



# The Separation of Church and State: What's at Stake with the Next Supreme Court Justice

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The separation of religion and government is the linchpin of religious freedom for all, but President Donald Trump – and many of the nominees on his short list to replace Justice Ruth Bader Ginsburg on the U.S. Supreme Court – have shown little respect for this fundamental American value. We cannot afford to have a Supreme Court that does the same.

The American people agree: 60 percent of likely voters said protecting the separation of religion and government is either one of the most important issues or very important to them, according to a poll conducted in 2019 by Anzalone Liszt Grove Research on behalf of Americans United.

Our country's next Supreme Court nominee must uphold the separation of church and state as guaranteed by the First Amendment of the U.S. Constitution. Religious freedom for all Americans – the right to practice any faith, or no faith at all, as long as you don't harm others – hangs in the balance.

## **At Stake: Whether religious exemptions will be used to harm others, undermine discrimination laws and deny access to health care.**

A long line of religious-freedom cases makes clear that the Constitution prohibits religious exemptions that result in harm to others. Yet, over the past several years, the Supreme Court has issued troubling decisions in cases asking whether businesses and institutions can get religious exemptions that permits them to discriminate or harm others. Seating a justice who does not believe in the “do no harm principle” could lead to the Supreme Court stripping people of their rights – particularly women, LGBTQ people, religious minorities and the nonreligious – under what a narrow minority calls religious freedom.

For example, in *Burwell v. Hobby Lobby*, the Court held that businesses could use their owners' religious beliefs as a justification for refusing to provide employees with insurance coverage for birth control. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court ruled in favor of a bakery that refused to bake a cake for a same-sex couple's wedding. And, most recently in *Bostock v. Clayton County*, the Supreme Court confirmed that Title VII of the Civil Rights Act bars employers from discriminating against LGBTQ people; but the majority opinion warned that future cases will determine whether businesses could use religious freedom claims to “supersede Title VII's commands.”

More cases like these are making their way through the lower courts and *will* make their way to the Supreme Court. In fact, in November, the Supreme Court will hear *Fulton v. City of Philadelphia*, in which a taxpayer-funded, faith-based foster care agency wants the court to create a constitutional right to discriminate against qualified families because they are LGBTQ or don't follow an agency's religious tenets. The ruling could extend beyond foster care

agencies and create a sweeping license to use religion to discriminate in other taxpayer-funded services. Meanwhile, the Trump administration, empowered by the current conservative Court, is adopting regulations and policies that permit taxpayer-funded entities to discriminate in employment, health care and the provision of social services.

With Justice Ginsburg's death, we lost a staunch proponent of the "do no harm" principle on the Court. As she has said in religious exemption cases, "[y]our right to swing your arms ends just where the other man's nose begins." The next Supreme Court justice must also acknowledge the "do no harm principle" and apply it correctly. Our civil rights, health care and religious freedom are at stake.

### **At Stake: Whether taxpayers will be forced to pay for religious activities.**

Our country's founders considered it anathema to religious freedom for government to force taxpayers to pay for religious education and activities. However, conservative judges are chipping away at this foundational religious-freedom principle.

In 2017, the Supreme Court ruled in *Trinity Lutheran Church of Columbia v. Comer* that Missouri could not exclude a church from a taxpayer-funded state grant program that pays to resurface playgrounds. Although the decision was explicitly limited to nonreligious uses of public funds, the Trump administration has used it to argue that the government should fund religious activities.

In June, in *Espinoza v. Montana Department of Revenue*, the Supreme Court held that states cannot exclude religious schools – solely on account of their religious status – from private school voucher programs. The Supreme Court did *not* decide whether states may still prohibit program funds from being used by those schools for religious instruction, setting up that fight for a future Supreme Court case.

Justice Ginsburg dissented in both cases. The next Supreme Court justice must acknowledge our country's foundational principle that taxpayers should not be forced to fund religious education or other religious activities. Our freedom of conscience is at stake.

### **At Stake: Whether religious freedom will apply to everyone.**

The promise of the First Amendment is that the government will treat us all equally, regardless of our religious or nonreligious beliefs. That is why the Supreme Court has long forbidden the government from favoring one religion over another: Favoritism sends the message that those who hold a different religious belief – or none at all – are outsiders and not full members of the community.

Justice Ginsburg understood that separation of church and state is especially critical to protecting religious freedom for people of minority religions and the nonreligious. As she said during her confirmation hearings: "I am alert to discrimination. I grew up during World War II in a Jewish family. I have memories as a child, even before the war, of being in a car with my parents and passing a place ... with a sign out in front that read: 'No dogs or Jews allowed.'"

In *Masterpiece Cakeshop*, the Supreme Court ruled that the government must not make policy based on hostility to a religion. In that case, which involved perceived hostility to Christianity, the

Court explained that we cannot tolerate “even ‘subtle departures’” from religious neutrality. Yet, a few weeks later in *Hawai’i v. Trump*, the Court was willing to ignore the blatant religious animus behind President Trump’s Muslim Ban. The divergence between the two cases – one going out of its way to label behavior as hostile to Christians, and the other going out of its way to dismiss Trump’s hostility to Muslims – is troubling. The dissent in *Hawai’i v. Trump*, which Justice Ginsburg joined, pointed out this hypocrisy and its effect on minority religions.

The next Supreme Court justice must commit to protecting religious freedom for everyone, not just a privileged few. The rights of religious minorities and the nonreligious are at stake.

### **At Stake: Whether public school students could be forced to pray in school.**

Because students in the public schools are impressionable and a captive audience, the Supreme Court has held for more than 50 years that public schools must not sponsor prayer, promote religion or coerce students to participate in religious activities. Yet public school officials across the country continue to violate the Constitution. For instance, in *Kennedy v. Bremerton*, an assistant football coach is insisting he had a right to pray with players and students at the 50-yard line after games; this case is in the 9th U.S. Circuit Court of Appeals and could end up before the Supreme Court.

President Trump issued federal “school prayer guidance” in January that undermines religious-freedom protections for public schoolchildren by encouraging students and even teachers to pray at public school events, and students to speak “persuasively” about religion with classmates – which could lead to religious proselytization and harassment. In the last school prayer case considered by the Supreme Court in 2000, *Santa Fe Independent School District v. Doe*, Justice Ginsburg sided with students and their families who objected to school-sponsored prayer. This core constitutional protection is now on the line.

The next Justice must ensure that public schools are welcoming and accepting of all students, regardless of their religious beliefs. The religious freedom of our schoolchildren is at stake.

### **Justice Ginsburg’s Legacy and What Comes Next**

In her many years on the Supreme Court, Justice Ginsburg was a staunch and consistent protector of church-state separation. She voted against using religion to justify discrimination or diverting taxpayer funds to private religious schools. She voted for the rights of religious minorities, women and LGBTQ people, rights that are continually endangered by the claims of religious extremists.

Church-state separation and religious freedom are at stake with a Supreme Court that could include yet another Trump appointee. The wrong choice could fatally damage church-state separation, jeopardize freedom of conscience and religion for the vast majority of Americans, and threaten our equality under the rule of law. President Trump’s record of appealing to and appeasing a minority of religious extremists signals that his nominee would be a critical vote against the First Amendment’s promise of religious freedom. A Trump nominee would undoubtedly join in the attempt to redefine that freedom as a sword to harm others rather than as a shield to protect us.