

The Road to *Bostock* and Its Ramifications

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The Supreme Court’s decision on June 15, 2020, in *Bostock v. Clayton County, Ga.*,¹ signifies a seismic shift in the law that will have ramifications, both predictable and unforeseen, for years to come. To appreciate *Bostock*’s importance, it is useful to place it in its historical legal context and summarize the majority’s and dissents’ basic points. After first tracing the road to *Bostock*, this article will then discuss some of the potential ramifications of *Bostock*.

Of its many negative consequences, the most troubling is that the conservative justices, in joining the *Bostock* majority, failed a generation of law students and young lawyers by abandoning the principles of judicial restraint that they had previously publicly championed.

The LGBT Movement’s 50-Year Effort to Re-define Title VII

Congress enacted Title VII of the Civil Rights Act of 1964 to prohibit discrimination against an individual in employment “because of such individual’s race, color, religion, sex, or national origin.”² All agree that when Title VII was enacted in 1964, Congress had no intention of prohibiting discrimination on the basis of sexual orientation or gender identity.

Federal and State Legislative Efforts to Add Sexual Orientation and Gender Identity: Beginning in 1975, the LGBT movement tried to persuade Congress to amend Title VII by adding “sexual orientation” as a class protected from employment discrimination, in addition to the original protected classes of “race, color, religion, sex, or national origin.”³ In 2007, such legislation passed the House but stalled in the Senate. In 2013, such legislation passed the Senate but stalled in the House.⁴ Beginning in 2007, some legislative efforts also included “gender identity” as a protected class.

In 2019, the House of Representatives passed the Equality Act, 236-173, to add “sexual orientation” and “gender identity” as protected classes not only to Title VII, but to all titles of the 1964 Civil Rights Act, including public accommodations (Title II), housing (Title VIII), and federal financial assistance (Title VI). The Equality Act would also expressly eviscerate the Religious Freedom Restoration Act,⁵ removing vital protections for religious institutions and individuals who hold traditional beliefs regarding marriage, sexual conduct, and gender identity. As of July 2020, the Senate had not held a floor vote on the Equality Act and was not expected to do so in the 116th Congress.

¹ *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020), which is also the Court’s opinion in *Altitude Express v. Zarda*, No. 17-1623, and *R.G. & G.R. Harris Funeral Homes v. EEOC*, No. 18-107.

² 42 U.S.C. § 2000e-2(a).

³ *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) (“For the past 45 years, bills have been introduced in Congress to add ‘sexual orientation’ to the list, and in recent years, bills have included ‘gender identity’ as well. But to date, none has passed both Houses); *id.* at nn.1 & 2 (Alito, J., dissenting) (listing bills introduced since 1975).

⁴ H.R. 3685, 110th Cong., 1st Sess. (2007) (passed House, 235-184, on Sept. 27, 2007); S. 815, 113th Cong., 1st Sess. (2013) (passed Senate, 64-32, on Nov. 7, 2013). See *Bostock*, 140 S. Ct. at 1822-23 (Kavanaugh, J., dissenting).

⁵ 42 U.S.C. § 2000bb *et seq.*

By 2020, 23 state legislatures included “sexual orientation” as a protected class in their state employment laws, while 20 included “gender identity.” In addition, many local governments had enacted such protections, including in states in which state law did not prohibit sexual orientation or gender identity discrimination in employment. Several state governors issued executive orders designating “sexual orientation” and “gender identity” as protected classes in employment by the state or by state contractors.

Executive Branch Efforts to Add SOGI: During the Obama Administration, the Equal Employment Opportunity Commission (“EEOC”) issued administrative rulings and guidance documents that re-defined “sex” in Title VII to include sexual orientation and gender identity discrimination. In July 2014, by Executive Order 13672, President Obama amended Executive Order 11246, which prohibited federal contractors from discriminating on the basis of race, color, sex, religion, and national origin, to also prohibit sexual orientation and gender identity discrimination.⁶

Court Efforts to Re-define Title VII: Beginning in 1979, the LGBT movement pressed the federal courts to interpret Title VII’s prohibition of sex discrimination to include prohibition of sexual orientation and gender identity discrimination. Until April 2017, no court of appeals had adopted this interpretation.⁷ Instead, of the 30 appellate judges hearing these claims, all 30 rejected re-interpreting Title VII to include sexual orientation and gender identity discrimination.⁸

