RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / JANUARY 2021

FROM *the* EDITOR

Welcome to the January 2021 issue of the *Religious Liberty Law Section Newsletter*.

It is remarkable to note how America has repeatedly and consistently relied upon religious faith at times of great national peril. In the last two issues of this Newsletter, I highlighted how, during the American Revolution and again during World War II, Americans collectively prayed for Divine guidance and protection at times when the nation was in great danger. Between those two momentous events, America was in what might have been its greatest trial, engulfed as it was in the third year of a bloody civil war. And, again, characteristically, America turned to prayer – not to request Divine assistance, but to express gratitude for Divine blessings and to ask forgiveness for national sins. Therefore, for this issue's Great Moments in Religious Liberty I have chosen President Abraham Lincoln's Thanksgiving Day Proclamation of 1863, which, although certainly not the first national act of thanksgiving in American history (in fact, we highlighted President George Washington's 1789 Thanksgiving Proclamation in the June 2019 issue of the Section Newsletter), led to the creation of a national tradition that has endured for over a century and a half.

Also, I want to extend a personal note of thanks to John Bursch, the author of this issue's Feature Article addressing the U.S. Supreme Court's opinions, issued during the Court's most recent term, that address or impact religious liberty. This was a busy year at the Supreme Court for religious liberty law cases, and John had a front row seat.

As always, we hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful.

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"History … tells us that hitherto civilized society has rested on religion, and that free government has prospered best among religious peoples."

— James Bryce, *The American Commonwealth* (1888).

IN *this* ISSUE

Published by the Religious Liberty Law Section of The State Bar of Arizona.

FROM *the* CHAIR

It is my honor to have been elected as Chair of the Religious Liberty Law Section ("RLLS") of the State Bar and to have served as a member of the Executive Council of the RLLS since its inception. This Section was one of the first (and remains one of a few) of its kind in the country.

It is truly a pleasure to observe the Section grow – both in its membership and in its reach and activities. The Section has sponsored stellar programs at each Bar Convention since its creation, continually sponsors and co-sponsors a variety of CLE programs (thanks in large part to my colleague, Raj Gangadean, who has faithfully chaired that committee for years), and regularly produces this exceptional newsletter. In each of these efforts, the Section seeks "to educate, to discuss, and to disseminate information regarding, as well as to advance and to protect, the basic human and constitutional right of religious liberty through law." RLLS Mission Statement.

As of the writing of this article, our country has just endured another election. "We the People" seem increasingly polarized and intolerant towards the views of the "other" side. An abundance of carefully formulated echo chambers (social media, "news" outlets, podcasts, etc.) and the resulting confirmation bias obscure the merit and virtue of the "opposing viewpoint," even to the point of vilifying it. Religious liberty is certainly not immune to this polarization and intolerance of perspectives. Indeed, it is often at the very center of these skirmishes in one way or another. This Section stands for the freedom to practice, speak, and live one's faith.

As Justice Douglas wrote, "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses… We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306 (1952).

This Section exists, among other things: "To encourage and facilitate debate within the legal profession on religious liberty issues… [and] to encourage and to support mutual respect for, and understanding of, differing religious belief systems and practices and how they relate to religious liberty law." RLLS Mission Statement (emphasis added). But the Section also exists "to promote… the education of members of the State Bar and the public about issues related to religious liberty law." *Id.* Because these topics are of grand Constitutional significance, but also very dear to each of us personally, the Section has endeavored to present the clarity and substance the subject requires, delivered with the utmost civility and professionalism.

To that end, the Section's educational efforts have unflinchingly addressed controversial religious liberty cases pending before and just decided by the United States Supreme Court and Arizona Supreme Court, practical topics for practitioners, and topics highlighting the approaches of different faiths to legal issues.

I am both proud of the Section's accomplishments and eager to see the contributions the Section will make in the coming years. Please consider encouraging your fellow attorneys to read more about the Section and consider joining at: https://www.azbar.org/for-lawyers/communities/sections/religious-liberty-law/.

Finally, I would be remiss if I did not, on behalf of the entire Executive Council, thank our tireless State Bar of Arizona Staff and especially our Section Administrator, Betty Flores, and our former Section Administrator Nancy Nichols, who we have missed since her retirement earlier this year. They make possible the activities, impact, and growth of the Section.

Thank you all.

James Williams
James L. Williams, Chair

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

Proclamation 106 – Thanksgiving Day, 1863 | By the President of the United States

A Proclamation

The year that is drawing toward its close has been filled with the blessings of fruitful fields and healthful skies. To these bounties, which are so constantly enjoyed that we are prone to forget the source from which they come, others have been added, which are of so extraordinary a nature that they cannot fail to penetrate and even soften the heart which is habitually insensible to the ever-watchful providence of Almighty God.

In the midst of a civil war of unequal magnitude and severity, which has sometimes seemed to foreign states to invite and provoke their aggressions, peace has been preserved with all nations, order has been maintained, the laws have been respected and obeyed, and harmony has prevailed everywhere, except in the theater of military conflict; while that theater has been greatly contracted by the advancing armies and navies of the Union.

Needful diversions of wealth and of strength from the fields of peaceful industry to the national defense have not arrested the plow, the shuttle, or the ship; the ax has enlarged the borders of our settlements, and the mines, as well as of iron and coal as of the precious metals, have yielded even more abundantly than heretofore. Population has steadily increased, notwithstanding the waste that has been made in the camp, the siege, and the battlefield, and the country, rejoicing in the consciousness of augmented strength and vigor, is permitted to expect continuance of years with large increase of freedom.

