Plenary Session
Religious Freedom Cases of the 2019 and 2020 Terms
of the United States Supreme Court
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Introduction: This session will include six religious freedom experts who routinely file briefs in the United States Supreme Court in religious freedom cases. The speakers will review the Supreme Court's 2019 Term in which the Court delivered a number of critical decisions regarding religious freedom. The speakers will also present the facts of cases already on the Court's docket for the 2020 Term. Attendees will gain an understanding of the Court's decisions in key areas of religious freedom, including the ministerial exception, the Religious Freedom Restoration Act, and the Free Exercise and Establishment Clauses.

I. Religious Freedom Cases in the Supreme Court's 2019 Term

A. *Espinoza v. Montana Department of Revenue,* 140 S. Ct. 2246 (2020)

1. The facts and ruling below

a. Like approximately 37 states, Montana's constitution contains a provision prohibiting the public funding of religious institutions, commonly known as a "Blaine Amendment." Specifically, Article X, Section 6, provides as follows:
(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.

b. The Montana Legislature passed a law allowing tax credits to state taxpayers who donated money to private scholarship organizations. In turn, these organizations distributed scholarships to families whose children could use them to attend private schools, including religious schools.

c. The Montana Department of Revenue passed a rule excluding religious schools from the program, claiming that their participation violated the state constitution. On review, the Montana Supreme Court invalidated the statute as to all private schools. *Espinoza v. Montana Department of Revenue*, 435 P.3d 603 (Mont. 2018).

d. CLS amicus brief - https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/Espinoza%20CLS%20Amicus%20Brief.pdf

2. **The United States Supreme Court reversed, 5-4, holding that the exclusion of the religious schools and families violated the federal Free Exercise Clause.**
   a. Chief Justice Roberts' opinion for the Court
      1) See opinion, https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf
      2) Holding: when there is an educational program with a secular purpose, the Free Exercise Clause requires that the program be available without regard to the religious status of the service provider.
      3) Other qualifying secular-purpose programs might pertain to health care, social services, emergency disaster assistance, or economic relief.
      4) In general, the resulting principle is that a government cannot enact a law or program that purposefully discriminates against a religion, a practice because it is religious, or an individual because of his or her religious status.
      5) Limited the holding in *Espinoza* to status-based discrimination.

   b. Concurrences in full
      1. See opinion, https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf
      2. Justice Thomas joined by Justice Gorsuch
         a) This case involves the Free Exercise Clause, not the Establishment Clause, the Court's mistaken interpretation of the Establishment Clause continues to hamper Free Exercise rights.
         b) Under the modern view of the Establishment Clause, the government must treat all religions equally and treat religion equally to nonreligion. This view is unmoored from the original meaning of the Establishment Clause.
         c) The Court's overly expansive understanding of the Establishment Clause has led to a cramped interpretation of the Free Exercise Clause in that, under this Court's current approach, state and local governments may rely on the Establishment Clause to justify policies that others wish to challenge as violations of the Free Exercise Clause.
      3. Justice Alito
         a) Regardless of the motivation for the no-aid provision, its application here violates the Free Exercise Clause.
      4. Justice Gorsuch
         a) As he did in *Trinity Lutheran*, Justice Neil Gorsuch convincingly pointed out that a distinction between religious status and religious use made little sense.

   c. Dissents
      1. See opinion, https://www.supremecourt.gov/opinions/19pdf/18-1195_g314.pdf
      2. Justice Ginsberg joined by Justice Kagan
         a) Focused on one aspect of the Montana Supreme Court's decision, which shut down the scholarship program for all schools and not just religious ones. Justice Ginsburg wrote there had been no discrimination because no one was eligible for scholarships under the state court's ruling.
         b) "On that sole ground, and reaching no other issue," Justice Ginsburg wrote, "I dissent from the court's judgment."