Seventh Circuit: This consensus abruptly altered in April 2017, in *Hively v. Community College*, when the *en banc* Seventh Circuit held, 8-3, that Title VII’s prohibition on sex discrimination did indeed include sexual orientation discrimination.⁹ An adjunct professor sued for sexual orientation discrimination after a public community college refused to hire her for several full-time positions and eventually did not renew her contract. Denying the charge that it discriminated based on sexual orientation, the college filed a motion to dismiss, relying on Seventh Circuit precedent ruling that Title VII did not prohibit sexual orientation discrimination.

Eight judges voted to re-interpret Title VII. Two conservative judges relied on a “textualist” reading to support their conclusion that Title VII prohibited sexual orientation discrimination.¹⁰ In a separate solo concurrence, Judge Posner urged his colleagues to “acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of ‘sex discrimination’ that the Congress that enacted it would not have accepted.”¹¹ Judge Sykes’ dissent expertly dissected the so-called

⁶ Exec. Order No. 13672, 79 Fed. Reg. 42971 (Jul. 21, 2014).

⁷ *Bostock*, 140 S. Ct. at 1777-1778 (Alito, J., dissenting) (listing cases since 1991); *id.* at nn.38-40 (listing cases before 1991).

⁸ *Id.* at 1824 (Kavanaugh, J., dissenting) (“Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.”).

⁹ 853 F.3d 339 (7th Cir. 2017) (*en banc*).

¹⁰ *Id.* at 357-359 (concurring opinion) (Flaum, J., joined by Ripple, J.).

¹¹ *Id.* at 357 (concurring opinion) (Posner, J.).

“textualist” arguments, as well as other arguments made in support of re-defining sex discrimination to include sexual orientation and gender identity.¹²

Second Circuit: The Second and Sixth Circuits quickly followed in the Seventh Circuit’s footsteps. In *Zarda v. Altitude Express*, a skydiving instructor was fired after a customer alleged that he had touched her inappropriately.¹³ The employer responded to the instructor’s sexual orientation discrimination suit with a motion for summary judgment, relying on Second Circuit precedent holding that Title VII did not prohibit sexual orientation discrimination.

Sitting *en banc*, the Second Circuit ruled that Title VII prohibited sexual orientation discrimination. Interestingly, the federal EEOC filed in support of the employee, while the United States Department of Justice filed in support of the employer, reflecting the Obama Administration’s and the Trump Administration’s diametrically opposed interpretations of Title VII.¹⁴

Sixth Circuit: In *EEOC v. Harris Funeral Homes*, a Sixth Circuit panel ruled that Title VII prohibited gender identity discrimination in employment.¹⁵ A funeral home owner fired a transgender employee who announced that he was transitioning and would begin to dress as a woman at work. For the first time, the EEOC brought suit on behalf of a transgender employee under Title VII.

Eleventh Circuit: In *Bostock v. Clayton County, Georgia*, a county employee claimed that his employer’s proffered reasons for firing him were pretextual and that he was fired because of his sexual orientation.¹⁶ An Eleventh Circuit panel upheld the trial court’s dismissal of his suit because circuit precedent held that Title VII did not prohibit sexual orientation discrimination. The Eleventh Circuit denied rehearing *en banc*.¹⁷

The Supreme Court Re-interprets Title VII

United States Supreme Court: The Court granted review in *Zarda*, *Harris*, and *Bostock*. With the new conservative majority, most observers expected the Court to rule, 5-4, that Title VII did not prohibit sexual orientation and gender identity discrimination.

This expectation continued notwithstanding oral argument on October 8, 2019, when Justice Gorsuch sparked speculation by prefacing a question to the *Harris* employee’s counsel with the comment: “When a case is really close, really close, on the textual evidence, and I – assume for the moment . . . I’m with you on the textual evidence.” Many observers downplayed Justice Gorsuch’s comment because he was believed to be a reliable textualist given his writings

¹² *Id.* at 359 (dissenting opinion) (Sykes, J., joined by Bauer and Kanne, JJ.).

¹³ 883 F.3d 100 (2d Cir. 2018) (*en banc*).

