

***2020 LEGAL UPDATE***  
***Ministerial Exception Decisions***  
***&***  
***Removing Disruptive Persons***

Mark Dickenson   Bob Brown   Jerry Steele



**Our Lady of Guadalupe  
School v. Morrissey Berru  
(St. James School v. Biel)**

The Ministerial Exception



Our Lady of Guadalupe  
School v. Morrissey-  
Berru  
&  
St. James School v. Biel

Our Lady of Guadalupe School/St. James  
School

- ▶ Two elementary school teachers
- ▶ Catholic schools in the Archdiocese of Los Angeles
- ▶ Claimed wrongful termination

## Our Lady of Guadalupe School/St. James School

- ▶ Similar employment agreements required Teachers to:
  - ▶ “model and promote” Catholic “faith and morals,”
  - ▶ participate in “school liturgical activities, as requested” and
- ▶ Teachers could be terminated for failure to execute their responsibilities or for “conduct that brings discredit upon the School or the Roman Catholic Church.”

## Morrissey-Berru (teacher at Our Lady of Guadalupe School)

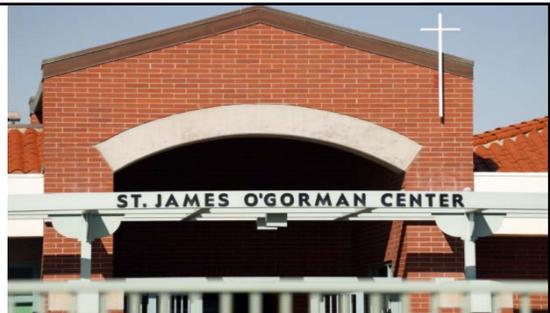
- ▶ Taught religious instruction daily
- ▶ Prepared students for:
  - ▶ Mass
  - ▶ communion
  - ▶ confession
- ▶ Prayed with her students and
- ▶ Took them to Mass weekly.



## Morrissey-Berru (teacher at Our Lady of Guadalupe School)

- ▶ In 2014, School asked Teacher to move to a part-time position and the school decided not to renew her contract the next year.
- ▶ Teacher claimed she was terminated due to her age and the school contended that the nonrenewal was based on poor performance.

## Kristen Biel (teacher at St. James School)



- ▶ Taught at St. James School for year and a half
- ▶ Instructed students in the tenets of Catholicism
- ▶ Worshipped and prayed with her students, and was expected to "infuse Catholic values" in all of her teaching.

## Kristen Biel (teacher at St. James School)

- ▶ Teacher requested a leave of absence for breast cancer treatment
- ▶ School declined to renew her contract.
- ▶ Teacher claimed termination due to her medical condition
- ▶ School argued that the decision was based on poor performance.

## Basis for the Ministerial Exception

- ▶ Created by courts
- ▶ Protects the “autonomy of religious institutions in:
  - ▶ internal management decisions
  - ▶ essential to the institution’s central mission”

## Prior Decisions

Nearly 200 courts have applied the exception to employment law claims since the Supreme Court ruled in *Hosanna-Tabor*.

## Basis for the Ministerial Exception

- ▶ First Amendment protections for religious institutions:
  - ▶ decide for themselves, free from state interference
  - ▶ matters of church government
  - ▶ as well as faith and doctrine”

(*Kedroff v. Saint Nicholas Cathedral*, 344, U.S. 94, 116)

## Basis for the Ministerial Exception

- ▶ Justice Roberts:

- ▶ “the Establishment Clause prevents the Government from appointing ministers, and
- ▶ the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own”

(Hosanna-Tabor Evangelical Lutheran Church v. Perich, 565 U.S. 171)

## 2020 Supreme Court Decisions

- ▶ Supreme Court refused to follow a formula.
  - ▶ “What matters, at bottom, is what an employee does” (slip opinion, p. 18)
- ▶ **Issue: Do the employee’s job duties reflect a role in fulfilling the religious organization’s mission and delivering its message??**

## Supreme Court Decision

In the case of *Morrissey-Berru and Biel*, the Court focused on the fact that they were “educating young people in their faith, inculcating its teachings, and training them to live their faith” (slip opinion, p. 18).

**PRACTICAL TAKE-AWAYS!**

**“ICRA”**

## Takeaways

- ▶ **IDENTIFY EMPLOYEES** With Religious Duties
- ▶ **CLARIFY** Religious duties
- ▶ **REQUIRE** written acknowledgement
- ▶ **ASSESS** performance

## Takeaways

- ▶ **Identify**
  - ▶ which employees
  - ▶ carry out your religious mission and
  - ▶ convey its religious message (“ministerial employees”)

## Takeaways

- ▶ **Clarify Religious/Evangelical/Spiritual duties in:**
  - ▶ job descriptions
  - ▶ employee handbooks
  - ▶ policies, etc.

