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Religious Liberty in American Higher Education

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Religious liberty is having a moment. Every recent Supreme Court term has included at least one high-profile religious liberty case on its docket, and the regulatory docket of every presidential Administration of late (including the current one) also has included a number of regulations implicating religious liberty. The highest profile cases and conflicts tend to involve wedding vendors, healthcare practitioners and organizations, child-welfare agencies, and K-12 schools—all of which are crucially important contexts in which religious freedom must be protected. This article looks at another key setting, which has flown somewhat under the radar despite being the locus of a number of complex religious liberty questions and challenges: higher education.

Any one of the topics addressed herein could lend itself to a full-length analysis, and some of the many issues implicating religious liberty in higher education will not be addressed here at all. This article aims to offer readers a non-exhaustive, whirlwind tour through a number of the hottest and most timely issues at the intersection of higher education and religious liberty. It first addresses important, unresolved questions about parameters for a religious university around its employment practices. It then looks at religious liberty questions arising from a university's relationships with its students. Finally, it addresses Title IX's prohibition on sex discrimination in education and its religious exemption, which recently has been the subject of both litigation and regulatory activity.

Religious Universities, Employee Relations, and Religious Liberty

For any mission-driven organization, building and maintaining a committed workforce is critical for success. Organizations with an educational mission must be particularly attuned to shaping their workforce accordingly, as good teachers lead by example and not just through their lesson plans. "Personnel is policy," as they say in Washington, D.C., and that is equally as true for religious educational institutions as it is in the government.

A crucial question for any religious college or university, then, is how much freedom it has under the law to shape and manage its workforce—the people who carry out its mission every day. Several recent lines of cases address this question.

1. *Ministerial Exception in Higher Education*

The ministerial exception is a legal doctrine derived from the First Amendment that provides significant autonomy to religious institutions in the hiring and firing of employees who are "ministerial"—that is, employees who "perform vital religious duties" (*Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. __ (2020), slip op. at 21) or play a vital part in carrying out the institution's

religious mission. When it applies, the ministerial exception denies a covered employee legal grounds to file an employment discrimination claim against his or her religious employer, even if that employment discrimination claim is not based on religious discrimination. In other words, a "ministerial" employee cannot bring claims of discrimination based on age, disability, or other protected traits.

The Supreme Court has laid out the shape of the ministerial exception in two key cases so far: *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC* (565 U.S. __) in 2012, and *Our Lady of Guadalupe School v Morrissey-Berru* (591 U.S. __) in 2020. Both cases have addressed the all-important question of who is a "minister" for purposes of the ministerial exception, and in both, the Supreme Court has emphasized that whether an employee has the title of minister is not dispositive. Instead, the Court has looked to factors including training, self-identification as a minister, and job duties, as well as the employee's title. In *Our Lady of Guadalupe*–the more recent case–the Court particularly stressed that what really matters is what an employee *does*.

Hosanna-Tabor and *Our Lady* both involved elementary school teachers, and in both of those cases, the schools won: their employees were designated as ministers (that is, people designated by the religious employer to carry out its mission), and so in each case the lawsuit brought against the school could not proceed. These two Supreme Court decisions have firmly established the ministerial exception at the elementary school level.

It is not at all clear yet, however, what the ministerial exception looks like in the context of religious higher education. Last year, the Supreme Court had its first opportunity to tease out whether and how the ministerial exception differs at the higher ed level from K-12, but the Court declined to take the case. That case arose when Gordon College, a Christian school in Massachusetts, was sued by a member of its social work faculty after she was denied promotion to full professor. The highest court in Massachusetts held that she was not a minister and that her discrimination lawsuit could go forward. The college then asked the Supreme Court to determine whether the ministerial exception barred this suit, which the Court declined to do (seemingly for procedural reasons).

However, Justice Alito released a statement, joined by Justices Thomas, Kavanaugh, and Barrett, saying that the Massachusetts court had taken a "troubling and narrow" view of religious education. (*Gordon College v. DeWeese-Boyd*, 595 U.S. __ (2022), slip op. at 5). The state court said the teacher was not a minister because she didn't teach anything touching on religion; but "religious education," Justice Alito countered, "includes much more than instruction in explicitly religious doctrine or theology." (*Id.*). This short statement signed by four of the Justices is a good indication that the Supreme Court is looking for an appropriate opportunity to take a case involving the ministerial exception at the higher education level.