¹⁴ *Compare* En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal, 2017 WL 2730281 (June 23, 2017) *with* Brief for the United States as Amicus Curiae, 2017 WL 3277292 (Jul. 26, 2017).

¹⁵ 884 F.3d 560, 574-75 (6th Cir. 2018).

¹⁶ 723 Fed. Appx. 964 (11th Cir. 2018).

¹⁷ 894 F.3d 1335 (11th Cir. 2018) (denying rehearing *en banc*).

in support of a textualist approach to judging. Moreover, his comments acknowledged the highly disruptive consequences of re-interpreting Title VII, when he asked whether a judge should “take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that . . . Congress didn’t think about it . . . and that is . . . more appropriate a legislative rather than a judicial function?”¹⁸

On June 15, 2020, the Court announced its 6-3 ruling that Title VII already prohibited sexual orientation and gender identity discrimination.¹⁹ Justice Gorsuch wrote the majority opinion, which was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Two masterful dissents were filed. One by Justice Alito, joined by Justice Thomas, evoked “a pirate ship” to describe the majority opinion as “sail[ing] under a textualist flag, but what it actually represents is a theory of statutory interpretation . . . that courts should ‘update’ old statutes so that they better reflect the current values of society.”²⁰ Stressing the violation of separation of powers represented by the Court’s opinion, Justice Kavanaugh’s dissent bluntly stated, “Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.”²¹

Majority opinion: Characterizing his reading of the statute as “textualist,” Justice Gorsuch wrote that Title VII’s original prohibition on sex discrimination necessarily prohibits both sexual orientation and gender identity discrimination. According to the Court, this outcome follows from the scenario in which a male employee is fired after bringing his male spouse to a work event, while a female employee is not fired after bringing her male spouse to the event.²² This difference in treatment, according to the majority, is “because of” the employees’ biological sex, meaning that Title VII includes sexual orientation discrimination.

Justice Gorsuch forthrightly acknowledged that Congress in 1964 “might not have anticipated” this outcome.²³ Or as Justice Alito asserted in his dissent: “While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of ‘transgender status’ or ‘gender identity,’ terms that would have left people at the time scratching their heads.”²⁴

Justice Gorsuch’s candid acknowledgement seemingly collides head-on with the majority opinion’s claim that textualism ascertains and implements the “ordinary public meaning” of a statute at the time it was enacted.²⁵ It seems to be more important to Justice Gorsuch that his reading of Title VII align with prior Title VII decisions, including decisions in which the Court

¹⁸ *Harris Funeral Homes v. EEOC*, No. 18-107, oral arg. trans. at 25,

https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf.

¹⁹ *Bostock*, 140 S. Ct. 1731.

²⁰ *Id.* at 1755-56 (Alito, J., dissenting).

²¹ *Id.* at 1823 (Kavanaugh, J., dissenting).

²² *Id.* at 1742.

²³ *Id.* at 1737, 1750.

²⁴ *Id.* at 1772 (Alito, J., dissenting).

²⁵ *Id.* at 1738.

was not attempting a textualist reading,²⁶ than that it align with what Congress thought it was doing in 1964, or how federal appellate courts had uniformly interpreted Title VII for nearly four decades.

In Dissent: As Justice Kavanaugh observed, by bypassing the “ordinary public meaning” of Title VII in 1964, Justice Gorsuch took a “literalist,” rather than a “textualist,” approach to statutory interpretation.²⁷ Justice Kavanaugh’s dissent focused on the majority’s unconstitutional violation of the separation of powers arising from the Court’s usurpation of Congress’ legislative function.²⁸ In their dissent, Justices Alito and Thomas detailed the flaws with the Court’s opinion, including the long history of failed efforts to amend Title VII in the courts and Congress. Both dissents merit a thoughtful reading.²⁹

The Ramifications of *Bostock*

At oral argument, Justice Gorsuch had foreseen “massive social upheaval” if Title VII were re-interpreted to include sexual orientation and gender identity.³⁰ But his majority opinion brushed aside the likely consequences of the decision, implying that it might be possible to confine its logic to Title VII, while punting the peril for religious freedom to future cases.³¹

Near-term Ramifications

1. Federal laws that prohibit “sex” discrimination: Justices Alito and Thomas appended to their dissent an appendix listing over 160 federal laws that currently prohibit sex discrimination. It is unclear how Title VII’s prohibition on sex discrimination must include a prohibition on sexual orientation and gender identity discrimination, yet other federal statutes that prohibit sex discrimination do not. It seems probable that the Court amended not only Title VII but also 160 other federal laws to include prohibitions on sexual orientation and gender identity. In particular, because Title IX generally is interpreted in tandem with Title VII,³² its broad prohibition on sex discrimination in education likely also prohibits sexual orientation and gender identity discrimination in K-12 schools and colleges. Title IX includes a religious exemption that will, no doubt, be tested.³³

²⁶ *Id.* at 1743-44.