No human counsel hath devised, nor hath any mortal hand worked out these great things. They are the gracious gifts of the Most High God, who while dealing with us in anger for our sins, hath nevertheless remembered mercy.

It has seemed to me fit and proper that they should be solemnly, reverently, and gratefully acknowledged as with one heart and one voice by the whole American people. I do, therefore, invite my fellow-citizens in every part of the United States, and also those who are at sea and those who are sojourning in foreign lands, to set apart and observe the last Thursday of November next as a Day of Thanksgiving and Praise to our beneficent Father who dwelleth in the heavens. And I recommend to them that, while offering up the ascriptions justly due to Him for such singular deliverances and blessings, they do also, with humble penitence for our national perverseness and disobedience, commend to His tender care all those who have become widows, orphans, mourners, or sufferers in the lamentable civil strife in which we are unavoidably engaged, and fervently implore the interposition of the Almighty hand to heal the wounds of the nation, and to restore it, as soon as may be consistent with the Divine purposes, to the full enjoyment of peace, harmony, tranquility, and union.

In testimony whereof, I have hereto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this third day of October, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States the eighty-eighth.

Abraham Lincoln

By the President: William H. Seward. Secretary of State

SELECTED U.S. CASE LAW *Updates*

The following five U.S. Supreme Court cases are more fully discussed in this Issue's Feature Article: *2020 Supreme Court Religious Liberty Law Round-Up.*

(1) *Espinoza, et al. v. Montana Dept. of Revenue, et al.*, 140 S.Ct. 2246 (2020), 2020 WL 3518364. THE EXCLUSION OF RELIGIOUS SCHOOLS FROM A STATE PROGRAM DESIGNED TO PROVIDE TUITION ASSISTANCE TO PARENTS OF PRIVATE SCHOOL STUDENTS VIOLATES THE FREE EXERCISE CLAUSE OF THE U.S. CONSTITUTION.

(2) *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049 (2020), 2020 WL 3808420. ELEMENTARY SCHOOL TEACHERS AT ROMAN CATHOLIC SCHOOLS WERE "MINISTERS" FOR PURPOSES OF THE MINISTERIAL EXCEPTION.

(3) *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, et al.*, 140 S.Ct. 2367 (2020), 2020 WL 3808424. HEALTH RESOURCES AND SERVICES ADMINISTRATION'S INTERIM FINAL RULES EXEMPTING EMPLOYERS WITH RELIGIOUS OR MORAL OBJECTIONS FROM THE AFFORDABLE CARE ACT'S MANDATE TO PROVIDE NO-COSTS CONTRACEPTIVE COVERAGE WERE VALID.

(4) *Calvary Chapel Dayton Valley v. Steve Sisolak, Governor of Nevada, et al.*, 140 S.Ct. 2603 (2020). DISSENT FROM A SUMMARY DENIAL OF A CHURCH'S APPLICATION FOR INJUNCTIVE RELIEF REGARDING AN EXECUTIVE ORDER LIMITING CHURCH ATTENDANCE, ARGUING THAT THE EXECUTIVE ORDER VIOLATES THE FIRST AMENDMENT BECAUSE IT IMPOSES STRICTER ATTENDANCE LIMITS ON PLACES OF RELIGIOUS WORSHIP THAN ON PLACES OF SECULAR ACTIVITIES.

(5) *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. ____ (2020), 2020 WL 6948354. NEW YORK GOVERNOR'S EXECUTIVE ORDER PLACING MORE SEVERE OCCUPANCY LIMITS ON RELIGIOUS SERVICE ATTENDANCE THAN IMPOSED ON SECULAR USE ATTENDANCE IS ENJOINED AS PROBABLY VIOLATIVE OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

CASE 1 *Kim Davis v. David Ermold, et al*

592 U.S. ____ (2020), 2020 WL 5881537.

U.S. SUPREME COURT SHOULD "FIX" THE RELIGIOUS LIBERTY PROBLEM IT CREATED IN *OBERGEFELL*.

On October 5, 2020, the U.S. Supreme Court denied a public employee's petition for writ of certiorari in a Title VII religious accommodation case in which the public employer had denied the employee's request to accommodate her religious beliefs concerning same-sex marriage.

Although the denial of certiorari was unanimous, Justice Thomas, joined by Justice Alito, filed a concurring opinion in which they stated that – although this case was not a good vehicle for fixing the problem – the Court in *Obergefell* had "through its creation of atextual constitutional rights and its ungenerous interpretation of the Free Exercise Clause, [left] those with religious objections [to same-sex marriage] in the lurch … enabl[ing] courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss."

They concluded that "By choosing [in its *Obergefell*

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decision] to privilege a novel constitutional right [to same-sex marriage] over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix. Until then, *Obergefell* will continue to have 'ruinous consequences for religious liberty.'"

CASE 2 *March for Life Education and Defense Fund v. California*

___ U.S. ___ (2020), 2020 WL 3865244. THE 9TH CIRCUIT MUST RECONSIDER ITS HOLDING AGAINST U.S. DEPT. OF HEALTH AND HUMAN SERVICES RULES THAT PROTECT ORGANIZATIONS WITH RELIGIOUS OR MORAL OBJECTIONS FROM HAVING TO INCLUDE ABORTIFACIENTS IN THEIR HEALTH CARE PLANS.

In the case of *March for Life Education and Defense Fund v. California*, the U.S. Court of Appeals for the 9th Circuit upheld a ruling of the U.S. District Court that blocked the implementation of HHS rules freeing religious organizations that have moral objections to abortifacients from including insurance coverage providing abortifacients in their health care plans.