What could that tip-of-the-spear case be? Justice Alito suggested that Gordon College itself could return to the Court with another cert petition once it is procedurally appropriate to do so. Another case to watch involves a lawsuit brought against Liberty University by a former art teacher. The district court held that the teacher was not a minister, and so Liberty can't take advantage of the ministerial exception to block the teacher's age discrimination lawsuit. The oral argument in the Fourth Circuit appeal in January 2023 involved lengthy discussion of whether an art professor, whose teaching load and syllabus do not on their face include teaching religion or theology at all, can

be a "minister." The forthcoming decision in this case will be an important landmark as this issue winds its way back to the Supreme Court.

2. Implications of Bostock for Religious Institutions

Another key issue percolating for religious colleges and universities is what the Supreme Court's 2020 *Bostock* decision means for how these schools interact with an employee who is in a same-sex relationship or who has adopted a transgender identity contrary to his or her sex.

In *Bostock v. Clayton County* (140 S. Ct. 1731), the Supreme Court held that Title VII's prohibition of sex discrimination in employment extends to prohibiting discrimination on the basis of sexual orientation or transgender status. In the majority opinion written by Justice Gorsuch, the Court acknowledged concerns that this expansion of the definition of "sex" could require religious employers to violate their deeply held beliefs, and shared its "deep concern" with preserving free exercise. (*Id.* at 1754). But it declined to lay out a protective framework for religious employers, noting that the ministerial exception, Title VII's religious exemption, and the Religious Freedom Restoration Act ("RFRA"), all offer protections to religious employers under certain circumstances. The majority opinion, nonetheless, left the details for another day.

Courts are just beginning to sort through how *Bostock*'s holding will interact with existing legal protections for religious organizations. For example, *Bostock* governed a district court's decision that Charlotte Catholic High School violated Title VII when it terminated a substitute teacher after he announced his wedding to a man. (*Billard v. Charlotte Catholic High School*). That decision is currently on appeal to the Fourth Circuit, where Charlotte Catholic High School and the Diocese of Charlotte reminded the court in their briefs of the Supreme Court's concern expressed in *Bostock* for preserving the promise of the free exercise of religion. Briefing is complete in that case and oral argument will be held in early May 2023, with a decision to follow in due course. (Case No. 22-1440).

Another important case to watch is *John Doe v. Catholic Relief Services* (D. Md. No. 20-cv-01815), which presents the question whether Catholic Relief Services (CRS) can decline to provide same-sex spousal benefits because of its adherence to Catholic teaching about the nature of marriage. CRS lost in federal district court on this question, as the court declined to apply any of the legal protections available under federal law to religious institutions. This case will likely be appealed to the Fourth Circuit, after the resolution of three questions of Maryland state law that the federal district court certified to the Supreme Court of Maryland. Although it doesn't involve an educational institution, this case will set an important precedent for all religious institutions—including religious colleges and universities—regarding legal protections for religion-based decisions about availability of benefits to same-sex spouses.

3. Unionization of Employees

Whether religious schools must bargain with unions purporting to represent their faculty has long been a contested issue in the labor law space. In August 2021, the new General Counsel of the National Labor Relations Board (NLRB or "the Board") announced her intention to take a close look at a line of precedent that limits Board jurisdiction over religious educational institutions.

Reading between the lines of this announcement, she will attempt to use her office's advocacy tools to push to establish a right of faculty at religious schools to unionize.

This declaration by the NLRB's General Counsel is the latest move in a dogged, years-long effort by the Board to introduce faculty unionization into religious schools. Despite the Supreme Court's decision in 1979 in *NLRB v. Catholic Bishop of Chicago* (440 U.S. 490) that the National Labor Relations Act (NLRA) did *not* authorize Board jurisdiction over teachers in religious schools, the NLRB spent years attempting to limit that decision and find some way to reach faculty in religious colleges and universities. Finally, in June 2020 in a case called *Bethany College*, the Board formally repudiated its previous approach and adopted the D.C. Circuit's more deferential test for determining Board jurisdiction over faculty at religious schools. (369 NLRB No. 98 (2020)). Under this approach, the Board lacks jurisdiction over a school if it: (a) holds itself out as religious; (b) is nonprofit; and (c) is religiously affiliated. In other words, the specific role played by the faculty member(s) in question does not factor into the analysis at all. The religious identity of the institution is sufficient for preventing the application of the NLRA to require schools to permit unionization. *Bethany College* is the decision the NLRB General Counsel has flagged for another look.