²⁷ *Id.* at 1824-25 (Kavanaugh, J., dissenting).

²⁸ *Id.* at 1822 (Kavanaugh, J., dissenting).

²⁹ *Id.* at 1754 (Alito, J., joined by Thomas, J., dissenting).

³⁰ *Harris Funeral Homes v. EEOC*, No. 18-107, oral arg. trans. at 25, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf; audio at <https://www.oyez.org/cases/2019/18-107>. The oral argument in the *Bostock* and *Zarda* cases are at *Bostock v. Clayton County & Altitude Express v. Zarda*, Nos. 17-1618 & 17-1623, oral arg. trans., https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_7k47.pdf; audio at <https://www.oyez.org/cases/2019/17-1618>.

³¹ 140 S. Ct. at 1753-54.

³² *See, e.g., Whitaker v. Kenosha School District*, 858 F.3d 1034 (7th Cir. 2017) (Title IX prohibition on sex discrimination includes prohibition on gender identity and, therefore, allows a transgender student to sue a school district for access to bathrooms and locker rooms of the student’s choice).

³³ 20 U.S.C. 1681(a)(3) (“[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization[.]”)

2. State and local laws that prohibit “sex” discrimination: Before the *Bostock* decision, 23 states had laws prohibiting sexual orientation discrimination in employment, and 20 states had laws prohibiting gender identity discrimination. With the *Bostock* decision, federal law applies in the other 27 states to prohibit sexual orientation discrimination in employment, and in the other 30 states to prohibit gender identity discrimination. And not a single vote was cast by any state legislator.

Twenty-four states previously prohibited sex discrimination, but not sexual orientation and gender identity discrimination, in employment.³⁴ At least some state supreme courts likely will adopt Justice Gorsuch’s logic in order to interpret state laws to prohibit not only sex discrimination but also sexual orientation and gender identity discrimination. One might ask why that matters if Title VII applies in the states. But it matters for religious employers in those states because many state nondiscrimination laws lack exemptions for religious employers. That is, Title VII’s religious exemption protects religious employers only as to federal employment discrimination claims, not as to state employment discrimination claims. Religious exemptions in state laws, if they exist, may be inadequate to protect the religious employers in those states.

3. Equality Act: As discussed earlier, amending Title VII to include sexual orientation and gender identity as protected classes has been a high priority for the LGBT movement for decades. Some commentators have opined that the *Bostock* decision, therefore, will diminish the momentum for the Equality Act, but that seems unlikely. Passage of the Equality Act³⁵ will remain a high priority for the LGBT movement. While *Bostock* may mean that Congress no longer needs to amend Title VII, other significant areas of federal nondiscrimination law do not prohibit sex discrimination. For example, sex discrimination (and, therefore, sexual orientation and gender identity discrimination) is not prohibited in federal public accommodations law³⁶ or federal financial assistance law.³⁷

Recall how dangerous the so-called Equality Act is. It vastly expands the federal definition of “public accommodation” to encompass nearly every business,³⁸ as well as any “individual whose operations affect commerce and who is a provider of a good, service, or program.”³⁹ And “public accommodation” “shall not be construed to be limited to a physical facility or place.”⁴⁰ The Equality Act would gut the Religious Freedom Restoration Act’s protection for religious individuals and institutions, making it unavailable to “provide a claim

³⁴ The number adds up to 47 states because three states lack nondiscrimination laws regarding employment.

³⁵ H.R. 5, 116th Cong., 1st Sess. (passed House, 236-173, May 17, 2019), at <https://www.congress.gov/116/bills/hr5/BILLS-116hr5rfs.pdf>. The Senate companion bill is S. 788, 116th Cong., at <https://www.congress.gov/116/bills/s788/BILLS-116s788is.pdf> (46 co-sponsors).

