



What Comes Next: Religion & State Post-Title VII Decision

June 2020

On June 15, the Supreme Court held that Title VII of the Civil Rights Act protects LGBTQ people from employment discrimination on account of sexual orientation or gender identity. This was a landmark victory for civil rights.

But the Supreme Court left unresolved a question with dangerous implications for LGBTQ rights. While recognizing that Title VII provides broad protections against discrimination for LGBTQ employees, the court specifically noted that “how doctrines protecting religious liberty interact with Title VII are questions for future cases.” In other words, employers that want to discriminate against LGBTQ employees now have an even greater incentive to cite their religious beliefs as the basis for that discrimination and try to misuse the Religious Freedom Restoration Act, in the hope that courts will excuse their violations of the law and allow the discrimination to continue.

Americans United for Separation of Church and State has been the pre-eminent expert on religion/state issues for nearly 75 years. Here is an in-depth analysis of how those issues may play out as a consequence of yesterday’s decision.

What religious institutions and nonprofits are covered by Title VII’s existing religious exemption? What does the law say about this existing religious exemption permitting discrimination by religious institutions and nonprofits against LGBTQ individuals?

Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. That exemption applies only to institutions whose “purpose and character are primarily religious.”

Courts use a variety of factors to determine whether an entity is “primarily religious.” But to date, the religious exemption has been understood to apply solely to religious nonprofits. Courts have said that houses of worship, religiously affiliated hospitals and universities, and faith-based social-service providers, among others, may use the exemption. But the exemption has never been understood to apply to for-profit entities – not by the courts, and not by the federal Equal Employment Opportunity Commission (EEOC).

The Trump administration, however, has taken the position that the religious exemption is broad. In an August 2019 proposed rule, the Department of Labor, citing *Hobby Lobby v. Burwell*, wrongly asserted that for-profit businesses can utilize the exemption.

We expect an increasing number of cases in which employers, both nonprofit and for-profit, assert a right to the religious exemption under Title VII to avoid having to comply with the new decision.

Another question courts will have to resolve is whether employers entitled to the exemption are permitted to use it specifically for LGBTQ discrimination. According to the EEOC (and numerous courts agree), the religious exemption:

“...only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.”

Applying that principle, therefore, employers also shouldn't be able to use the religious exemption to engage in LGBTQ discrimination, which has now clearly been labeled a form of sex discrimination. But if, for example, a religious employer argues that their definition of hiring “good Christians” excludes LGBTQ people – who can't possibly be “good Christians” according to the employer – the courts will have to resolve this issue as well.

The Supreme Court will also soon decide a case concerning who is covered by the “ministerial exception,” which exempts religious institutions from following anti-discrimination laws with respect to clergy and other employees with primarily religious duties. Does the ministerial exception exempt employers from prohibitions on LGBTQ discrimination?

Yes, the ministerial exception bars the application of all anti-discrimination protections to those who preach and teach the faith at houses of worship and religious schools. Those entities may choose their own clergy, including on the basis of race, without demonstrating a theological reason for excluding certain classes of people.

In *Our Lady of Guadalupe School v. Morrissey-Berru* (argued in May), the Supreme Court will soon decide who counts as a minister for purposes of the ministerial exception. This is the second time the court has considered the issue in less than a decade. In 2012, the court decided *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, finding that courts must assess a variety of factors to decide whether an employee counts as a minister, including job title, job duties, training required, etc. The religious schools in *Guadalupe* made some troubling arguments, including that nurses in Catholic hospitals, for example, can be considered “ministers” and thus aren’t protected by anti-discrimination laws. The outcome of the case may have harmful consequences for civil rights protections for LGBTQ people (and others) working in a wide array of jobs across the country.

We also anticipate increased litigation around which institutions are covered by the ministerial exception. Currently, houses of worship, religious denominations, and religious schools are covered. But especially now, in the wake of the Title VII decision, there will undoubtedly be a legal effort to include any faith-based nonprofit, regardless of whether it is affiliated or unaffiliated with a denomination or house of worship. For-profit corporations may clamor to be included as well.

How does the Religious Freedom Restoration Act (RFRA) apply to Title VII and other anti-discrimination protections? What does it mean in the Bostock opinion that “Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases”?

RFRA applies to federal laws only, not to state or local laws. Under RFRA, the federal government may not place a substantial burden on religious exercise unless it has a compelling governmental interest and the law is the least restrictive way of achieving that interest. RFRA was intended to provide heightened but not unlimited protections for religious exercise.

RFRA applies not just to individuals and religious organizations, but also, the Supreme Court held in *Hobby Lobby*, to closely held for-profit companies. In the last decade or more, there have been few cases raising the question whether RFRA exempts employers from otherwise-applicable anti-discrimination laws when they say that their discriminatory practices are based on their religious beliefs. In one of the Title VII cases, the for-profit funeral home that fired Aimee

Stephens tried but did not succeed – losing this question on appeal. (And the funeral home did not ask the Supreme Court to consider the issue). The Trump administration touts a George W. Bush-era legal memorandum that says RFRA can be used to circumvent employment nondiscrimination protections that apply to federal grant programs.