The U.S. Supreme Court vacated the 9th Circuit's ruling and ordered the 9th Circuit to reconsider its opinion in light of the Supreme Court's decision in *The Little Sisters of the Poor Saints Peter and Paul Home v. Commonwealth of Pennsylvania* which upheld the HHS religious conscience protections.

CASE 3 *Sandor Demkovich v. St. Andrew the Apostle Parish, Calumet City, and the Archdiocese of Chicago*

973 F.3d 718 (7th Cir. 2020). THE MINISTERIAL EXCEPTION DOES NOT CATEGORICALLY BAR ALL HOSTILE ENVIRONMENT DISCRIMINATION CLAIMS BY MINISTERIAL EMPLOYEES.

In *Demkovich v. St. Andrews the Apostle Parish*, the plaintiff, who served as the music director of a Roman Catholic church, alleged that his supervisor repeatedly and often subjected him to comments and epithets showing hostility to his sexual orientation, which increased in frequency and hostility after the supervisor learned that the employee intended to marry his same-sex partner and again as the date of the wedding ceremony approached. After the employee married his same-sex partner, the supervisor fired him on the grounds that the marriage violated Church teachings. The plaintiff sued the church asserting hostile environment claims under Title VII and the ADA (apart from his sexual orientation claim, the plaintiff also asserted that his supervisor had repeatedly harassed and humiliated him based on his weight and medical issues). The plaintiff did not challenge his firing.

In a 2-1 decision, The 7th Circuit U.S. Court of Appeals determined that the ministerial exception did not categorically bar all hostile environment discrimination claims by ministerial employees

In reaching its decision, the Court began its analysis by discussing the *Hosanna-Tabor* case, for the proposition that the ministerial exception is an application of the First Amendment in that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, … interferes with the internal governance of the church" and therefore "violates both the Free Exercise and Establishment Clauses of the First Amendment." The Court also noted that the ministerial exception "is not limited to religious discrimination claims [but] extends to sex, race, national origin, age, disability, and now sexual orientation. *Hosanna-Tabor* also made clear that the exception applies whether or not the decision was grounded in religious doctrine."

The Court noted that the parties agreed that the plaintiff was a "ministerial employee" within the meaning of the ministerial exception doctrine and that the supervisor's alleged harassment of the plaintiff was motivated by the supervisor's and the Church's religious beliefs.

The Court framed the issue as a question of law – namely whether ministerial employees may ever bring hostile environment claims against religious employers?"

In answering this question, the Court noted that "Religious organizations are not totally exempt from all legal claims by ministerial employees." It observed that ministerial employees may have valid legal claims against their religious employers for some breaches of contract, torts, and criminal claims.

The Court then noted that neither the U.S. Supreme Court nor the 7th Circuit had answered the question posed in this case, and further noted a circuit split on the issue presented, with the 9th Circuit, in *Bollard v. California Province of Society of Jesus*, holding that the ministerial exception did not bar civil suits against a church for the negligent supervision of ministers who have allegedly subjected an employee to inappropriate sexual behavior, and the 10th Circuit, in *Skrzypczak v. Roman Catholic Diocese of Tulsa*, coming to the opposite conclusion and dismissing a hostile environment claim against a religious employer on the ground that entertaining such a claim "would pose too great a threat of entanglement with religious matters."

In its own analysis, the Court started by noting that hostile environment claims are essentially tortious in nature and involve behavior of employers that is considered outside the scope of employment, and for that reason do not involve

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claims of employer behavior that are essential to the management, supervision, or control of employees. As the Court stated: "The notion that such harassment is necessary to control or supervise an employee is, under employment discrimination law, an oxymoron. We presume an employer is interested in maximizing the employee's ability to perform his or her stated duties to further the organizations objectives, not in permitting a supervisor to 'control' the employee through abuse that actively inhibits job performance and is beyond the scope of that supervisor's own employment."

Therefore, the Court concluded, creating a hostile work environment is simply not a permissible means of exerting constitutionally protected control over employees and accomplishing the mission of the business or religious organization. Hence, subjecting an employee to a hostile work environment is neither a statutorily permissible nor constitutionally protected means of control within the meaning of *Hosanna-Tabor*. For that reason, the Court concluded that hostile environment cases by ministerial employees do not categorically violate the Free Exercise Clause "so long as they do not challenge tangible employment action."

The Court then turned its attention to the Free Exercise Clause and, in doing so, determined, first, that "[t]he potential for procedural entanglement does not justify a categorical rule against all hostile environment claims by ministerial employees" because "[p]rocedural entanglement is not necessarily any more a concern with hostile environment claims by ministerial employees than with claims by non-ministerial employees."

With respect to substantive entanglement, the Court acknowledged that this question was more problematic, but concluded that the risk of substantive entanglement was not so great as to bar all hostile environment claims asserted by ministerial employees, because although federal courts cannot pass on the substance of Catholic doctrines or practices – including the church's position on same-sex marriage – "the Supreme Court has long held that civil courts may and sometimes must draw lines at times around the ways in which religious beliefs are expressed" and, in this case, the supervisor "could have chosen to express Church doctrine on same-sex marriage, or to exercise his supervisory powers, in non-abusive ways that would not add up to a hostile environment." The Court concluded that "[w]e believe that risk [of not becoming unconstitutionally entangled in religious doctrine] can be managed by avoiding substantive decisions on issues of religious doctrine or belief and by balancing First Amendment rights with the employee's rights and the government's interest in regulating employment discrimination."