## Takeaways

- ▶ **Require**
  - ▶ employees to acknowledge and agree
  - ▶ in writing that they
  - ▶ understand and
  - ▶ will perform their ministerial duties.

## Takeaways

- ▶ **Assess**
- ▶ In writing
- ▶ Employees' performance of:
  - ▶ ministerial duties
  - ▶ as specified in the job description.



**Robert Erven Brown**  
Attorney at Law

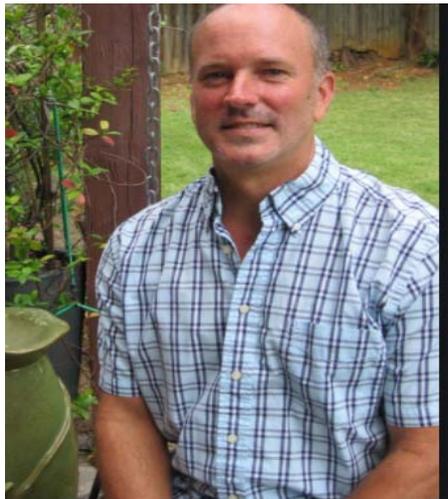
Bob@ChurchLaw.US  
Cell: 602-740-1032 Main: 602-277-7000 Ext. 142  
1221 East Osborn Road, Suite 105, Phoenix, Arizona 85014

## Bostock v. Clayton County

- ▶ Bostock, a gay man began working for Clayton County, Georgia in child welfare services in 2003.



## County Employee Gerald Bostock



## Bostock v. Clayton County

- ▶ In 2013 Bostock began participating in a gay recreational softball league.
- ▶ Shortly afterwards, Clayton County terminated Bostock for “conduct unbecoming of its employees.”

## Altitude Express v. Zarda



## Altitude Express v. Zarda

- ▶ Zarda, a gay man, worked as a skydiving instructor for Altitude Express in New York.
- ▶ Zarda was discharged a few days after he mentioned being gay.

## Harris Funeral Homes v. EEOC

- ▶ In 2007, Harris Funeral hired a male funeral director.
- ▶ At the time, Stephens presented as a man.
- ▶ In 2013, Stephens presented a letter to owner that she was transitioning from male to female.



## Harris Funeral Homes v. EEOC

### ▶ Aimee's letter to Harris Funeral Homes:

"....at the end of my vacation on August 26, 2013, I will return to work as my true self, Aimee Australia Stephens, in appropriate business attire."

## Harris Funeral Homes v. EEOC

### ▶ As part of the transition, Stephens would begin dressing as a women.



## Harris Funeral Homes v. EEOC



- ▶ Harris Funeral Home terminated her employment citing Stephens violation with same sex dress code.
- ▶ Harris initially argued that complying with Title VII would infringe upon owner's religious beliefs, but this argument was dropped on appeal to the Supreme Court.

## SPLIT OF CIRCUIT COURTS OF APPEALS!

- ▶ In Bostock, the 11<sup>th</sup> Circuit allowed employer to terminate.
- ▶ In Zarda and Harris, the 6<sup>th</sup> and 2<sup>nd</sup> Circuit ruled for employees.



## Bostock Consolidated Decision

- ▶ employment discrimination  
"because of . . . sex" necessarily encompasses discrimination based on an individual's sexual orientation.



## Justice Gorsuch: Bostock Holding:



**"An employer who fires an individual merely for being gay or transgender defies the law."**

- Justice Neil Gorsuch  
*Bostock v. Clayton County*



## Bostock Consolidated Decision Answering Dissent

- ▶ “Under Title VII, we do not purport to address bathrooms, locker rooms, or anything else of this kind.”
- ▶ On issue of religious convictions, majority cites *Hossana-Tabor* and federal RFRA as bulwarks.



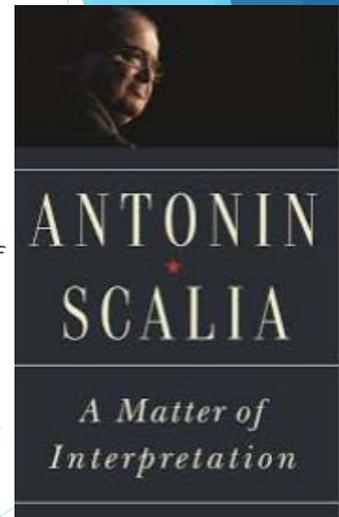
## Bostock Consolidated Decision Answering Dissent

- ▶ “Because RFRA operates as a kind of super statute, displaying the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.”
- ▶ None of the employers in this case claim that compliance will infringe on their religious liberties.



## Bostock Dissent - Justice Alito

- ▶ “There is only one word for what the court has done today: legislation.”
- ▶ Majority opinion is ‘like a pirate ship’ flying a false flag of textualism.
- ▶ Majority does what Justice Scalia excoriated, updating a statute to better reflect evolving values that Congress has not enacted.



