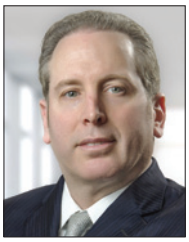
New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 264—NO. 43
MONDAY, AUGUST 31, 2020

RELIGION LAW

Expert Analysis

U.S. Supreme Court Expands Religious Freedom in Key Rulings



By **Barry Black**

And **Jonathan Robert Nelson**

The U.S. Supreme Court, over the course of little more than a week at the end of this past term, issued decisions in three different cases that demonstrated the Court's strong support of religious freedom. Indeed, the spate of pro-religion rulings by the Court should make it clear to the religious community, and to federal and state legislators, just how strongly the Court supports religious liberty.

In these cases, the Court:

- Struck down the "no-aid" provision in the Montana constitution, which prohibited aid to a school controlled by a "church, sect, or denomination";
- Rejected federal employment discrimination claims brought by two elementary school teachers at Catholic schools in Los Angeles; and
- Held that the U.S. Departments of Health and Human Services, Labor, and the Treasury (collectively, the Departments) have the statutory authority to provide exemptions from the regulatory contraceptive requirements of the Patient Protection and Affordable Care Act of 2010 (the ACA) for employers with religious and conscientious objections.

The Court's decisions in these cases will affect untold numbers of individuals, businesses, and other enterprises across the country. Their significance as milestone beacons of modern First Amendment jurisprudence can hardly be overstated. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," means exactly what it says.

The School Aid Case

On June 30, the Court issued its 5-4 decision in *Espinoza v. Montana Department of Revenue*. Chief Justice John G. Roberts, Jr., wrote the majority opinion for the Court, in which Justices Clarence Thomas, Samuel A. Alito, Jr., Neil M. Gorsuch, and Brett M. Kavanaugh joined.

The case arose after the Montana legislature granted a tax credit of up to $150 as part of a tuition assistance program for parents sending their children to private schools. Three mothers of children attending Stillwater Christian School in northwestern

BARRY BLACK, *the Religion Law columnist for the New York Law Journal, is a partner in the religion law firm Nelson Madden Black LLP, which serves the legal needs of religious institutions and individuals.* JONATHAN ROBERT NELSON *is a partner in the firm. Resident in the firm's offices in Midtown Manhattan, they can be reached at bblack@nelsonmaddenblack.com and jnelson@nelsonmaddenblack.com, respectively.*

Montana were barred from using the tuition assistance at Stillwater by the "no aid" provision in the Montana constitution. The case reached the Supreme Court, which ruled that the First Amendment's Free Exercise Clause prohibited application of the no-aid provision and that excluding religious schools and affected families from the program was inconsistent with that clause.

The Court pointed out that there was no dispute that the scholarship program was permissible under the First Amendment's Establishment Clause, which permits religious organizations to benefit from "neutral government programs." It added that the Free Exercise Clause, which applies to states under the Fourteenth Amendment, "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status."

The Court then reviewed its decision in *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. ___ (2017). There, Missouri provided grants to help nonprofit organizations pay for playground resurfacing, but a state policy disqualified any organization "owned or controlled by a church, sect, or other religious entity." Because of that policy, an otherwise eligible church-owned preschool was denied a grant to resurface its playground. The Court held that Missouri's policy unconstitutionally discriminated against the church "simply because of what it is—a church."

Montana's no-aid provision similarly barred religious schools and parents wanting to send their children to religious schools from public benefits "solely because of the religious character of the schools," the Court declared. Applying the "strictest scrutiny," the Court struck down the no-aid provision. It concluded that although a state "need not subsidize private education," once it decided to do so, it could not disqualify private schools solely because they were "religious."

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Justices Ruth Bader Ginsburg, Stephen G. Breyer, Elena Kagan, and Sonia Sotomayor dissented in several opinions, proposing a "flexible, context-specific approach" that might well vary from case to case. But the majority would have no part of this, positing that the dissenters' "'room[y]' or 'flexible' approaches to discrimination against religious organizations and observers would mark a significant departure from our free exercise precedents. The protections of the Free Exercise Clause do not depend on a 'judgment-by-judgment analysis' regarding whether discrimination against religious adherents would somehow serve ill-defined interests."

Employment Discrimination

The Court was not nearly as divided in either of the next two cases.

On July 8, the Court decided *Our Lady of Guadalupe School v. Morrissey-Berru*, with Justice Alito writing the majority opinion, in which Chief Justice Roberts and Justices Thomas, Breyer, Kagan, Gorsuch, and Kavanaugh joined.

The case arose after Agnes Morrissey-Berru, who had been employed as a teacher at Our Lady of Guadalupe School (OLG), a Roman Catholic primary school in the Archdiocese of Los Angeles, learned that OLG had decided not to renew her contract. She filed a claim with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, and filed suit under the federal Age Discrimination in Employment Act of 1967, claiming that the school had demoted her and had failed to renew her contract so that it could replace her with a younger teacher.