Judge Flaum filed a dissenting opinion. Judge Flaum opined that the 7th Circuit's 2003 *Alicea-Hernandez v. Catholic Bishop of Chicago* opinion held that the ministerial exception barred all of the plaintiff's claims, including the plaintiff's hostile work environment claim, and that the *Alicea-Hernandez* decision was controlling and binding precedent that should lead the Court to bar the plaintiff's hostile work environment claim in this case too.

Judge Flaum pointed out that "[w]e stated in *Alicea-Hernandez* that '[t]he 'ministerial exception' applies without regard to the type of [employment discrimination] claims being brought.'" He argued that that was the correct result because the U.S. Supreme Court, in *Our Lady of Guadalupe v. Morrissey-Berru*, stated that the "First Amendment protects the right of religious institutions to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," and in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, the Supreme Court stated that a "church's independence in matters of 'faith and doctrine' requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities."

Citing *Hosanna-Tabor*, Judge Flaum went on to argue that "[c]ontrol of a minister necessarily includes the ability to supervise, manage, discipline, and communicate with the minister, including by telling the minister that his behavior does not conform with church doctrine and by instructing him to change his behavior." He went on to state that "courts are not equipped to say whether a religious employer's communications with its ministers inhibit or improve their job performance, and it is not for courts to regulate how a church communicates with its ministers to further its religious objectives." He argued that allowing ministers to bring hostile work environment claims against their religious employers "will 'gravely infringe' on the rights of religious employers more generally 'to select, manage, and discipline their clergy free from government control and scrutiny' by encouraging them to employ ministers that lessen their exposure to liability rather than those that best 'further [their] religious objective[s].'"

Judge Flaum also argued that "[a]pplying discrimination statutes 'to the employment relationship between' the Church and [the plaintiff] will also 'involve 'excessive government entanglement with religion' as prohibited by the Establishment Clause of the First Amendment'" because, in order to assess a minister's hostile work environment claim, the court will necessarily need to determine whether the minister's work environment was appropriate, and in so doing will have to delve into the minister's terms and conditions of employment and matters of church governance and administration.

Judge Flaum stated that the majority's position effectively erases the distinction between ministers and non-ministers as to hostile work environment claims, thereby missing the

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point of the ministerial exception, "which is to 'ensure[ ] that the authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' – is the church's alone."

In conclusion, Judge Flaum stated that "[i]n *Alicea-Hernandez*, we laid out a workable approach that remains faithful to the religion clauses of the First Amendment: The ministerial exception bars employment discrimination claims brought by ministers 'without regard to the type of claims being brought,' and that he "would follow that approach here by holding that the ministerial exception bars each of Demkovich's employment discrimination claims."

CASE 4 *Tanzin v. Tanvir*

___ U.S. ____ (2020), 2020 WL 7250100. **RFRA's EXPRESS REMEDIES PROVISION PERMITS LITIGANTS, WHEN APPROPRIATE, TO OBTAIN MONEY DAMAGES AGAINST FEDERAL OFFICIALS IN THEIR INDIVIDUAL CAPACITIES.**

The plaintiffs in this case were Muslims who claimed that FBI agents placed them on a "No-Fly" list in retaliation for their refusal to act as informants against their religious communities. They sued various government agents, both in their official and individual capacities, to get their names removed from the No-Fly list and for money damages suffered due to wasted airline tickets and lost job opportunities. The question before the Court was whether RFRA provided for money damage claims against government agents in their individual capacities?

Justice Thomas, who penned the unanimous Opinion (without Justice Barrett's participation) started out the Court's analysis by noting that "RFRA gives a person whose religious exercise has been unlawfully burdened the right to seek 'appropriate relief.'" The Court further noted that RFRA provides for relief "against a government" and that "government" is defined in the statute to include "an official" of the United States. The Court then found that the term "official" does not refer solely to an office, but to an actual person invested with an office. Also, the Court noted that the statute expressly includes liability of "other person[s] acting under color of law," which, the Court noted, is a phrase taken from 42 U.S.C. §1983, and which the Court has long held to include individual liability of government agents. So, the Court concluded, "a suit against an official in his personal capacity is a suit against a person acting under color of law. And a suit against a person acting under color of law is a suit against 'a government,' as defined under RFRA."

The Court conducted a tour of the history of money damages against government officials in their individual capacities, both under the common law and under various statutes. The Court also noted that, due to sovereign immunity principles, money damages against individual government agents is the only effective remedy for some sorts of RFRA violations, noting for example that in this case an injunction would not remedy the plaintiffs' claims for wasted airline tickets.

The Court concluded its analysis by noting that, although Congress could, if it wanted, shield government employee from money damages under RFRA, it had not done so and that it was not appropriate for the Court to do so in Congress's stead.

In conclusion, the Court held that "RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities."

CASE 5 *Calvary Chapel Dayton Valley v. Steve Sisolak, et al*

___ F.3d___ (9th Cir. 2020), 2020 WL ___. **A STATE'S COVID-19 ORDER THAT TREATED SECULAR ACTIVITIES SIGNIFICANTLY BETTER THAN RELIGIOUS ACTIVITIES VIOLATED THE FREE EXERCISE CLAUSE.**

Calvary Chapel, a Christian worship center, challenged the Nevada Governor's COVID Directive, which limited attendance at "houses of worship" to 50 people, regardless of the size of the facility, while allowing certain secular uses, such as retail businesses, bowling alleys, arcades, gyms, fitness facilities, restaurants, breweries, distilleries, wineries, casinos, and body-art and piercing facilities, to operate at 50% of fire-code capacity, regardless of the size of the facility. In a unanimous decision, the U.S. Court of Appeals for the 9th Circuit struck down the Governor's order as a violation of the Free Exercise Clause of the U.S. Constitution.