Importantly, this line of decisions is limited to unions purporting to represent faculty—not other staff–employees at religious educational institutions. The D.C. Circuit has signaled that it might not see a relevant distinction between faculty and non-faculty staff for purposes of Board jurisdiction, but it has not yet addressed this question directly. In the meantime, the newest signal from the NLRB—i.e., that it will continue to push for the unionization of faculty at religious schools—should raise alarm bells as it represents another type of interference in the relationship between religious schools and those who carry out their religious mission.

Religious Universities, Student Relations, and Religious Liberty

To state the obvious, institutions of higher education are in the business of teaching. Students are at the heart of what colleges and universities are about. A religious college or university therefore instantiates its religious commitments not just through its formation and organization of its workforce, but also through how it organizes student life. Everything that a religious university does has a pedagogical component, aimed at its religious mission to form students. A secular public university, on the other hand, must ensure consistent treatment of religious and non-religious student organizations, and is bound by the First Amendment (as opposed to being protected by it, as religious universities are). These related but distinct responsibilities governing the relationships between universities and their students can be fraught with controversy.

1. *Student Groups at Religious Schools*

When a university formally recognizes a student group, that student group typically receives a set of privileges and benefits that may include access to university funds, meeting space, support for event promotion, and more. Formal recognition of a student group, such that the group can call itself "The XYZ University Students for Something," also carries with it an imprimatur that in turn conveys to the public something about the university itself. To restate a critical point, religious colleges and universities are not bound by the First Amendment but are protected by it. This enables

them to exercise considerable freedom in approving would-be student groups, to ensure that the university's name and resources are used only in ways that are compatible with its religious mission and convictions.

Yeshiva University, a school in New York City devoted to the Modern Orthodox tradition, has recently been embroiled in a high-profile case that goes right to the heart of a religious university's freedom to place parameters around student life that accord with its religious commitments. When undergraduate students asked for a recognized LGBTQ student club, Yeshiva administrators consulted with a group of senior Rabbis, who rendered their opinion that the university could not grant such recognition consistent with its religious commitments. Yeshiva therefore declined the request for formal recognition for the so-called Pride Alliance. The students sued.

Yeshiva lost in state court, on a ruling under the NYC Human Rights Act, and the New York court ordered Yeshiva to approve the club immediately. Yeshiva quickly began to pursue every avenue for relief available to it, including an emergency request to the U.S. Supreme Court asking that it stay the state court's order. The Supreme Court declined to intervene, saying that it was too early for it to get involved, but it invited Yeshiva to return to the Court if it was not able to get relief from the New York courts. Justice Alito, joined by Justices Thomas, Gorsuch, and Barrett, dissented from denial—stating plainly that if Yeshiva comes back to the Supreme Court it is likely to win. (*Yeshiva Univ. v. YU Pride Alliance*, 597 U.S. __ (2022), slip op. at 3-4).

Ultimately, Yeshiva was able to strike an agreement with Pride Alliance to voluntarily stay the New York court's recognition order while the litigation continues. In December 2022, Yeshiva lost its appeal in New York state court; its fight continues.

Yeshiva was sued under a New York City law—so the specific legal analysis used by the lower court in this case will not necessarily apply broadly to religious institutions in other jurisdictions. But the key question of federal law implicated here is whether the First Amendment blocks a state or a city from applying its nondiscrimination laws to take away a religious university's freedom to recognize or decline to recognize student groups consistent with its religious beliefs. That is an extremely important question for religious colleges and universities, no matter where they are located.

2. Religious Student Groups at Secular Schools

The past few years have also seen litigation involving the reverse scenario; i.e., whether a secular university may decline to recognize a religious student group because, for example, the university disagrees with the student group's requirements for its student leadership.