There's a good reason why this issue comes up so rarely in court cases – these kinds of exemptions would violate the Establishment Clause of the First Amendment. The Establishment Clause prohibits the government from granting religious exemptions that would detrimentally affect any third party – all nine justices in *Hobby Lobby* agreed with that principle.

But given the higher stakes following yesterday's decision, more entities will try to use RFRA to get out of Title VII's requirements, especially if they don't qualify as religious employers under Title VII. When the issue comes up, the cases will in part involve determining what is a substantial burden on an employer's religion. Unfortunately, more often than not, courts defer to whatever those asserting RFRA claims or defenses say is a substantial burden. There are some cases, though, in which courts have recognized the commonsense principle that protected religious exercise is about being free to practice your own faith – being bothered that somebody else in your organization isn't living according to your religious beliefs isn't a substantial burden on your religious exercise.

Questions about the effect of RFRA on Title VII are, as Judge Gorsuch suggested in his majority opinion, matters for future cases to resolve.

We are concerned by the fact that the majority of the justices signed onto so expansive a description of RFRA. But the Supreme Court has been clear that religious exemptions are impermissible if they harm third parties. Now we'll have to see how seriously the lower courts take that rule.

Do other laws that protect against sex discrimination also now protect against LGBTQ discrimination?

As a formal matter, we don't know; the Supreme Court didn't decide. That said, the majority concluded that sexual orientation and gender identity, though not the same as "sex," are unavoidably intertwined with it because when someone is treated differently based on sexual orientation or gender identity, that necessarily involves taking the person's sex into account.

In that sense, Justice Alito's dissent is correct: The Title VII decision *should* affect other federal laws forbidding sex discrimination, including areas such as housing, education, and public accommodations. We of course think that the linked nature of anti-discrimination laws makes sense: If we can't fire someone because she's LGBTQ, we also must uphold her civil rights in other areas. And the same logic should be applied to state and local laws prohibiting sex discrimination.

Last week the Trump administration put out a regulation from HHS to implement the Health Care Rights Law (Section 1557) of the Affordable Care Act. The regulation seeks to exclude trans people from protections against sex discrimination in health care. Are this and other regulations in question now because of the Title VII decision?

On June 12, the Trump administration announced a regulation implementing Section 1557 of the ACA, which bars sex discrimination in health programs or activities. The rule relied on a narrow and incorrect interpretation of the definition of sex to roll back protections against discrimination on the basis of gender identity and sex stereotyping. The decision in *Bostock* makes clear that the Trump administration's harmful interpretation is wrong and cannot stand.

In addition, Title IX of the Education Amendments of 1972 and regulations under it are directly implicated. Title IX prohibits discrimination on the basis of sex by educational institutions that receive federal financial assistance. This provision should be read in the same way as Title VII – sex should include sexual orientation and gender identity. The Trump administration has taken the position, however, that this nondiscrimination protection does not prohibit discrimination on the basis of sexual orientation or gender identity.

Other regulations may also be affected. For example, we anticipate a proposed regulation from the Department of Housing and Urban Development that would make harmful changes to an existing rule requiring that HUD-assisted and HUD-insured housing – including temporary, emergency shelter – be made available without regard to actual or perceived sexual orientation, gender identity, or marital status. Although we have not seen the rule and do not yet know the Trump administration's reasoning, the same arguments that were rejected in *Bostock* could be implicated.

What are the implications of this case for the battle over the meaning of religious freedom? What upcoming cases will further define the role of religious freedom given Monday's decision and in what way?

There is a raging debate today over the meaning of religious freedom. Is it a shield that protects or a sword that licenses discrimination and harm to others? Monday's decision tees up this question for future cases. We expect upcoming legal battles over whether religious freedom can be harnessed to circumvent protections against LGBTQ discrimination.

In addition to this term's ministerial exception case referenced above, next term's *Fulton v. Philadelphia* case is now even more important. In *Fulton*, Catholic Social Services claimed that it was discriminated against because city officials terminated the agency's contract to provide foster care on behalf of the government after it refused to follow the city's LGBTQ anti-discrimination rules. Catholic Social Services has asked the court to decide whether the Free Exercise Clause of the Constitution gives it a right to disobey the city's anti-discrimination law.

If *Fulton* changes the constitutional standard to match the aggressive view of RFRA advanced by the Trump administration, the Free Exercise Clause would then mean that any "burden" on religion has to be justified by a compelling government interest and be the least restrictive remedy possible. This is particularly dangerous because the Free Exercise Clause is part of the Constitution. It can't be adjusted by Congress over time to make sure that the right balance is struck to protect religious freedom and other civil rights. And it applies to all governmental action – federal, state, and local – not just to federal law.

By contrast, RFRA is a statute. It can be amended to preserve important civil rights protections, like the proposed Do No Harm Act does, or new legislation can say that RFRA doesn't apply in certain contexts, like the proposed Equality Act does.

So the *Fulton* case may now be an apotheosis of religion/state issues from a constitutional point of view.