Citing the U.S. Supreme Court's *Roman Catholic Diocese v. Cuomo* decision, which the Court stated "arguably represented a seismic shift in Free Exercise law," the Court found that the Governor's Directive "treats numerous secular activities and entities significantly better than religious worship services" – a "disparate treatment of religion that triggers strict scrutiny review."

Although the Court concluded that "slowing the spread of COVID-19 is a compelling interest, the Directive is not narrowly tailored to serve that interest." In particular, the Court noted that the Directive could have imposed the same occupancy limits on houses of worship that it imposed on secular activities, capping attendance at 50% of a house of worship's fire-code capacity rather than a strict cap of 50 attendees regardless of fire-code capacity.

In conclusion, the Court enjoined enforcement of the Governor's 50 person limit against houses of worship and remanded the case back to the District Court with instructions to apply strict scrutiny in its review of the Church's claims.

FEATURE ARTICLE

2020 Supreme Court Religious Liberty Law Round-Up

By John J. Bursch

The U.S. Supreme Court's 2019 Term was a blockbuster in many respects, including one decision that struck down the Trump Administration's rescission of the Deferred Action for Childhood Arrivals program and another that invalidated a Louisiana law that required abortion doctors to have admitting privileges at nearby hospitals. But the Term was particularly noteworthy for the Court's four religious-liberty opinions, including a sequel for the Little Sisters of the Poor and a significant ruling involving state prohibitions on funding for religious schools. The outcome in these cases suggests that a majority of Justices share a strong conviction for upholding the religious-liberty principles on which our country was founded.

1 ***In Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020),** the Court had an opportunity to build on its decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), clarifying that so-called "Blaine Amendments" cannot be used to discriminate against religious schools or their students based merely on their religious status. Blaine Amendments are a relic of the 19th century, when U.S. Senator James. G. Blaine proposed an amendment to the U.S. Constitution that prohibited any public funding for "any religious sect." Though Senator Blaine was ultimately unsuccessful at the federal level, several dozen states adopted some form of the Blaine Amendment in their state constitutions. Many of these state Blaines prohibit public funding for religious or sectarian schools. A few of them prohibit public funding for any private school, secular or religious. Montana had a Blaine Amendment that fell into the former category, prohibiting any aid to "sectarian schools."

The litigation arose when the Montana Legislature created a tax-credit program for those who donate to organizations that award scholarships for private-school tuition. The program's purpose was to encourage donations that families could use if they wished to send their children to private schools. Shortly after enactment, the Montana Department of Revenue promulgated a rule that prohibited families from using any of

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ABOUT THE AUTHOR

JOHN BURSCH serves as Senior Counsel and Vice-President of Appellate Advocacy with Alliance Defending Freedom. He also owns and operates his own law firm, Bursch Law, PLLC.

He has argued 12 cases before the U.S. Supreme Court and more than 30 cases before state supreme courts. He served as the Solicitor General of the State of Michigan from 2011 through 2013. Bursch earned his J.D., *magna cum laude*, from the University of Minnesota Law School, where he served as Chief Note and Comment Editor of the *Minnesota Law Review*.

After law school Bursch served as a law clerk for the Hon. James B. Loken of the U.S. Court of Appeals for the 8th Circuit. He has been inducted into the American Academy of Appellate Lawyers and serves as a member of the American Law Institute. Bursch is admitted to practice before numerous federal district and appellate courts, including the U.S. Supreme Court.

the scholarship monies at private religious schools. This was necessary, explained the Department, to reconcile the scholarship program with the Blaine Amendment in Montana's Constitution.

A single mother who worked three jobs applied to the program to assist her in paying tuition for her children at a private Christian school. The school met all program qualifications, but ran afoul of the Department of Revenue's exclusionary rule enforcing the state's Blaine Amendment. After the mother filed suit, the Montana Supreme Court invalidated the entire scholarship program rather than allow any money to be sent to a religious school.

The U.S. Supreme Court reversed. It began by reiterating that the Free Exercise Clause protects against unequal treatment of religious observers and against laws that impose special disabilities based on religious status. The Court then explicated its holding in *Trinity Lutheran* as prohibiting government from disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character." *Espinoza*, 140 S. Ct. at 2755 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021). Doing so imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny." *Id.* (quoting *Trinity Lutheran*, 137 S. Ct. at 2021).

Like the Missouri Blaine Amendment at issue in *Trinity*, Montana's Blaine Amendment barred religious schools from public benefits solely because they are religious. Likewise, the Amendment barred parents from receiving a public benefit solely because of the religious character of the schools to which they sent their children. Montana's disparate treatment based on religious status triggered strict scrutiny, and Montana could not satisfy that high standard. Among other things, the Court rejected as insufficient Montana's purported interest in maintaining a strict separation between church and state, as well as Montana's readoption of its Blaine Amendment in the 1970s.

After *Trinity Lutheran* and *Espinoza*, it is clear that religious schools cannot be forced to choose between accepting public funding and maintaining their religious character. The same is true for families. It remains an open question whether a state can still discriminate based on religious *use* rather than religious status, and whether a so-called "neutral" Blaine Amendment (one that prohibits aid to all private schools, religious and secular) is enforceable if it was adopted with anti-religious animus or has anti-religious effects.

❷ *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020), involved a different, though very familiar, problem: the U.S. Department of Health and Human Services' requirement that employers include abortifacients and artificial contraception as part of their employee health plans under the Affordable Care Act. When it initially created this requirement, the Department provided an unqualified exemption for churches but a more limited exemption for non-church, religious organizations like the Little Sisters. In its final form, the limited exemption required a religious organization to sign a piece of paper professing the organization's religious objection to providing such coverage. The government would then use that form to co-opt the religious organization's health provider, forcing the provider to offer abortifacients and artificial contraception (purportedly) at no cost to the religious employer.

