (RFRA) provides broad protections for religious liberty and it applies to all federal laws, unless otherwise stated. Administrative agencies may consider how RFRA applies to their actions.

KEY QUOTE

"For over 150 years, the Little Sisters have engaged in faithful service and sacrifice, motivated by a religious calling to surrender all for the sake of their brother. . . . But for the past seven years, they—like many other religious objectors who have participated in the litigation and rulemakings leading up to today's decision— have had to fight for the ability to continue in their noble work without violating their sincerely held religious beliefs."