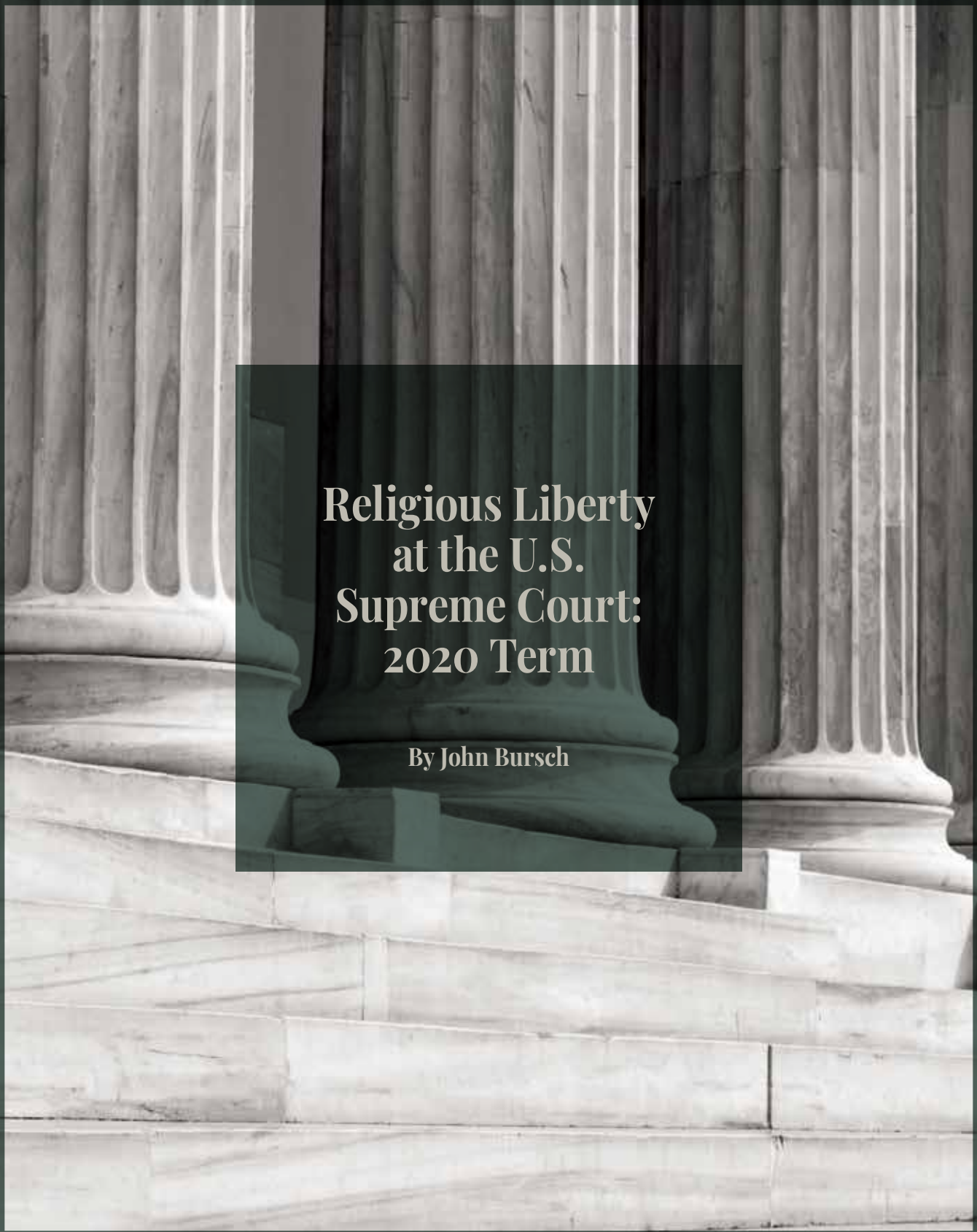

Religious Liberty at the U.S. Supreme Court: 2020 Term

By John Bursch

A year ago, one might not have predicted that the United States Supreme Court would close its 2020 term hearing oral arguments by phone. A microcosm of the world wrestling to respond to the challenges of COVID-19, our nation's highest court eschewed tradition for ad hoc procedure and exigent solutions. Yet during this tumultuous time, one thing remained precedented: the high court's religious liberty jurisprudence.

Four cases particularly impacted religious liberty during the 2020 term, bringing further consistency and unification to the Court's interpretation of the First Amendment's free exercise clause and clarifying the Court's future direction.

Espinoza v. Montana Department of Revenue[1]

Religious views cutting against the popular sentiment of the majority have long been feared and targeted for elimination in American society. At the turn of the 19th century, many feared the dogma of the Catholic Church and wished to curtail the influence of Catholic immigrants and their presumed loyalty to the pope. In response to this fear, Sen. James G. Blaine proposed an amendment to the Constitution that forbade any public funding being forwarded to "any religious sect."[2] While it failed at the federal level, more than 30 states adopted some form of the Blaine amendment.[3]

Fast forward to 2015, when the state of Montana established a program providing tuition assistance to parents desiring for their children to attend private school. A single mother working three jobs applied for tuition assistance for her children to attend a private Christian school. The school met all qualifications for the state program except that the school identified itself as Christian. Instead of providing the tuition assistance to the family, the state invalidated the entire scholarship program to avoid sending money to the religiously affiliated school. The Supreme Court analyzed one question: whether the free exercise clause allowed a state to bar religious schools from its scholarship program. Applying *Trinity Lutheran Church of Columbia v. Missouri Dep't of Natural Resources*, where the Court ruled that a church could not be disqualified from applying for a state grant to resurface its playground equipment due to its religious status,[4] the Court held that the free exercise clause protected religious entities from unequal treatment and incurring a special disability based on its religious status.[5]

At a Glance

Last term, the Supreme Court heard four cases that particularly impacted religious liberty. The cases further unified and defined the Roberts Court interpretation of the First Amendment free exercise clause. Anticipate a significant ruling at the end of the 2021 term when the Supreme Court might reconsider the holding of *Employment Div. v. Smith*.

