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The Supreme Court Broadens the Berth for Religious Exemptions from Federal and State Anti-Discrimination Law and the Affordable Care Act

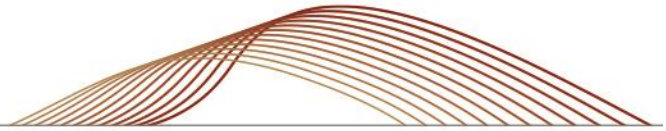
By Jeffrey D. Wohl & Adriana N. Simmons

In two decisions rendered at the end of its term, the U.S. Supreme Court has broadened the right of religious employers not to follow federal and state law with respect to job discrimination and to restrict the availability of covered birth control for employees under the Affordable Care Act.

Broadening the Ministerial Exception to Anti-Discrimination Laws

In *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19–267 (July 8, 2020), the Court considered how far the so-called "ministerial exception" to anti-discrimination law extends. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012)), the Court had held that ministers employed by a church were not protected against job discrimination under federal and state law because of the First Amendment right of the church to decide who carries out its religious mission. In *Morrisey-Berru* and a consolidated case, the employees suing for job discrimination did not have a ministerial title but were instead teachers at Catholic church-run schools whose responsibilities were not strictly related to religious instruction. One of the teachers alleged that her teaching contract was cancelled shortly after she told the principal she had been diagnosed with cancer; she sued under the Americans with Disabilities Act. The other teacher alleged that her contract was not renewed after she refused her principal's suggestion that she retire; she sued under the Age Discrimination in Employment Act. The schools argued that the ministerial exemption extends to teachers in church-run schools under the test laid out in *Hosanna-Tabor*, and, therefore, they could not be sued by these teachers for discrimination. The district court agreed. The Ninth Circuit, however, reversed. Applying the *Hosanna-Tabor* test narrowly, the Ninth Circuit found that because the two teachers did not have the formal title of "minister" and had not undergone rigorous religious training, the ministerial exemption did not apply to them. The schools then sought and were granted review of the decision by the Supreme Court.

Writing for a 7–2 majority, Justice Alito said that the ministerial exemption did apply because the teachers "performed vital religious duties." Even if they did not carry the official title of minister or have in-depth religious training, "their core responsibilities as teachers of religion were essentially the same [as the minister-teacher in *Hosanna-Tabor*]." Justice Alito explained, "In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding



and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important." Accordingly, "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."

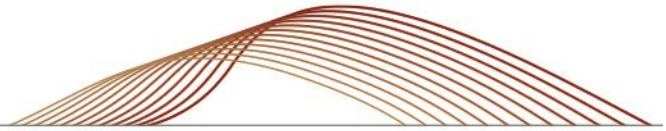
Dissenting from the decision were Justices Sotomayor and Ginsburg. They argued that the Court was expanding the power of a church to discriminate against its employees too far, noting that under the majority's reasoning, teachers at religious schools now can be "fired for any reason," even if they "taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic."

The key question after *Morrisey-Berru* is how far the decision goes—how attenuated from a church's religious mission may an employee's duties be to warrant application of the ministerial exception? One can suppose that a school janitor or secretary would not fall within the exception, but a host of other positions could, such as a bishop's executive assistant, or a church's public relations or community outreach coordinator. Another important issue is to which religious-affiliated institutions does the decision apply? Examples include hospitals, orphanages, youth and sports groups, and mutual-benefit organizations—but how about a faith-based corporation? In applying *Morrisey-Berru*, the lower courts will need to sort out the contours of the decision.

Exempting Employers from the Birth-Control Requirements of the Patient Protection and Affordable Care Act

In a second case decided at the same time as *Morrisey-Berru*, the Court upheld a Trump Administration exemption from the birth-control requirements under the Patient Protection and Affordable Care Act ("ACA") (also known as "Obamacare"). In *Little Sisters of the Poor Saints Peter and Paul Home. v. Pennsylvania et al.*, No. 19–431 (July 8, 2020), the Court looked at the Administration's exemption to the ACA's contraceptive provision, which requires that birth control be covered by employer group health plans with no co-pay as a preventative service. Regulations under the law already allowed exemptions from the ACA's contraceptive provisions for churches or other religious entities, but required them to self-certify to their health-insurance issuer that they met certain criteria; the issuer then would exclude contraceptive coverage from the employer's plan but still provide participants with coverage for contraceptive services without imposing any cost-sharing requirements on the employee. After religious employers objected even to that alternative, the Trump Administration did away with the contraception mandate for any private employer, even publicly traded corporations, that have a "sincerely held religious belief [against the use of contraception]." The Administration also extended the exemption to small businesses or organizations with objections to this provision "on the basis of moral conviction which is not based in any particular religious belief." Pennsylvania and New Jersey went to federal court to challenge the expanded exemption, arguing that the new rule violated both the ACA and the Administrative Procedure Act (including its notice-and-comment procedures). When a lower court blocked the rule nationwide, the Administration and the Little Sisters of the Poor (a Roman Catholic religious order) asked the Supreme Court for review.

Again by a 7–2 decision, the Court held that under the ACA, the Department of Health and Human Services ("HHS") had the authority to carve out the exemption to the ACA's contraceptive mandate. Writing for the majority, Justice Thomas said under the Women's Health Amendment to the ACA,



group health plans must provide women with "preventive care and screenings . . . as provided for in comprehensive guidelines supported by [the Health Resources and Services Administration ("HRSA"), an HHS unit]." The phrase "as provided for," Justice Thomas wrote, grants sweeping authority to HRSA to define the preventive care that applicable health plans must cover. That same grant of authority empowers HRSA to identify and create exemptions from its own guidelines. The Court also ruled that the process for adopting the exemption complied with the procedural requirements of the APA. However, the Court did not decide whether the exemption satisfied the APA's requirement that a regulation be based on "reasoned decisionmaking;" that issue remains open for the lower courts to address. (In a concurring opinion, Justices Kagan and Breyer expressed skepticism the exemption would satisfy that test). And although the issue was raised, the Court also declined to address whether the exemptions were compelled by the Religious Freedom Restoration Act ("RFRA").

Of course, because the exemption is the product of regulatory action by the Trump Administration, if a new administration is elected in November, the exemption could be narrowed or even eliminated, though that surely would be followed by even more litigation brought under the APA and the RFRA.

Little Sisters, along with the Court's prior decision in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (upholding a closely held corporation's right to object to the ACA's contraception mandate), and *Morrissey-Berru*, represents a clear statement by the Court of its willingness to uphold claims of exercise of religious beliefs. How far the Court will go in that direction remains to be seen, as new cases challenging governmental regulations based on religious grounds continue to be brought.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings lawyers:

New York

Adriana N. Simmons
1.212.318.6698
adrianasimmons@paulhastings.com

San Francisco

Jeffrey D. Wohl
1.415.856.7255
jeffwohl@paulhastings.com