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Religious Liberty Lives at the Supreme Court

In two 7-2 rulings, the Justices uphold conscience protections.

By THE EDITORIAL BOARD | July 08, 2020

Religious Americans sometimes fear that intolerant secular progressives will soon try to ruin them for holding traditional views. They can take heart in a pair of 7-2 rulings Wednesday from the Supreme Court, in which the Justices upheld conscience protections for nuns and parochial schools.

The issue in [the first opinion](#), *Our Lady of Guadalupe School v. Morrissey-Berru*, was whether two teachers could sue for discrimination after Catholic schools didn't renew their contracts. In 2012 the Court in *Hosanna-Tabor* said a fourth-grade teacher could not sue her Lutheran school. She was covered by a "ministerial exception," based on the First Amendment right of churches to be free of government meddling. That teacher had religious training and a formal title as a commissioned minister.

How far does the ministerial exception reach? In *Guadalupe*, the two teachers at Catholic elementary schools prayed in class, instructed students in doctrine, and took them to Mass. They had less-substantial religious training, however, and no special titles. One even is "not currently a practicing Catholic," she argued.

"What matters, at bottom, is what an employee does," wrote Justice Samuel Alito for the majority. Focusing on clerical titles "would risk privileging religious traditions with formal organizational structures." An amicus brief by Jewish organizations, for example, said that "Judaism has many 'ministers.'" The same problem applies with trying to use religious training as a key distinction.



Demonstrators gather outside the U.S. Supreme Court on July 8. PHOTO: PATRICK SEMANSKY/ASSOCIATED PRESS

The ministerial exception is not subject to a “rigid formula,” Justice Alito wrote, citing *Hosanna-Tabor*. The teachers here clearly “performed vital religious duties,” and their schools “expressly saw them as playing a vital part in carrying out the mission of the church.”

Don’t forget the context. Last month’s ruling in *Bostock v. Clayton County* extended federal antidiscrimination law to sexual orientation and transgender status. A religious school in progressive California might worry about being sued for dismissing a lay math teacher who began living a proudly gay lifestyle in defiance of the church’s teachings.

Justice Neil Gorsuch’s opinion in *Bostock* dismissed such concerns with a pat line about how those “are questions for future cases.” There will be a blizzard of them, no doubt. It’s a hopeful sign for religious liberty that even liberal Justices Stephen Breyer and Elena Kagan joined the *Guadalupe* majority to expand the ministerial exception.

The second opinion Wednesday, *Little Sisters of the Poor v. Pennsylvania*, involved employers who object to providing contraceptives under a mandate from ObamaCare. The Little Sisters, an order of Catholic nuns, have been fighting this for years. The Trump Administration put forth regulations in 2017 and 2018 to expand exemptions for employers with good-faith objections. Pennsylvania and New Jersey sued, calling it an abuse of discretion.

Not so, wrote Justice Clarence Thomas for the Court’s five conservatives. The Affordable Care Act’s text doesn’t mention contraceptives here, but rather empowers the executive branch to decide what preventive health coverage is mandatory. That “capacious grant of authority,” Justice Thomas wrote, includes “the ability to identify and create exemptions.”

This is a victory, but a narrow one. Justice Kagan concurred in the judgment, joined by Justice Breyer. But as the case moves back to lower courts, she wrote, the Trump Administration’s opt out might “prove arbitrary and capricious.” That reads like an invitation to keep the Sisters in court. Justices Alito and Gorsuch signed a concurrence saying they also would have held for the Sisters under the Religious Freedom Restoration Act, which would end their “legal odyssey.” But progressives today exhibit a growing hostility to religion, and they are likely to pursue the nuns to the end of the legal earth.

A President Biden would be under pressure from the left to undo protections for religious employers, so the fight could start anew in 2021. A question for Joe Biden: How much do you want to force Catholic nuns to violate their conscience to appease the secular left?