In a previous iteration of the litigation, the Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), ruled in favor of the Little Sisters, vacated several adverse circuit court rulings, and encouraged the parties to reach an out-of-court resolution. With the change in Presidential Administration, the Department succeeded in making a deal: religious and moral objectors to the Affordable Care Act's contraceptive mandate would be entitled to the same unqualified exemption as churches. At the same time, the Administration increased Title X funding to allow employees without contraceptive coverage to obtain it through the federal government.

This compromise was too much for some states. They could identify no individual employee who would be unable to obtain government-funded contraceptives due to the rule change. (After all, if someone chooses to work for the Little Sisters, or a group like March for Life, they are likely not looking for abortifacient coverage. And even if they are, they have Title X options, as noted above). Yet these states claimed that the Department lacked statutory authority to enact a broader religious and moral exemption.

The Supreme Court disagreed emphatically, holding that because the Affordable Care Act delegated to the Department the authority to create the mandate in the first instance, the Act necessarily delegated the Department authority to create exemptions to the mandate. Otherwise, even the initial "church" exemption would have been invalid. The Court also rejected the states' protests that the new exemption was procedurally invalid.

While the Court reversed the adverse lower-court ruling in its entirety, it left for remand the issue whether the new exemption is arbitrary and capricious. This means that there could be a *Little Sisters of the Poor III* soon. What's more, a different Administration could change the exemption yet again, which would likely trigger additional litigation between non-church religious organizations and the federal government over the mandate's requirements. Such litigation could raise additional interesting religious-liberty issues, including the Free Exercise and Equal Protection rights of non-church, religious employers. (For example, does it violate the Equal Protection Clause for the federal government to co-opt an

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independent religious seminary's health plan to provide abortifacients and artificial contraception when a church-affiliated religious seminary has a complete exemption?) In sum, after two trips to the Supreme Court, the Little Sisters' courtroom adventures are likely far from over.

3 *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), required the Court to revisit yet another of its religious-liberty precedents, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012). In *Hosanna-Tabor*, the Court formalized the so-called "ministerial exception" doctrine that lower courts had adopted and followed for many years. Under that doctrine, courts prohibit employees from bringing employment-discrimination claims against religious employers if the employees are "ministers" of the religious organization. The First Amendment requires this prohibition to ensure that courts do not entangle themselves in matters of church governance as well as those of faith and doctrine.

Hosanna-Tabor involved a Lutheran-school teacher who claimed she had been fired in retaliation for threatening to file a lawsuit under the Americans with Disabilities Act. The Court held that the ministerial exception barred that lawsuit on the ground that the teacher qualified as a "minister" because the Lutheran congregation that operated the school conferred upon her the title "Minister of Religion," the teacher had a significant degree of religious training plus a formal process of commissioning, the teacher held herself out as a minister by claiming a special housing allowance on her taxes, and the teacher's job duties reflected her role in conveying the Church's message and carrying out the Church's mission.

Our Lady and its companion case, *St. James School v. Biel*, required the Court to consider what test lower courts should apply when determining whether a religious organization's employee serves in a "ministerial" capacity. Both cases involved Catholic-school teachers, one claiming age discrimination, the other discrimination under the Americans with Disabilities Act. Neither teacher held the title of "minister," and neither had significant theological training comparable to the teacher in *Hosanna-Tabor*. Based on these differentiators, the Ninth Circuit held that neither qualified as a minister.

The Supreme Court reversed, holding that courts must consider a variety of factors in determining whether a religious employee is a minister. Many religious traditions do not use the title "minister," so that cannot be a necessary requirement. Likewise, a position may have an important role in teaching the tenets of the religious organization's faith even without requiring a person who fills that position to have formal theological training. Those "circumstances, while instructive in *Hosanna-Tabor*, are not inflexible requirements and may have far less significance in some cases." 140 S. Ct. at 2064.

What matters most, explained the Court, is "what an employee does." *Id.* When a religious organization's employee has the responsibility of educating young people in the religion's faith, that employee stands at the core of what the First Amendment protects: a religious organization's selection and supervision of employees who lead the organization, conduct religious services or ceremonies, or serve as a messenger or teacher of the faith. Applying this flexible test, the Court easily concluded that the plaintiff Catholic school teachers were ministerial employees.

This does not mean, however, that the Court is now done with the ministerial exception. Shortly after the Supreme Court issued its opinion in *Our Lady of Guadalupe*, the Seventh Circuit severely circumscribed that opinion's reach in *Demokovich v. St. Andrew the Apostle Parish, Calumet City*, 973 F.3d 718 (7th Cir. 2020). That case involved a music director who claimed that a Catholic parish fired him because of his sexual orientation. When it became clear that the ministerial-exception doctrine was going to bar that claim, the music director recast it as a hostile-environment claim. Although the principles that compelled the courts to adopt the ministerial-exception doctrine would appear to apply in either circumstance, the Seventh Circuit held the doctrine applicable only to tangible employment actions (like hiring or firing) and not intangible actions (like a hostile environment). That decision exacerbated a circuit split and, depending on how the Seventh Circuit handles the church's petition for rehearing en banc, could very well result in yet another ministerial-exception case at the Supreme Court within a short time.