3. Justice Breyer joined in part by Justice Kagan
    a) Expressed concern about the implications of the majority opinion for public and charter schools.
    b) "How would the majority's rule distinguish between those states in which support for charter schools is akin to public school funding and those in which it triggers a constitutional obligation to fund private religious schools?" Justice Breyer asked. "The majority's rule provides no guidance, even as it sharply limits the ability of courts and legislatures to balance the potentially competing interests."
4. Justice Sotomayor
    a) In dissent, Justice Sonia Sotomayor said the majority opinion "weakens this country's longstanding commitment to a separation of church and state beneficial to both."

3. Impact on religious freedom

a. Federal Free Exercise Clause
    1. Expansion of 2017 decision in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017)
        a) The decision in *Espinoza* built on *Trinity Lutheran Church v. Comer*, where the Supreme Court held that a childcare center could not be denied a Missouri grant to pay for a new playground surface to enhance child safety simply because of the center's status as church-operated.
        b) With reference to a state constitutional prohibition on government aid going to a religious organization—a provision similar to that in Montana—the state of Missouri denied the funding because of the grantee's religious status.
        c) This purposeful discrimination was found to violate the Free Exercise Clause.
    2. Viability of the distinction between discrimination based on religious status and religious uses

b. Blaine Amendments
    1) Are Blaine Amendments facially unconstitutional?
        a) In a sense, yes. The Court's ruling means that clauses in state constitutions that prohibit direct or indirect aid to religious or sectarian schools or institutions conflict with the Free Exercise Clause of the U.S. Constitution; as the U.S. Supreme Court said, these discriminatory clauses "cannot stand."
    2) Status of Blaine Amendments
        a) The majority opinion effectively says they cannot be enforced, at least when they are directed at preventing aid based on the character or status of the recipient.
        b) One could interpret the language of these provisions as directed at use, not necessarily status, but most lower courts will read the majority opinion otherwise.
        c) The result is that most state Blaine Amendments will be unenforceable.
    3) Court again refused to overrule *Locke v. Davey*, 540 U.S. 712 (2004)
        1) One reason for preserving *Locke* was that the state there had discriminated on the basis of use and not on the basis of status

c. Implications for government funding of religious schools, social service providers, and health care entities
   1) Carl H. Esbeck, *After* Espinoza*, What's Left of the Establishment Clause?*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3639570
   2) Thomas C. Berg & Douglas Laycock, Espinoza*, Government Funding, and Religious Choice*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680167
   3) Thomas C. Berg & Douglas Laycock, https://www.scotusblog.com/2020/07/symposium-espinoza-funding-of-religious-service-providers-and-religious-freedom/
   4) Thomas C. Berg, *Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate*, 21 J. Cont. Leg. Issues 279 (2013), https://www.clsnet.org/document.doc?id=1049
   5) Thomas C. Berg, *Religious Accommodation and the Welfare State,* 38 Harv. J. L. & Gender 103 (2015), https://harvardjlg.com/wp-content/uploads/sites/19/2015/01/Religious-Accommodation-and-the-Welfare-State.pdf
   6) Stephen V. Monsma & Stanley W. Carlson-Thies, *Free to Serve* (2015)
   7) Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 Notre Dame L. Rev. 1341 (2016), http://ndlawreview.org/wp-content/uploads/2016/06/NDL403.pdf
   8) Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisciplinary J. of Research on Rel. 1 (Vol 3) (2016), http://religjournal.com/pdf/ijrr12003.pdf

B. *Our Lady of Guadalupe School v. Morrissey-Berru,* 140 S. Ct. 2049 (2020), consolidated with *St. James School v. Biel*

1. The facts and ruling below
   a. Two elementary school teachers sued their Catholic school employers under federal nondiscrimination laws for adverse employment actions (age and disability discrimination)
   b. The schools claimed that the ministerial exception shielded their employment decisions from civil rights scrutiny because the teachers' jobs included important religious functions.
   c. Distinguishing the Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171 (2012), the Ninth Circuit ruled in favor of the teachers, holding that the schools could not claim the ministerial exception because the teachers did not possess the titles and credentials necessary to qualify them as ministers. *Our Lady of Guadalupe School v. Morrissey-Berru,* 769 Fed. Appx. 460 (2019); *St. James School v. Biel,* 911 F.3d 603 (2018).
   d. CLS amicus brief - https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/Our%20Lady%20Brief.pdf

