



## Are You a Minister?

### Supreme Court Denies Employment Protection to More Religious School Teachers

July 2020

#### What are the *Our Lady of Guadalupe School v. Morrissey-Berru* cases about?

These cases address when religious schools may ignore all laws against employment discrimination in the treatment of their teachers, under a judge-made rule called the “ministerial exception.”

In the 2012 case *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court ruled that the ministerial exception prevented a teacher at a private religious school from making a disability-discrimination claim under the Americans with Disabilities Act. In that case, the Court interpreted the Establishment and Free Exercise Clauses of the First Amendment to grant houses of worship and religious schools autonomy in the selection of clergy. Based on that reasoning, the Court held that it would be unconstitutional governmental interference with religion if employment-discrimination laws like the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 applied to the hiring and firing practices of houses of worship and religious schools when selecting those who preach, teach, and lead their congregations. These laws, which would otherwise protect workers from discrimination on the basis of race, disability, age, sexual orientation, gender identity, and other protected categories, thus do not apply to ministerial employees.

The consolidated cases decided on July 8, 2020, *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel*, address how the ministerial exception applies to lay (i.e., non-clergy) teachers at religious schools. The cases involved two fifth-grade lay teachers from private Catholic schools in California:

- Kristen Biel was fired after she was diagnosed with breast cancer; she has since died. She taught regular secular subjects but also was required to teach religion for 200 minutes a week and administer a test on religion every week. She used a religion textbook, taught her students about Catholic practices, and worshipped with her students. She was required to open and close each school day with a prayer.
- Agnes Morrissey-Berru was fired, after a decade of teaching, when she turned 64. She taught regular secular subjects plus a daily religion class; she led daily

classroom prayers; she planned liturgy for Mass once a month; and she was a certified Catechist with training in Catholic doctrine.

The cases asked whether the schools could count these two teachers as ministers, placing them within the scope of the ministerial exception and thus allowing the schools to ignore the federal laws against employment discrimination on the basis of age and disability.

### **What is the decision in *Our Lady of Guadalupe School v. Morrissey-Berru*?**

The majority of the Court determined that both teachers fell within the ministerial exception, and thus that they could not bring employment-discrimination claims against their schools. The Court declined to adopt a “rigid formula” for determining whether teachers at religious schools fall within the exception, but it encouraged a broad reading of the ministerial exception that may invite religious schools to treat more of their lay teachers as ministers based on minimal religious duties.

In these cases, the Court concluded that the ministerial exception applied because the school trusted these teachers “with the responsibility of educating and forming students in the faith.” As Justice Sotomayor’s dissent explains, the Court’s broad articulation of the ministerial exception will likely sweep thousands more teachers at religious schools into the category of ministerial employees, leaving them outside the legal protections against workplace discrimination.

The *Morrissey-Berru* decision is thus an example of the harms that a distorted interpretation of religious freedom can cause. It also speaks to how serious we are or aren’t about our fundamental legal commitments against workplace discrimination when an employer happens to be a religious institution. The decision demonstrates how the Supreme Court continues to redefine religious freedom. The court elevated a distorted notion of religious freedom over the basic employment rights of educators.

### **What was the ministerial exception designed to protect?**

The Establishment and Free Exercise Clauses of the First Amendment guarantee that houses of worship get to decide – without interference from the government – how to preach, practice, and disseminate their religious beliefs and how to organize their own internal governing structures. The ministerial exception was created by the courts to ensure that houses of worship and religious schools maintain control over their religious

doctrine by having complete freedom to hire and fire employees who hold important religious positions. For example, if the laws prohibiting discrimination in employment based on religion were to apply to clergy, that might mean in theory that a Baptist church could have to hire a Catholic, Methodist, or Jewish person to be its pastor rather than being able to limit its hiring to Baptists. Of course, the government should not be permitted to limit the selection of clergy in this way.

In 2012, the Supreme Court held that the exemption isn't limited to protecting the ability to hire people of the same faith into leadership positions. It instead applies to, and overrides, all antidiscrimination protections, even if the reason that an employer fires (or doesn't hire) someone has nothing at all to do with religion and is invidious. Thus, the exception applies even if people are denied jobs solely because of their race or, as alleged in these latest cases, are fired because the employer decides that they are too old or no longer wants them around because they have a disability.