4 *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020). The final 2019 Term case that focused on religious liberty arose in a more unusual procedural posture: an application for an injunction pending appeal. The dispute was one of many dozens of actions filed by churches across the country in response to government orders shutting down or severely circumscribing religious worship, ostensibly to prevent the spread of COVID-19. The order that Calvary Chapel challenged was particularly egregious, as it gave casinos, amusement parks, and other secular assemblies a 50%-of-capacity limit while capping church attendance at only 50 persons. This meant that a casino with a 2,000-person capacity could host 1,000 gamblers while a church with a 2,000-person capacity could host only 50 worshippers.

Surprisingly, five Justices declined to grant the appellate injunction over three fiery dissents, joined in different parts by four dissenting Justices. As the lead dissent, penned by

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Justice Alito, noted, "[t]hat Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing." 140 S. Ct. at 2604.

Rather than belabor the dissenters' points of view, it is important to note that the Court adopted a very different tone only a few weeks ago in *Roman Catholic Diocese of Brooklyn v. Cuomo*, __ S. Ct. __, 2020 WL 6948354 (Nov. 25, 2020). There, the Diocese and a synagogue sought an appellate injunction to prevent New York's Governor from imposing a 10-person cap on religious services. Five Justices agreed to grant the injunction. The per curiam opinion explained that the Governor's order was neither neutral nor generally applicable under *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990), because while a synagogue or church in the so-called COVID-19 "red zone" could admit no more than 10 persons, many secular businesses had no such limit, including acupuncture facilities, campgrounds, certain manufacturers, and transportation facilities. As a result, the Governor's order had to satisfy strict scrutiny, and the Court held that the order failed that test, since there were many more narrow ways of accomplishing the Governor's goals.

There are many additional church cases involving COVID-19 orders in the pipeline, both in the lower courts and knocking on the Supreme Court's door. It seems likely the Court will soon hear at least one of these cases on the merits. And if the Court follows its reasoning in *Diocese of Brooklyn*, the outlook for religious liberty is bright indeed.

ARTICLES *of* NOTE

Ben Clements, *Defining "Religion" In The First Amendment: A Functional Approach*, 74 Cornell L. Rev. 532 (1989).

AUTHOR'S CONCLUSION:

"The First Amendment's command that the government 'make no law respecting an establishment of religion or prohibiting the free exercise thereof' requires an interpretation of religion that will allow the courts to distinguish between religious and nonreligious belief. On the other hand, the purpose of the religion clauses – to ensure religious liberty for all – requires an interpretation that will encompass the religious impulses in persons, whether these impulses are expressed in the form of a traditional religion, or in the form of a unique, unstructured, personal religion. These two goals are served by defining religion in terms of the religious function in an individual's life – addressing the fundamental questions of human existence and providing a guide for how to conduct one's life. The proposed definition embodies this religious function and provides a specific, but flexible guide for determining what is religion in both fee exercise and establishment clause cases."

Lee J. Strang, *The Meaning Of "Religion" In The First Amendment*, 40 Duq. L. Rev. 181 (2001-2002).

AUTHOR'S INTRODUCTION:

It is the contention of this Article that 'religion,' in 1791, meant at least what we would think of today as a traditional theistic belief in a God with concomitant duties, which imply a future state of rewards and punishments. In other words, while religion very likely meant something narrower than simply theistic belief systems, such seems to include under the rubric of religion only monotheistic beliefs such as Christianity, Judaism, or Islam. It also appears to be unlikely, given the historical evidence, that religion was thought to include polytheistic beliefs. It is clear that religion did not encompass atheism or what the Court often refers to today as 'irreligion.' Consequently, the original meaning of the word religion cannot offer an exact abstract definition. Nevertheless, original meaning interpretation in this instance can offer a continuum whereby traditional mono-theistic[sic] beliefs, and certainly Christianity, are included as religions, while belief systems based on non-theistic views of the world – philosophy for example – are not included in the definition of religion.

Consequently, a religion in the First Amendment context has several attributes: a religion is at least theistic, and likely monotheistic, the Supreme Being to whom the belief system claims adherence requires the believer to do and refrain from doing certain things, and the belief system must profess a future state of rewards and punishments."

Courtney Miller, *"Spiritual But Not Religious": Rethinking The Legal Definition of Religion*, 102 Va. L. Rev.833 (2016).

AUTHOR'S ABSTRACT:

Through the statutory mechanisms of RFRA and RLUIPA, Free Exercise jurisprudence has expanded the scope of religious protection. In the absence of a clear legal definition of religion, however, this protection has an unknown and biased reach. In particular, courts and legal scholars embody a misunderstanding of a burgeoning group of Americans who identify as 'spiritual but not religious,' excluding them from religious protection. This Note uses a recent case, which dismissed as nonreligious the beliefs of a plaintiff whose beliefs are paradigmatic of this growing cohort, to analyze how the law denies religion. It argues that while such belief systems reject the institutional characteristics of organized religion, they are sufficiently analogous to religious belief systems to deserve the same legal protection."

Ethan Blevins, *A Fixed Meaning Of "Religion" In The First Amendment*, 53 Willamette L. Rev. 1 (2016).

AUTHOR'S PART II:

"Scholars and jurists have proposed a variety of First Amendment definitions of religion. In joining their ranks, I suggest a substantive definition of religion for the Free Exercise clause centered on the worship of supernatural agents. This definition aligns with original intent and understanding while providing a workable definition for a diverse society. Specifically, this article argues that religion in the First Amendment is a belief in a sentience with supernatural power to influence the natural world that believers worship through acts of devotion and obedience."