³⁶ 42 U.S.C. § 2000a.

³⁷ 42 U.S.C. § 2000d.

³⁸ H.R. 5, § 3(a)(2)(c) (the definition includes in part “any establishment that provides a good, service, or program, including a store, shopping center, online retailer or service provider, salon, bank, gas station, food bank, service or care center, shelter, travel agency, or funeral parlor, or establishment that provides health care, accounting, or legal services”).

³⁹ *Id.*, § 3(c).

⁴⁰ *Id.*

concerning, or a defense to a claim” or to “provide a basis for challenging the application or enforcement” of any part of the Equality Act.⁴¹

4. Constitutional and statutory religious freedom protections: Both the majority and dissenters emphasized that various federal protections already exist for religious individuals and institutions.⁴² Some commentators have suggested that these protections are sturdy enough to withstand the upheaval unleashed by *Bostock*. Others think that assumption is ill-founded.⁴³

a. Title VII exemption for religious employers: Title VII has strong protection for religious employers, but its scope is contested on two crucial fronts. First, the definition of “religious employers” who are entitled to claim the exemption is broad but not limitless. Those limits are still being determined by the courts.⁴⁴ Second, while Title VII defines “religion” broadly,⁴⁵ an increasing number of liberal academics claim that the religious employer’s right to hire employees of a particular religion is limited and does not protect a religious employer’s standards of conduct for employees. That is, while a Baptist college may limit its hiring to Baptists, it may not refuse to hire a Baptist who enters a same-sex marriage. While the case law regarding “sex discrimination” typically supports the employer’s right to require that employees abide by non-pretextual religious standards of conduct, the newly added prohibitions on sexual orientation and gender identity will trigger future litigation.⁴⁶

b. Title IX exemption for religious schools and colleges: Title IX does “not apply to an educational institution that is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”⁴⁷ But retaliation against religious colleges and their students for invoking the Title IX religious exemption reared its ugly head in 2016, when the California Assembly came within a few votes of denying state financial assistance to low-income students who attended religious colleges that had invoked their Title IX exemption.⁴⁸ The effort failed only after intense engagement by religious colleges representing diverse faiths.

⁴¹ *Id.*, § 9.

⁴² 140 S. Ct. at 1753-54; *id.* at 1777-83 (Alito, J., dissenting); *Id.* at 1823 n.2 (Kavanaugh, J., dissenting).

⁴³ Kim Colby, *Symposium: Free Exercise, RFRA, and the Need for a Constitutional Safety Net*, SCOTUSBLOG (Aug. 10, 2020), <https://www.scotusblog.com/2020/08/symposium-free-exercise-rfra-and-the-need-for-a-constitutional-safety-net/>.

⁴⁴ *See, e.g., Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2011).

⁴⁵ 42 U.S.C. § 2000e(j) (“The term ‘religion’ includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.”).

⁴⁶ For a thorough discussion of this issue, *see* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Decisions: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD JOURNAL OF LAW AND RELIGION 368 (2015), at <https://academic.oup.com/ojlr/article-abstract/4/3/368/1557522>.

⁴⁷ 20 U.S.C. § 1681(a)(3).

⁴⁸ Kim Colby, *Whose Shame?*, Religious Freedom Institute Cornerstone Blog (Sept. 20, 2016), at <https://www.religiousfreedominstitute.org/cornerstone/2016/9/20/whose-shame>.

c. Religious Freedom Restoration Act: Because of a 1990 Supreme Court decision,⁴⁹ a federal statute, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, provides more protection for Americans' religious freedom against *federal* government overreach than does the United States Constitution.⁵⁰ RFRA protects religious freedom by requiring the government to demonstrate a compelling interest that cannot be achieved by a less restrictive means before a government action may impose a substantial burden on an individual's (or institution's) sincerely held religious exercise. RFRA was passed by overwhelmingly bipartisan, nearly unanimous votes in Congress and signed into law by President Clinton in 1993.