In one illustrative high-profile case, the University of Iowa kicked Business Leaders in Christ (BLinC) off campus, literally and figuratively, on the grounds that BLinC's requirements for its student leadership violated the school's nondiscrimination policies. BLinC sued the school and won. The federal district court ruled for the students, telling the University that it must allow BLinC back on campus and cease applying its policies in a way that singled out religious student groups for mistreatment. (*Bus. Leaders in Christ v. Univ. of Iowa*, 360 F.Supp.3d 885 (2019)). Cases like this have continued to come up, as public education institutions continue to ignore their legal obligations to treat religious student groups fairly. For example, in one case that is currently ongoing, the Ninth Circuit issued a similar ruling in August 2022 protecting a Fellowship of Christian Athletes chapter

in a public high school setting. (*Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Ed.*, No. 22-15827). The Ninth Circuit will review this decision *en banc* in late March 2023.

Observing a pattern of illegal discrimination against religious student groups, the Trump Administration finalized a regulation in September 2020 that protects such groups at public colleges and universities. Specifically, it prohibits public institutions from denying a religious student organization any right, benefit, or privilege on the basis of the organization's beliefs, practices, policies, membership standards, or leadership standards, if informed by sincerely held religious beliefs. More broadly, this rule reminds public institutions of their obligation to comply with the First Amendment's guarantees of freedom of religion, speech, and assembly in their treatment of student groups–on pain of losing their federal funding from the Department of Education if they don't. Private colleges and universities do not have First Amendment obligations to their students, but the regulation attempts to reign them in as well by holding them accountable for consistently applying their own stated institutional policies regarding freedom of speech.

On February 22, 2023, the Department of Education proposed rescinding this rule. It justified its proposal in part by claiming that it would be too burdensome for the Department to investigate alleged First Amendment violations raised pursuant to the existing regulations. (88 Fed. Reg. 10857, 10863 (Feb. 22, 2023)). But the Department's primary rationale for rescinding the regulations protecting the rights of religious student groups on secular campuses is that the regulation could result in religious groups receiving "preferential treatment" on college campuses because it does not make sufficiently clear that a religious student organization must comply with neutral and generally applicable nondiscrimination requirements regarding membership and leadership standards. (*Id.* at 10860). Over 58,000 comments were submitted by the public during the 30-day comment period on the Department's proposal, reflecting the American people's engagement with this issue. The Department must review and respond to these public comments before it can issue its final rule.

Title IX and its Religious Exemption

Last but certainly not least, it is impossible to talk about religious liberty in higher education without talking about Title IX.

Title IX prohibits discrimination on the basis of "sex" in education programs and activities that receive federal financial assistance. (20 U.S.C. 1681). It governs equity in athletic programs, the handling of sexual harassment situations, and, generally, discrimination on the basis of "sex." Whether Title IX's prohibition on discrimination on the basis of "sex" must be read to encompass sexual orientation *and* gender identity remains disputed. In the wake of the Supreme Court's expansion of the definition of "sex" in the Title VII employment discrimination context, the federal government in the current Administration, and a handful of lower courts, have said that *Bostock's* reasoning applies in the Title IX context as well—meaning that Title IX prohibits discrimination in education on the basis of sexual orientation and gender identity.

The courts are far from unanimous on this question. For example, in November 2022 a federal district court in Texas declined to export *Bostock*'s reasoning to Title IX, saying that to do so would be inconsistent with the ordinary public meaning of discrimination "on the basis of sex" at the time of Title IX's enactment and in the Title IX context. (*Neese v Becerra*, N.D. Tex. No. 2:21-cv-163). But the Biden Administration has proposed to insert sexual orientation and gender identity into Title