2. **The United States Supreme Court reversed, 7-2, holding that the teachers were ministers for purposes of the ministerial exception and, therefore, the Free Exercise Clause and the Establishment Clause prohibited civil authorities from intervening in the dispute between the school and teacher.**
   a. See opinion - https://www.supremecourt.gov/opinions/19pdf/19-267_1an2.pdf
   b. The Court ruled that the First Amendment's religion clauses foreclose federal courts from hearing employment-discrimination claims from teachers at religious schools who have at least some role in teaching the faith.
   c. Justice Alito, for the 7-2 Court: "What matters, at bottom, is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."
   d. Justice Alito for the 7-2 Court: "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow." 140 S. Ct. at 2069.
   e. Justice Thomas, joined by Justice Gorsuch, concurring
      1) "I agree with the Court that Morrissey-Berru's and Biel's positions fall within the 'ministerial exception,' because, as Catholic school teachers, they are charged with 'carry[ing] out [the religious] mission' of the parish schools. *Ante*, at 21. The Court properly notes that 'judges have no warrant to second-guess [the schools'] judgment' of who should hold such a position 'or to impose their own credentialing requirements." *Ante*, at 24. Accordingly, I join the Court's opinion in full. I write separately, however, to reiterate my view that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.' (See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 196 (2012) (Thomas, J., concurring)."
   f. Justice Sotomayor, joined by Justice Ginsburg, dissenting said the majority reached its result "even though the teachers taught primarily secular subjects, lacked substantial religious titles and training, and were not even required to be Catholic."

3. **Practical implications for religious institutions**
   a. Scope of the ministerial exception as interpreted in *Hosanna-Tabor*
      1) The decision is an application of the *Hosanna-Tabor* ruling and not an expansion of the ministerial exception.
   b. Scope of the ministerial exception after *Our Lady of Guadalupe*
      1) Decision draws the line pretty much where the lower courts had drawn it before *Hosanna-Tabor*
      2) Employees that fall within the ministerial exception probably include most teachers in religious elementary schools because they teach the whole curriculum, including religion.

c. Practical steps religious employers should take to have their employees fall within the ministerial exception
    1) Function versus credentials.
    2) Thomas C. Berg, Erik Money, & Nathaniel Fouch, *Credentials Not Required: Why an Employee's Significant Religious Functions Should Suffice to Trigger the Ministerial Exception*, 20 Federalist Soc'y Rev. 182 (2020)
d. Limits of the ministerial exception
    1) Decision likely only covers employees of churches and religious institutions. The "ministerial exception" is tied to the First Amendment doctrine that courts are bound to stay out of employment disputes involving those "holding certain important positions with churches and religious institutions." Private, non-religious organizations cannot use this exception.
e. Applications to the church autonomy doctrine?

C. *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020)

1. The facts and rulings below

a. Little Sisters' third trip to the Supreme Court
    1) In 2014, during the Little Sisters' first trip to the Supreme Court, they obtained an injunction protecting them from the HHS Mandate's requirements until their case was heard by the Tenth Circuit. *Little Sisters of the Poor v. Sebelius*, 571 U.S. 1171 (2014).
    2) The Little Sisters returned to the Supreme Court in 2016 in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). The Court returned the religious nonprofits' cases to the lower courts with instructions to agree on a mechanism by which the government did not violate their religious consciences but without clear instructions as to how to accomplish that goal.
    3) Having lost in the Third and Ninth Circuits, in 2020, the Little Sisters turned to the Supreme Court for the third time.
b. Brief overview of the HHS Mandate litigation
    1) The Obama Administration adopted the HHS Mandate, which required many employers to pay for insurance coverage that would guarantee employees cost-free contraception, including some drugs and devices that may act as abortifacients. While the Mandate included an exemption for some religious employers, it was exceptionally narrow and did not cover many religious nonprofit employers, including religious colleges, schools, and social service providers.
    2) Beginning in 2012, religious nonprofit employers, as well as a handful of religious for-profit employers, filed lawsuits to protect their religious freedom to decline to pay for insurance that violated their religious convictions regarding the sanctity of human life.
    3) In June 2014, the Supreme Court ruled in favor of religious for-profit employers in *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014). The Court ruled that the Religious Freedom Restoration Act (RFRA) required the government to accommodate the religious beliefs of the owners of a closely-held corporation.