But there is strong pressure on Congress to eviscerate RFRA's protections, especially in the nondiscrimination context. As noted above, the House of Representatives passed the Equality Act in May 2019, which contains a provision that makes RFRA inapplicable to nondiscrimination claims.⁵¹ In addition, the so-called Do No Harm Act⁵² would gut RFRA. Drawing its support solely from the Democratic side of the aisle, it has 176 co-sponsors in the House and 28 co-sponsors in the Senate. Because RFRA is vital to the survival of religious freedom, it deserves and needs the support of all Americans.⁵³

d. The Free Exercise Clause: In its 1990 decision in *Employment Division v. Smith*,⁵⁴ the Supreme Court severely weakened the protection for religious exercise afforded by the Free Exercise Clause of the First Amendment. The Court ruled that a neutral and generally applicable law – such as a nondiscrimination law – could burden the free exercise of religion as long as the government was not targeting religion for discriminatory treatment. Three years later, Congress passed RFRA to restore strong protection for religious freedom. But RFRA only protects religious freedom as to federal laws, not as to state or local laws.⁵⁵

Between 1990 and 2017, the Free Exercise Clause essentially went into hibernation, with occasional sightings when states discriminated against religious individuals and institutions. But in the past three years, the Court has issued two rulings in which the Free Exercise Clause is re-awakening.⁵⁶ And in Fall 2020, the Court will hear argument in a case,

⁴⁹ *Employment Division v. Smith*, 494 U.S. 872 (1990).

⁵⁰ Kim Colby, *The Religious Freedom Restoration Act: A Complicated Legacy for Justice Scalia*, OUTCOMES 32-33, Summer 2016, at <https://www.clsnet.org/document.doc?id=967>.

⁵¹ H.R. 5, 116th Cong., 1st Sess., §9.

⁵² H.R. 1450, 116th Cong., at <https://www.congress.gov/116/bills/hr1450/BILLS-116hr1450ih.pdf>; S. 593, 116th Cong., at <https://www.congress.gov/116/bills/s593/BILLS-116s593is.pdf>.

⁵³ Kim Colby, *How the Religious Freedom Restoration Act Benefits All Americans*, at <https://www.clsnet.org/document.doc?id=803>.

⁵⁴ 494 U.S. 872 (1990).

⁵⁵ *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Congress failed to make the factfinding necessary to support its constitutional authority to apply RFRA to state and local laws).

⁵⁶ *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). See CLS's amicus brief in *Espinoza*, Brief of Christian Legal Society, United States Conference of Catholic Bishops, the Union of Orthodox Jewish Congregations of America, American Association of Christian Schools, the Anglican Church in North America, Association of Christian Schools International, the Church of Jesus Christ of Latter-Day Saints, Council for American Private Education, Council for Christian Colleges & Universities, Ethics & Religious Liberty Commission, Evangelical Council for Financial Accountability, the General Conference of Seventh-day Adventists, Institutional Religious Freedom Alliance, the Lutheran Church-

Fulton v. City of Philadelphia,⁵⁷ in which the Court may overrule the *Smith* decision and again make the Free Exercise Clause a meaningful protection for religious freedom at the state and local levels, as well as the federal level.

e. Ministerial exception: The “ministerial exception” is a religious freedom doctrine rooted in both the Free Exercise and Establishment Clauses of the First Amendment that requires federal and state judges to refrain from deciding cases involving religious congregations’ and religious schools’ employment decisions regarding their leaders and teachers. The Supreme Court has ruled that judges are not competent to sort through religious doctrine when a congregation decides whether to hire or retain someone as a minister or teacher.⁵⁸ Even if the case involves race, sex, or other protected classes, the courts are to respect the autonomy of religious organizations and allow them to make necessary decisions regarding employment of the persons who lead their worship or teach their doctrine. While its coverage is deep, the ministerial exception’s applicability is somewhat narrow because it is limited to employees whose jobs include religious functions.

f. State and local religious protections: If state courts decide to follow the Court’s lead in *Bostock* and re-interpret their state laws to prohibit sexual orientation and gender identity discrimination, the primary protections for religious freedom will be the religious exemptions found in those local and state nondiscrimination laws, which may or may not be adequate. Some state courts have interpreted their state constitutions to require strict scrutiny for state or local laws that burden religious exercise. In addition, 22 states have state RFRAs, which the courts may or may not apply robustly. If *Smith* is overruled in *Fulton*, the federal Free Exercise Clause will again provide necessary protections at the state and local level.⁵⁹

g. Tax-exempt status: During oral argument in *Obergefell v. Hodges*,⁶⁰ in response to a question from Justice Alito, the United States’ top attorney at the time, Solicitor General Donald Verrilli, agreed that religious colleges’ tax-exempt status would likely become an issue for religious colleges that prohibited same-sex conduct by their students.⁶¹ With its finding that sexual orientation and gender identity discrimination has been prohibited by Title VII for the past 56 years, the *Bostock* decision contributes to a narrative that some religious