## Bostock Dissent

- ▶ Over 100 federal statutes prohibit discrimination because of sex.
- ▶ Alito argues the Court has taken from Congress the opportunity to craft special rules for relevant statutes.
- ▶ Mentions a particular bill in Congress that would have given more protections for religious belief.



## Outstanding Questions Workplace Speech

- ▶ Will an employee who displays iconography associated with a religion that opposes same-sex marriage be complicit in creating a “hostile work environment”?
- ▶ Can expect that workplaces and schools enforce the use of gender neutral pronouns.
- ▶ If someone “misgenders” another employee at the water cooler, are they creating a hostile work environment for transgender employees?



## Outstanding Questions

### Bathrooms & Locker rooms

- ▶ Is it discrimination to prohibit transgender persons from using a bathroom or locker room of their choice?
- ▶ Court does not define a transgender person.

## Outstanding Questions

### Bathrooms & Locker rooms

- ▶ In 2016, a DOJ issued a “Dear Colleague Letter” that barring a student from a bathroom for the gender which the student identifies constitutes unlawful sex discrimination.
- ▶ A number of states sued to enjoin the injunction and 5<sup>th</sup> Circuit granted the injunction.

## Outstanding Questions

### Bathrooms & Locker rooms



- ▶ In February 2017, the DOJ under AG Jeff Sessions withdrew the government’s appeal of the injunction.
- ▶ In October 2017, AG Sessions sent a memorandum to all heads of executive departments and agencies that “it shall be the policy of the executive branch to vigorously enforce federal law’s robust protections of religious liberty.”

## Outstanding Questions

### Women's Sports

- ▶ Does interpretation of Bostock necessitate giving a right to a transgender female to participate in women's sports?
- ▶ Does Bostock require owners of professional female sports team to allow transgender female to play?



## Path Forward for Rights of Conscience?

- ▶ Justice Gorsuch did mention in Bostock that RFRA might supersede Title VII in "appropriate places."
- ▶ RFRA prohibits federal government from substantially burdening a person's free exercise of religion unless government demonstrates a compelling governmental interest and least restrictive means.
- ▶ Hobby Lobby decision (2014) found that corporations can be "persons" for purposes of RFRA.

## Path Forward for Rights of Conscience?

- ▶ Owners still have the opportunity to defend themselves on grounds of their strongly held religious convictions.
- ▶ Despite change in case law, we can hope religious exemptions will be available to accommodate rights of conscience.



**Are ministries  
allowed to remove  
disruptive people?**

**Jerry Steele, Esq.**



# YES!

## Removing Disruptive People

- ▶ General Rules:
  - ▶ House of Worship is Private Property
  - ▶ Inviting the Public Does Not Make the House of Worship Public Property



JLS 1

## Removing Disruptive People

- ▶ General Rules:
  - ▶ Private Property Provides Rights and Presents Responsibilities
  - ▶ Policies and Training Are Essential for Balancing Rights and Responsibilities

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## House of Worship is Private Property

- ▶ Arizona law does NOT require churches to allow a stranger to enter or remain on their property simply because their ministries are open to the public.



## Inviting the Public Does Not Make the House of Worship Public Property

- ▶ When a ministry has reason to believe that a person will disrupt its service or activity, the ministry may either deny access or require the person to leave.



## Right to Remove Must Be Balanced With Responsibilities

- ▶ Preserve the mission
- ▶ Protect those in attendance and staff
- ▶ Protect those doing the disrupting



## Policies and Training Are Essential for Balancing Rights and Responsibilities

- ▶ Policies and Training both affect how the responsive and preventive actions will be judged



## Policies and Training Are Essential for Balancing Rights and Responsibilities

- ▶ Have the policies in your governing documents and follow them and conduct and update the training



## Tips and Resources

- ▶ **Develop a Written Plan Now**
  - ▶ Assign a Senior Decision-maker
  - ▶ Create a “Team”
  - ▶ Consider Medical Response Issues
  - ▶ Inventory Resources

## Tips and Resources

- ▶ **Develop a Written Plan Now**
  - ▶ Check Insurance
  - ▶ Consider Training Key Personnel
  - ▶ Establish Contact With Local Law Enforcement
  - ▶ Consider Hiring Off-duty Officers

## Tips and Resources

- ▶ Include the police as quickly as possible
- ▶ Follow up with court imposed restraining orders
- ▶ Anticipate a protest - contact police ahead of time

## Tips and Resources

- ▶ Services and Consultants
  - ▶ [ArizonaChurchSecurityNetwork.com](http://ArizonaChurchSecurityNetwork.com)
  - ▶ [Safechurch.com](http://Safechurch.com)
  - ▶ [Sheepdogsafetytraining.com](http://Sheepdogsafetytraining.com)
  - ▶ FEMA Guide for Developing High Quality Emergency Operations Plans for Houses of Worship

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