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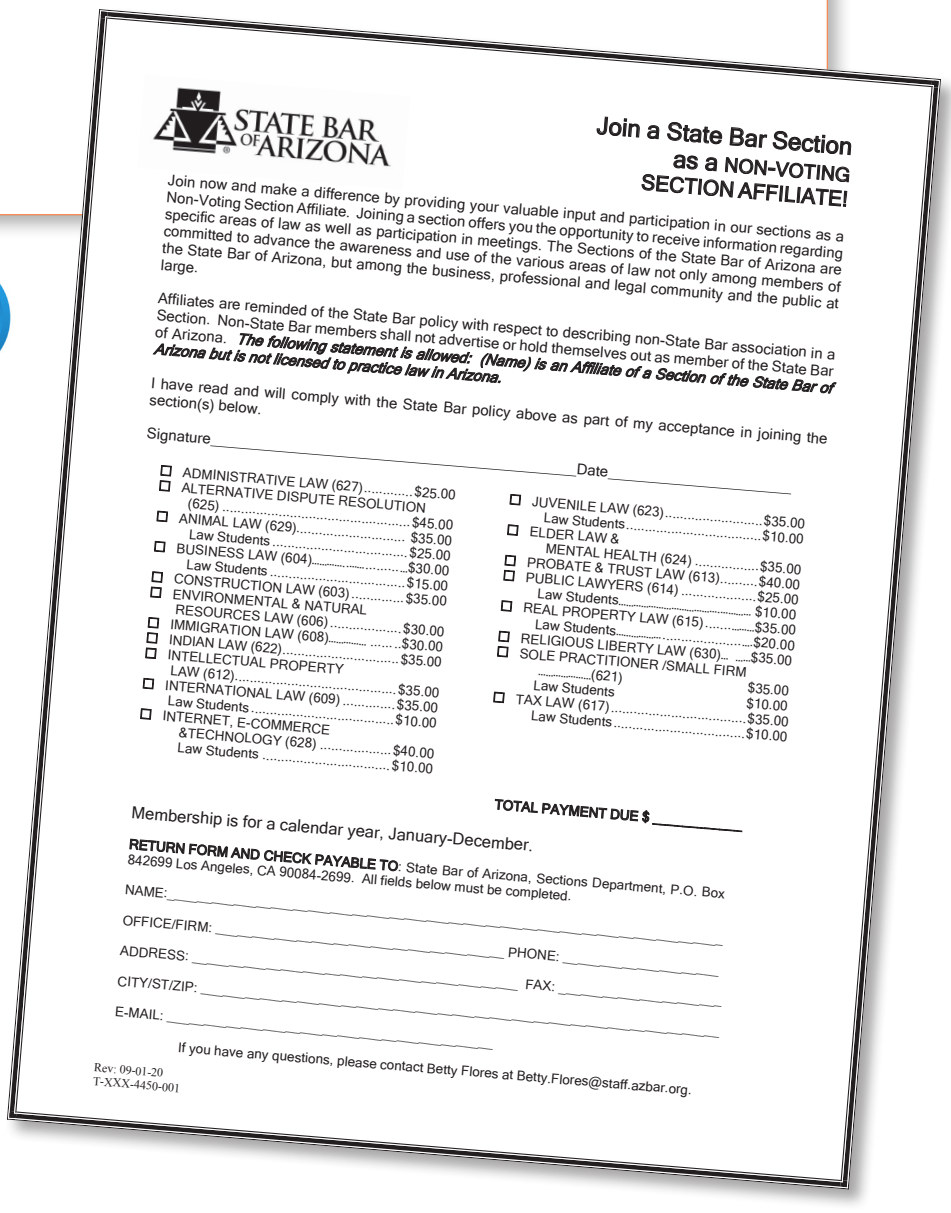

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RESOURCES

LAW RESOURCES

Federal Statutes

Religious Freedom Restoration Act of 1993 – 42 U.S.C. § 2000bb, et seq.

Religious Land Use and Institutionalized Persons Act (RLUIPA) – 42 U.S.C. § 2000cc, et seq.

Equal Access Act – 20 U.S.C. § 4071

Office of the U.S. Attorney General

October 6, 2017 Memorandum: Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006786/download

October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
https://www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

February 5, 2020 Declaration of Principles for the International Religious Freedom Alliance.
https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/

2019 Annual Report of the U.S. Commission on International Religious Freedom.
https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf

July 26, 2019 2nd Annual Ministerial to Advance Religious Freedom: Remarks by Vice President Pence.
https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/

U.S. Department of Justice and U.S. Department of Education

January 16, 2020 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.
https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

U.S. Department of Labor

August 10, 2018 Directive 2018-03: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

May 2020 Guidance Regarding Federal Grants and Executive Order 13798 – Equal Treatment in Department of Labor Programs for Religious Organizations.
https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act

U.S. Department of Health and Human Services

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

Arizona Freedom of Religion Act –
Ariz. Rev. Stat. § 41-1493.01

Other Resources

American Charter of Freedom of Religion and Conscience.
http://www.americancharter.org

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

Introduction: Religious Liberty Law Section CLE at the State Bar of Arizona 2017 Annual Convention, held on June 16, 2017

Presenter: David Garner (Osborn Maledon, P.A.)

[watch video]

Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

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Debate: Resolving conflicts between religious liberty and anti-discrimination laws

Participants: Jenny Pizer (Lambda Legal), Kristen Waggoner (Alliance Defending Freedom), Alexander Dushku (Kirton McConkie)

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Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Gallagher & Kennedy PA)
Panelists: Eric Baxter (The Becket Fund for Religious Liberty), Alexander Dushku (Kirton McConkie), Will Gaona (ACLU of Arizona), Jenny Pizer (Lambda Legal), Professor James Sonne (Stanford Law School), and Kristen Waggoner (Alliance Defending Freedom)

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