c. HHS adopted new rule granting broad exemption for religious and moral objectors to the HHS Mandate in 2018
d. Little Sisters' claim under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* (RFRA).
e. Third Circuit rules that HHS lacked authority under RFRA to adopt the broader exemption; RFRA is a ceiling not a floor.
f. Little Sisters appeal to Supreme Court. See CLS' amicus brief - https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/19-431%2019-454%20tsac%20Christian%20Legal%20Society%20et%20al.pdf

2. The United States Supreme Court reversed, 5-2-2, holding that HHS had authority under the Affordable Care Act and RFRA to provide a broad exemption from the government regulation.
a. See opinion - https://www.supremecourt.gov/opinions/19pdf/19-431_5i36.pdf
b. Justice Thomas for the Court: HHS had "the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections." And holding that the consider of RFRA was not inappropriate. 140 S. Ct. at 2373.
c. Justice Alito, joined by Justice Gorsuch, concurred, urging the Court to rule that RFRA required a religious exemption for the Little Sisters rather than a remand.
d. Justice Kagan, joined by Justice Breyer, concurring in the judgment and providing a roadmap for how the lower court on appeal could rule that HHS acted arbitrarily and capriciously in violation of the Administration Procedure Act.
e. Justice Ginsburg, joined by Justice Sotomayor, dissented.

3. Impact on religious freedom
a. Correct interpretation of RFRA's term "substantial burden"
b. Rejection of theory that the government could only extend a religious exemption that was required by RFRA and potential implications of that theory
c. How to counter attacks on RFRA, such as:
1) The Equality Act, H.R. 5, 116th Cong., 1st Sess.
a) To prohibit discrimination on the basis of sex, gender identity, and sexual orientation, and for other purposes.
b) Full text: https://www.congress.gov/bill/116th-congress/house-bill/5/text
2) Do No Harm Act, H.R. 1450, S. 593, 116th Cong.
a) To amend the Religious Freedom Restoration Act of 1993 to protect civil rights and otherwise prevent meaningful harm to third parties, and for other purposes.
b) Full text: https://www.congress.gov/bill/116th-congress/house-bill/1450/text
c) Kim Colby, *The Do No Harm Act's Assault on All Americans' Religious Freedom,* 9 J. Christian Legal Thought 22 (2019), https://www.christianlegalsociety.org/sites/default/files/2019-10/CLSJournal_Spring19_web.pdf
d) Kimberlee Wood Colby, Written statement for Hearing Record of House Educ. & Labor Comm. Hearing on *Do No Harm: Examining the*

Misapplication of the Religious Freedom Restoration Act (June 25, 2019), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Legislation/Christian%20Legal%20Society%20Written%20Statement%20Religious%20Freedom%20Restoration%20Act.pdf

3) Richard W. Garnett, *Religious Accommodations and – and Among – Civil Rights: Separation, Toleration, and Accommodation,* 88 S. Cal. L. Rev. 493 (2015), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2211&context=law_faculty_scholarship

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

5) Kim Colby, *The Religious Freedom Restoration Act: A Complicated Legacy for Justice Antonin Scalia,* Outcomes Magazine 32 (Summer 2016), *https://www.clsnet.org/document.doc?id=967*

D. *Bostock v. Clayton Cty., Ga.,* 140 S. Ct. 1731 (2020), consolidated with *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. EEOC*