In cases like these, application of the ministerial exception does nothing to protect the interest that the exception ostensibly safeguards – the ability of religious bodies to define and transmit their beliefs without governmental interference. Instead, it has allowed religious employers to disregard key workplace protections that prohibit discriminatory employment actions taken for reasons that have nothing to do with religious doctrine.

### **How did the opinion of the concurring justices differ from the majority opinion?**

Justice Thomas, joined by Justice Gorsuch, argued that rather than analyzing whether an employee's duties were sufficiently religious to trigger application of the ministerial exception, courts should simply defer to any good-faith determination by the employer that a particular worker is a minister. Thankfully, the Court's majority decision did not adopt that view, instead allowing for factual inquiry by courts into whether a teacher's job involves meaningful religious instruction or other religious functions. The deferential view proposed by the two concurring justices would essentially have eliminated any role for courts, handing employers complete power to give themselves a free pass to violate civil rights laws.

### **Is the ministerial exception open to abuse by employers?**

Most religious employers don't set out to discriminate. But employment-discrimination laws provide important safeguards for workers whenever discrimination arises in the workplace. The Supreme Court's decision, which reduces the reach of those laws out of

a distorted notion of religious freedom, will strip these critical protections from potentially hundreds of thousands of teachers at religious schools.

In recent years, moreover, some unscrupulous employers have begun to abuse the ministerial exception in a conscious attempt wholly to sidestep civil-rights laws. Rather than applying the exception solely to clergy and others who perform important religious functions, they have sought to invoke it – sometimes only after the fact – to employees who have no, or only minor, religious duties. For instance, schools could start assigning trivial religious functions – such as the recitation of a pre-written prayer at a monthly staff meeting – to all employees, including math teachers, secretaries, and janitors, so that they may later try to assert that any and all employees fall within the exception. These bad-faith tactics have been on the rise since the Supreme Court recognized the ministerial exception in 2012.

### **What do the dissenting justices think that the majority decision got wrong?**

Justice Sotomayor, joined by Justice Ginsburg, warns about the potential for abuse that is opened up by the court's broad framing of the ministerial exception. She notes the ways that the decision expands the scope of the ministerial exception compared to the Court's articulation of it in 2012, and she emphasizes that, as a result, thousands of school teachers stand to lose important legal protections.

### **Just last week, the Supreme Court ruled in *Espinoza v. Montana Department of Revenue* that when a state creates a private-school voucher program it is required to include religious schools in that program. How does *Morrissey-Berru* interact with the decision in *Espinoza*?**

As a result of the *Espinoza* decision, states that fund private schools through voucher programs will be compelled to provide that funding to religious private schools as well as secular ones. But some religious private schools engage in rampant discrimination against employees, students, and their families, and *Morrissey-Berru* means that many teachers will now have no legal recourse. As a result of *Espinoza*, taxpayers will be funding that discrimination as long as the voucher programs continue.

Notably also, the majority in *Morrissey-Berru* emphasizes that “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.” This inherently religious nature of private religious education is precisely why states have

legitimate interests in avoiding the divisiveness of using public funds for religious instruction – and why the combined effect of *Morrissey-Berru* and *Espinoza* is so worrisome. The hypocrisy is also telling: When the Court wants religious schools to get taxpayer funding (*Espinoza*), it insists the decision hinges solely on the school's religious *identity* and doesn't address its religious teachings; yet, when the Court wants to excuse religious schools from complying with the antidiscrimination laws (these cases), the Court emphasizes the importance of their religious teaching and proselytizing.

**Earlier this term, the Supreme Court affirmed in *Bostock v. Clayton County* that Title VII of the Civil Rights Act of 1964 protects LGBTQ people from employment discrimination. How does *Morrissey-Berru* interact with the decision in *Bostock*?**

Both *Bostock* and these cases are about employment discrimination, but they address different issues.

*Bostock* held that Title VII of the landmark 1964 Civil Rights Act, which bars employment discrimination on the basis of race, religion, national origin, and sex, protects LGBTQ employees. In contrast, *Morrissey-Berru* resolved a question about whether employment antidiscrimination laws (including, among others, Title VII) apply at all to the employment relationships between religious schools and teachers who perform some religious functions.