Little Sisters of the Poor v. Pennsylvania

In 2011, the U.S. Department of Health and Human Services began requiring the Little Sisters of the Poor, a group of Catholic nuns who devote their lives to serving the poor and elderly, provide and facilitate health care coverage that included birth-control drugs and devices.[6] The Little Sisters could not provide the drugs and devices without violating their sincerely held religious beliefs. The Little Sisters brought a lawsuit to enjoin the requirement on their health care coverage since violating the law would cost the group millions of dollars in IRS fines.

After years of litigation, the Trump administration enacted a regulation to halt the requirement that individuals and corporations, including the Little Sisters, provide this coverage based on their rights under the Religious Freedom Restoration Act (RFRA).[7] At the same time, the administration increased Title X funding to allow employees without contraceptive coverage to obtain such coverage through the federal government; a few states sued to strike down the regulation that protected the Little Sisters.[8] In a 7–2 opinion, the Supreme Court ruled that the administrative regulation followed statutory authority, and the administration had the power to exempt the Little Sisters of the Poor and the authority to exercise its power in accordance with RFRA.

Our Lady of Guadalupe School v. Morrissey-Berru

The ministerial exception gives churches and religious schools the autonomy to decide who should lead their organizations.[9] A landmark case in this area of law, *Hosanna Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, stemmed from a Michigan school that argued that a religious organization should be able to select who ministers to its congregation without governmental interference; the Supreme Court, in a 9–0 decision, generally agreed.[10]

The Supreme Court in *Our Lady of Guadalupe School* expanded the protections articulated in *Hosanna Tabor*. The case asked whether under the First Amendment, the Court should adjudicate employment discrimination claims when the employee's position entails important religious functions.[11] In a 7–2 opinion, the Supreme Court replaced a more stringent four-part test to determine whether the employee qualifies as

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a minister with a broader analysis focusing on the function of the employee and the importance of a religious organization's ability to guide "the selection of those who will personify [their] beliefs."[12]

Bostock v. Clayton County

In one of the most discussed and followed cases of the term, the Supreme Court held that Title VII's protection against sex discrimination also included protection against discrimination for gender identification and sexual orientation, finding that those classifications necessarily involved treatment on the basis of sex.[13] While the case before the high court did not specifically address religious liberty — which the justices specifically noted — the majority opinion did address that religious liberty doctrines including RFRA will interfere with the Title VII protections.[14] And when they do, the Court advised that the federal government should refrain from burdening the employer's exercise of religion unless "doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest."[15]

The majority also noted that RFRA "operates as a kind of super statute, displacing the normal operation of other federal laws" and that "it might supersede Title VII's commands in appropriate cases."[16] Thus, the justices foresee the future collision between religious liberty, protected under the First Amendment and RFRA, and protections now recognized as sex discrimination under Title VII. The Court seemingly tips its hat to express that when the case ultimately comes before it, the construction and purpose of a genuine claim under RFRA will protect an employer from the penalties of a Title VII violation.[17]

Conclusion

While 2020 supplied the Supreme Court with a litany of surprises, its religious liberty decisions were a source of consistency, ultimately recognizing the rights of litigants to avoid punishment for their sincerely held religious beliefs and acknowledging the autonomy of religious organizations to self-govern in accordance with their faith.

Stay tuned this term, as the Supreme Court in *Fulton v. Philadelphia*[18] heard oral argument in November 2020 for the most influential question in religious liberty jurisprudence in the last 25 years: whether the often lamented holding in *Employment Division, Department of Human Resources of Oregon v. Smith* should be overturned.[19] ■

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ENDNOTES

1. *Espinoza v Montana Dep't of Revenue*, 140 S Ct 2246; 207 L Ed 2d 679 (2020).
2. *Id.* at 2270.
3. *Id.* at 2269.
4. *Trinity Lutheran Church of Columbia v Missouri Dep't of Natural Resources*, 137 S Ct 2012, 2022–2025; 198 L Ed 2d 551 (2017).
5. *Espinoza*, 140 S Ct at 2273–2274.
6. *Little Sisters of the Poor v Pennsylvania*, 140 S Ct 2367; 207 L Ed 2d 819 (2020).
7. *Id.* at 2373, 2377–2378.
8. *Id.* at 2394–2395.
9. *Our Lady of Guadalupe School v Morrissey-Berru*, 140 S Ct 2049; 207 L Ed 2d 870 (2020).
10. *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 565 US 171, 194–196; 132 S Ct 694; 181 L Ed 2d 650 (2012).
11. *Our Lady of Guadalupe School*, 140 S Ct at 2063–2069.
12. *Id.*
13. *Bostock v Clayton County, Georgia*, 140 S Ct 1731; 207 L Ed 2d 218 (2020).
14. *Id.* at 1754.
15. *Id.* (citing to 42 USC 2000bb-3).
16. *Id.* at 1754.
17. *Id.*
18. *Fulton v City of Philadelphia*, 922 F3d 140 (CA 3, 2019), cert granted in *Fulton v City of Philadelphia*, 140 S Ct 1104 (Mem), 206 L Ed 2d 177 (2020).
19. *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990).