OLG moved for summary judgment, relying on the "ministerial

exception" that the Supreme Court had recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171 (2012). Under this rule, courts must stay out of employment disputes involving employees whose duties include certain religious functions in one form or another.

The district court granted OLG's motion, but the U.S. Court of Appeals for the Ninth Circuit reversed. It noted that Morrissey-Berru did not have the formal title of "minister," had limited formal religious training, and "did not hold herself out to the public as a religious leader or minister." Therefore, the circuit court concluded, she did not fall within the ministerial exception.

A companion case involved Kristen Biel, who worked as a lay teacher at St. James School, another Catholic primary school in Los Angeles, until St. James declined to renew her contract. She filed charges with the EEOC and, after receiving a right-to-sue letter, sued the school, alleging that she had been discharged because she had requested a leave of absence to obtain treatment for breast cancer.

Like OLG, St. James obtained summary judgment under the ministerial exception, and the Ninth Circuit reversed.

The Supreme Court reversed in both cases. The Court held that the First Amendment does not permit courts to intervene in employment disputes involving "teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith."

The Court observed that the First Amendment's Religion Clauses protect the right of religious institutions to decide matters "of faith and doctrine" without government intrusion. State interference in that sphere "would obviously violate the free exercise of religion," the Court continued, adding that "any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion."

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A religious institution's independence on matters "of faith and doctrine" requires that they have the authority to select, supervise, and, if necessary, remove a minister without interference by secular authorities, according to the Court. The ministerial exception, it continued, preserves a religious institution's "independent authority" in those matters—and forecloses certain employment discrimination claims brought against religious organizations.

The Court then ruled that both teachers—Morrissey-Berru and Biel—qualified for the ministerial exception under *Hosanna-Tabor*, even if neither of them were "ministers" or had clerical titles. The Court found "abundant record evidence that they both performed vital religious duties." It emphasized that they were "Catholic elementary school *teachers*, which meant that they were their students' primary teachers of religion." Finding no need to have a "rigid formula" to determine the applicability of the ministerial exception, the Court concluded:

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.

Justices Sotomayor and Ginsburg dissented, contending that the Court had improperly expanded the ministerial exception. In their view, the Court's decision could exempt not only teachers from federal employment discrimination laws, but

"countless coaches, camp counselors, nurses, social-service workers, in-house lawyers, media-relations personnel, and many others who work for religious institutions."

The Contraceptive Mandate

Also on July 8, and also by a vote of 7-2, the Court decided *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.

The majority decision was by Justice Thomas, with Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh joining. Justices Kagan and Breyer concurred in the judgment, and Justices Ginsburg and Sotomayor dissented.

The case involved the obligation imposed under the ACA on certain employers to provide contraceptive coverage to their employees through their group health plans and, more particularly, exemptions to that obligation created by the Departments for certain employers with religious and conscientious objections.

The U.S. Court of Appeals for the Third Circuit concluded that the Departments lacked statutory authority to promulgate the exemptions, but the Supreme Court disagreed. It ruled that the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections.

Importantly, the Court did not end its analysis when it held that the ACA provided a basis for the exemptions. It also found that it "was appropriate" for the Departments to consider the Religious Freedom Restoration Act of 1993 (RFRA) as they formulated exemptions from the contraceptive mandate. In so declaring, the Court emphasized that the RFRA "provide[s] very broad protection for religious liberty." In offering resounding support for the RFRA, the Court said, it was "clear from the face of [RFRA] that the contraceptive mandate is capable of violating RFRA."

Then, having decided that the Departments had the statutory authority to promulgate the exemptions, it concluded that the final rules were not procedurally invalid, and it reversed the Third Circuit.

Conclusion

Religious institutions and houses of worship certainly were not victorious in every case that reached the Supreme Court last term. In late May, and then again in late July, the Court, voting 5-4 in both instances, declined applications for injunctive relief brought by houses of worship challenging state "lockdown" orders. The concurring opinion by Chief Justice Roberts in the earlier case, *South Bay United Pentecostal Church v. Newsom* (May 29, 2020), highlighted the nature of the pandemic, the fact that "[t]he safety and the health of the people" are entrusted to politically accountable officials, and the special requirements for obtaining interlocutory relief in the federal courts. The results in that case, and in *Calvary Chapel Dayton Valley v. Sisolak* (July 24, 2020), may have had more to do with COVID-19 than religion law.

In any event, these two decisions do little to diminish the Court's significant religion rulings in the three primary cases discussed above. In a day and age when much is questioned, the Supreme Court is setting forth very clear boundaries around the Free Exercise Clause of the First Amendment.