Missouri Synod, National Association of Evangelicals, Queens Federation of Churches, and World Vision, Inc. (U.S.) as Amicus Curiae in Support of Petitioners, 2019 WL 4640380 (Sept. 18, 2019).

⁵⁷ *Fulton v. City of Philadelphia*, 922 F.3d 140 (2019), *cert. granted*, 140 S. Ct. 1104 (Feb. 24, 2020). CLS’s amicus brief in *Fulton*, Brief of Christian Legal Society, The Anglican Church in North America, Center for Public Justice, institutional Religious Freedom Alliance, the Lutheran Church-Missouri Synod, Queens Federation of Churches, Union of Orthodox Jewish congregations of America, and World Vision, Inc., as Amici Curiae in Support of Petitioners, 2020 WL 3078340 (June 3, 2020).

⁵⁸ *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

⁵⁹ See Colby, *supra* note xliii.

⁶⁰ 135 S. Ct. 2584 (2015).

⁶¹ Transcript of Oral Argument in *Obergefell v. Hodges*, No. 14-556, U.S. Supreme Court (April 28, 2015), available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-556q1_15gm.pdf at 38 (last visited July 10, 2020).

institutions' religious beliefs concerning marriage, sexual conduct, and gender identity violate "public policy" and should render them ineligible for tax-exempt status.⁶²

Long-term ramifications

The short-term ramifications are daunting, and the potential damage to religious freedom deeply troubling, but the *Bostock* opinion wreaks even worse damage in at least two fundamental ways.

1. "A Republic if you can keep it": Those words are reportedly Benjamin Franklin's response to a Philadelphia woman who asked him what kind of government the Constitutional Convention had given the American people. But a self-governing republic, and even the rule of law, are only possible if words have objective meaning that judges respect when they apply the law. The *Bostock* opinion erodes this essential element. While some courts have ignored words' objective meaning for decades, the textualist legal movement promised a return to these first principles for rebuilding authentic respect for the rule of law. These principles also make legislative compromises possible for the challenging problems facing our country. Citizens need to be confident that legislative compromises will be enforced by a judiciary that defers to Congress' words, rather than substituting its own judgment.

2. Law students and the next generation of lawyers: CLS law students come from across the political spectrum. Many identify as "progressives," many as "moderates," and many as "conservatives." The "progressive" and "moderate" law students have little to fear in their law school classrooms because they are ideologically compatible with their "progressive" professors and classmates.

But that is not true for conservative law students. Too many law schools allow a hostile learning environment to surround conservative women and men. Too often conservative students are harassed by their professors and classmates.⁶³ Their conservative legal philosophy often means they will not be recommended for clerkships or jobs by professors who disdain their conservative ideas and values. Their conservative speech exposes them to the risk of public ridicule and professional harm. One off-hand classroom comment can be instantly tweeted to the world by a classmate who reflexively chooses scoring political points over treating others decently.

Despite this, some conservative students courageously raise their hands to question the "progressive" legal theories of their professors and classmates. They risk their reputations merely to suggest that the rule of law depends on judges honoring the objective meaning of the words in the Constitution or a statute. They question the "progressive" stranglehold on the classroom by

⁶² See *Bob Jones University v. United States*, 461 U.S. 574 (1983) (IRS could revoke religious college's tax-exempt status because its racially discriminatory policy regarding student dating was against "public policy").

⁶³ Aaron Haviland, *I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong*, *The Federalist* (Mar. 4, 2019), <http://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/> (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

making principled arguments that the conservative justices in the *Bostock* majority were believed to champion.

The *Bostock* majority opinion betrays their defense of the idea that the words of the People's elected representatives have objective meaning which judges are duty-bound to respect by their oath to uphold the Constitution. These law students – and the country – deserved better than the outcome in *Bostock*.