IX's definition of "sex" via regulation, in a proposed rule published by the Department of Education in July 2022. Assuming this redefinition remains in the final rule expected sometime in 2023—and there is no reason to think that it won't be—the expanded definition will have binding effect for purposes of the federal government's enforcement activity, funding, and any other compliance efforts. Because the Title IX regulations apply to every aspect of the "education program or activity" of federal funding recipients, the expansion of Title IX's definition of "sex" will have extremely broad implications on college campuses, including in the areas of student organizations, housing, and bathroom usage. Although the July 2022 proposed rule did not directly address the hotly contested area of athletics, the Department of Education has now proposed sweeping changes to the federal legal framework governing participation of transgender-identifying student athletes at every level of competition—including higher education—in a separate rulemaking specifically addressing athletics. This Title IX Athletics proposal, if finalized in its current form, would prohibit institutions from maintaining categorical bans on participation of transgender-identifying athletes consistent with their "gender identity," although it would allow institutions to limit or deny participation by transgender-identifying athletes on a sport-by-sport basis if such limits are "substantially related to the achievement of an important educational objective" and "[m]inimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied." (88 Fed. Reg. 22860, 22891 (Apr. 13, 2023)).

The current milieu makes Title IX's religious exemption more important than ever for allowing religious colleges and universities to continue to operate consistent with their beliefs. The statutory religious exemption states that Title IX does not apply "to an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization." (20 U.S.C. 1681(a)(3)). Because this exemption was included in the statute by Congress, it cannot be canceled, rescinded, or superseded by regulation. Moreover, a school does not have to apply to the Education Department to receive the exemption, and arguably it is not within the power of the Department to grant or deny it. Per the statute, it is available by operation of law to qualifying institutions. It is, therefore, a critically important legal protection for religious colleges and universities, particularly post-*Bostock*.

Although the Department of Education cannot get rid of the Title IX religious exemption via regulation, it can attempt to implement limits on which institutions qualify for the exemption and how they must go about asserting that they qualify. By way of background, regulations promulgated by the Trump Administration establish how to determine which schools can invoke the exemption and clarify how to go about asserting it. (34 C.F.R. 106.12). A school that wants to obtain "assurance of exemption" may do so by sending a letter to the Department of Education's Office for Civil Rights (OCR) identifying the provisions of Title IX that conflict with specific tenets of its faith, but schools are not required to do this in order to assert the exemption. And a school wishing to assert the religious exemption is certainly not required to *request* an exemption from OCR and wait for a response before it can assert its exemption, contrary to previous indications from the Department. This regulation also codifies a list of factors establishing what characteristics of a religious institution of higher education are sufficient to render it "controlled by a religious organization," and thus qualified to claim the Title IX religious exemption. The regulation adopts a capacious approach to what it means to be "controlled by" a religious organization; for example, an educational institution is controlled by a religious organization not only if it is a school of divinity, or if it requires its employees or students to be members of the denomination that runs the schools, but also if its

mission statement, approved by its governing body, includes, refers to, or is predicated upon religious beliefs or teaching.

So far, the Biden Administration has not addressed the scope of the religious exemption or how to obtain it in any of its public-facing rulemaking activity. The proposed Title IX rule did not touch on this issue, and so the final rule presumably will not take on this issue either. But the Administration may yet use another rulemaking to attempt to limit which institutions qualify for the exemption.

In the meantime, although the religious exemption cannot be undone by administrative fiat, it recently was subject to an existential threat from another source. The constitutionality of the religious exemption was challenged in federal district court in a case in Oregon called *Hunter v. Dep't of Education*. (No. 6:21-cv-00474). The plaintiffs, LGBTQ-identifying students or former students at religious institutions of higher education, argued that the Department of Education's recognition of the religious exemption violates the Constitution. The Biden Administration defended the constitutionality of the exemption, although not without some minor hiccups. At one point during the course of the litigation the government represented in a brief that it planned to "vigorously" defend the exemption; after a swift backlash from progressives, it withdrew its brief the following day and filed a new version devoid of that key word and with a few other edits that walked back its commitment to the religious exemption. On January 12, 2023, the district court judge dismissed the case, upholding the exemption's constitutionality. The litigation will continue, however, as the plaintiffs have appealed this case to the Ninth Circuit. (No. 23-35174).

Conclusion

The religious liberty issues that arise in higher education are many and varied. They are fascinating both culturally and legally, with many of them generating litigation or regulatory activity in addition to ongoing discussion and debate both on and off America's campuses. This dynamic shows no signs of abating. All those who care about preserving the freedom of religious organizations and people of faith—including their capacity to contribute to the common good—would do well to be mindful of further developments in the higher education context.

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