Thus, even though LGBTQ employees are now clearly covered by Title VII as a result of *Bostock*, Title VII and other laws that protect against workplace discrimination don't apply to workers at religious schools and houses of worship who are considered to be ministerial employees. The broad formulation of the ministerial exception in *Morrissey-Berru* will unfortunately deprive many teachers of the protections afforded by Title VII, including the many people gaining those protections for the first time under *Bostock*.

**Does this decision say anything about workplaces other than houses of worship and religious schools? Or for employees other than teachers?**

The ministerial exception is meant to apply to employees with important religious functions at houses of worship and religious schools – institutions that determine and teach religious tenets – on the view that complete freedom to choose their ministers protects their freedom to decide matters of faith and religious doctrine. The *Morrissey-*

*Berru* decision is only about teachers at religious schools and does not speak to other types of employers or employment relationships.

But being free from having to comply with all nondiscrimination laws will, unfortunately, also be attractive to employers who affirmatively want to discriminate, as well as to businesses that want to avoid liability when employment discrimination does occur. The Supreme Court has already created troubling precedent by declaring that huge companies like the Hobby Lobby national chain of craft stores can have religious identities and religious-exercise rights that they may, as corporations, pursue. Many employers, including ordinary for-profit companies, may now try to declare that employees have religious functions and then argue that those employees are outside the protections of the nondiscrimination laws. These attempts to press the boundaries of the ministerial exemption in order to get away with harassment and other unlawful mistreatment of employees would be meritless and should ultimately fail in the courts – but a lot of employees are likely to be harmed before the courts conclusively dispose of those claims.

### **What would you advise teachers at private religious schools to do in light of this decision?**

Nondiscrimination laws protect us all. If a person's employer believes that it will have the right to fire them just because they have gotten old or sick, or if their boss and fellow employees are going to be free to harass them based on their race or sex or religion or sexual orientation without legal consequences, they should surely have a right to know that. Sadly, not everyone will be able to afford to forgo employment in those situations. But people should at least be able to make informed choices about whether to take a job where they won't be protected against discrimination and harassment.

Teachers considering employment at private religious schools may therefore wish to consult with a lawyer or otherwise determine whether the position that they are seeking would be protected by the laws that forbid employment discrimination. They may want to seek a firm commitment from their employer about whether they are or are not considered a ministerial employee. If an employer puts in writing in an employee handbook or offer letter that a position is not a religious one under the ministerial exception, this could prove helpful should the employee and employer end up in court later.

## **How do this term's Supreme Court cases affect the outlook for religious freedom going forward? Are the decisions based on consistent reasoning or do they contradict each other?**

This term's cases show that the fundamental principle of the separation of government and religion remains under grave threat – and is more important than ever to preserve. While the Court's laudable decision in *Bostock*, which affirmed that LGBTQ Americans are protected by Title VII of the Civil Rights Act of 1964, will extend fundamental workplace protections to many people, its *Morrissey-Beru* decision guarantees that thousands of teachers at religious schools will receive no protection at all from Title VII or other laws barring employment discrimination. And its *Espinoza* decision will result in many of those religious schools receiving public funds despite having a free hand to discriminate against many of their educators. Likewise, the Court's *Trump v. Pennsylvania* decision will encourage many employers to deny on religious grounds essential birth-control coverage to workers. Together, these decisions demonstrate how the Supreme Court has been redefining religious freedom, converting what is meant to be a shield that protects us into a sword that harms others.

## **What can AU and those committed to church-state separation do to fight back?**

People in states with private-school voucher programs, which will be compelled to fund private religious education as a result of the *Espinoza* decision, should demand that any school that intends to take public funding must inform its workers whether they are considered to be ministerial employees. Workers should have a right to know whether they will be protected by antidiscrimination laws, especially when their employers receive public funds. And taxpayers should have a right to know whether they are funding workplace discrimination. People should also join AU in opposing school-voucher programs generally and ensure that public money goes only for public education, because that will be the best way to ensure that public funds are not used to underwrite discrimination.