AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**

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From: **A. Eric Johnston**

Re: **The Ministerial Exception in Federal Discrimination Cases Extended to Teachers**

One of the most important cases for religious freedom during the past SCOTUS term is *Our Lady of Guadalupe School v. Morrissey-Berru* and *St. James School v. Biel* (collectively "OLG"). Actually, there were two cases and one opinion. They involved the federal age and disability laws. The employment of two teachers at separate Catholic schools was terminated and they each filed discrimination claims. The issue was clearly stated by Justice Alito who wrote for a seven-two majority for the court:

> "These cases require us to determine whether the First Amendment permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith. The First Amendment protects the right of religious institutions 'to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.' . . . Applying this principle, we held in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* . . . (2012), that the First Amendment barred a court from entertaining an employment discrimination claim brought by an elementary school teacher [whose title was] 'Minister of Religion, commissioned,' . . ."

The two teachers in OLG taught secular subjects, as well as, Catholic doctrine and participated in Mass, and other religious activities with students. As typical of many church schools in Alabama, these Catholic schools had annual employment contracts. When the teachers' contracts were not renewed for the next year, one filed a discrimination claim because of her age and the other because of her health.

In our August 2020 Educational Update, Title VII – Sex Now Includes Secular Orientations and Gender Identity, we opined there would be enforcement of a ministerial exception protecting churches and religious organizations from federal discrimination claims, and that would be extended by SCOTUS to teachers. While OLG involves age and disability claims, we expect the same rationale to apply when Title VII sex discrimination claims are filed. It is important that OLG be reviewed along with the *Bostock v. Clayton County, Georgia* case for applying guidelines to protect churches and religious nonprofit organizations from discrimination claims.

Justice Alito explained that the *Hosanna-Tabor* "ministerial exception" applies the Free Exercise Clause forbidding intrusion into church decisions. Though the plaintiff there was a teacher, she held a position as a minister and therefore it is referred to as the "ministerial exception." In OLG, the Ninth Circuit Court of Appeals attempted to apply a rigid formula to determine whether there would be a "teacher exception." The OLG opinion made several significant findings for the future of religious freedom. Justice Alito said, "The Religious Clauses protect the rights of churches and other religious institutions to decide matters 'of faith and doctrine' without government intrusion." This requires the church's independence in selecting ministers without interference of secular authorities. Relying heavily on the *Hosanna-Tabor* opinion, Justice Alito pointed out that "courts should 'defer to a religious organization's good faith understanding of who qualifies as a minister.' Also, the 'ministerial exception' should 'focus on the function performed by persons who work for religious bodies' rather than labels or designations that may vary across faiths." . . . "[t]he 'ministerial exception' should apply to any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals or serves as a minister or teacher of its faith." However, a "title", such as "minister" is not determinative.

"What matters, at the bottom, is what an employee does." This varies from denomination to denomination. Nondenominational Christian schools have proliferated and with them the responsibility of "inculcating biblical values in . . . students." Similarly, "religious education is a matter of central importance in Judaism", as well as Islam and in the Mormon faith. "In hiring a teacher to provide religious instruction, a religious school is very likely to select a person who meets this requirement, but insisting on this [judicial review] as a necessary condition would create a host of problems . . . deciding such questions could risk judicial entanglement in religious issues."

The significance of this decision it is not a question of trying to figure out rules of how to decide a particular case which would entangle the court in religion. It is to simply decide if an employee holds a position, according to the religious employer, that includes teaching and carrying out the religious mission of the employer. It is not for courts to determine what that religious mission is, but must rely on the rights of the religious institution as protected by the Free Exercise Clause in the Constitution. Further, the lesson from this case is that SCOTUS is protecting religious autonomy that will extend to other religious freedom issues.

The OLG case does not change our assessment of the problems we will encounter in the application of Title VII sex discrimination cases. Ministers and teachers will be protected. It will be difficult, however, to extend this to clerical employees. Whether administrative employees will have protection will depend on further opinions of SCOTUS. Whether clerical or administrative, the magnitude and responsibility of the employee will be instructive as to whether the employer will be protected from discrimination claims under various federal statutes.

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