1. **The issue: Whether Title VII of the '64 civil rights act prohibiting sex discrimination should be re-interpreted to include discrimination on the basis of sexual orientation and gender identity**
   a. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) (en banc) (Title VII's prohibition on sex discrimination already includes prohibition on sexual orientation discrimination)
   b. *Bostock v. Clayton County, Georgia*, 723 F.App'x 964 (11th Cir. 2018) (Title VII's prohibition on sex discrimination does not already include prohibition on sexual orientation discrimination)
   c. *Harris Funeral Homes v. EEOC,* 884 F.3d 560 (6th Cir. 2018) (Title VII prohibition on sex discrimination includes prohibition on gender identity discrimination)
   d. CLS amicus brief - https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/Bostock%20Amicus%20Brief%20Final%20Version.pdf

2. **The United States Supreme Court, 6-3, held that Title VII's prohibition on sex discrimination includes prohibitions on discrimination based on sexual orientation and gender identity.**
   a. See opinion - https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf
   b. Justice Gorsuch writing for the Court: "At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 140 S. Ct. at 1743.
   c. Justice Alito, joined by Justice Thomas, dissenting: "The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually *1756 represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts

should "update" old statutes so that they better reflect the current values of society." 140 S. Ct. at 1755–56 (Alito, J., dissenting).

d. Justice Kavanaugh dissenting: "Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation." 140 S. Ct. at 1823 (Kavanaugh, J., dissenting).

3. Implications for religious freedom

a. Adequacy of Title VII's religious employer exemption, 42 U.S.C. § 2000e-(2)(a)(2)
   1) Title VII has strong protection for religious employers, but its scope is contested on two crucial fronts.
      a) Definition of "religious employers" entitled to claim the exemption is broad but not limitless
      b) While Title VII defines "religion" broadly, 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.
   2) Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?,* 4 Ox. J. Law Religion 1 (2015), https://doi.org/10.1093/ojlr/rwv046
   3) Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm,* in *Legal Responses to Religious Practices in the United States* 194 (Austin Sarat, ed.) (2012), https://www.clsnet.org/document.doc?id=1047

b. Adequacy of RFRA
   1) Provides more protection for Americans' religious freedom against *federal* government overreach than does the United States Constitution.
   2) 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.
   3) Strong pressure on Congress to eviscerate RFRA's protections, especially in the nondiscrimination context.
      a) Equality Act contains a provision that makes RFRA inapplicable to nondiscrimination claims.
      b) Do No Harm Act would gut RFRA

c. Adequacy of the Free Exercise Clause
   1) In 1990, in *Employment Division v. Smith*, the Supreme Court severely weakened the protection for religious exercise afforded by the Free Exercise Clause by ruling 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.
   2) 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.
   3) In the past three years, the Court has issued two rulings in which the Free Exercise Clause is re-awakening - *Trinity Lutheran Church v. Comer*, 137 S. Ct.

2012 (2017); *Espinoza v. Montana Department of Revenue,* 140 S. Ct. 2246 (2020).

4) In Fall 2020, the Court will hear argument in a case, *Fulton v. City of Philadelphia*, 922 F.3d 140 (2019), *cert. granted,* 140 S. Ct. 1104 (Feb. 24, 2020), 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.

d. Adequacy of the ministerial exception

1) The "ministerial exception" requires federal and state judges to refrain from deciding cases involving religious congregations' and religious schools' employment decisions regarding their leaders and teachers.

2) 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. 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.

3) While its coverage is deep, the ministerial exception's applicability is somewhat narrow because it is limited to employees whose jobs include religious functions.

e. Kim Colby, *The Road to* Bostock *and its Ramification,* https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Other/%237%20Colby.pdf

E. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020); *Calvary Chapel Dayton Valley v. Sisolak,* 2020 WL 4251360 (2020)

1. The executive orders

a. Most states instituted executive orders

b. Each state order is different. See Pew Research Center article - https://www.pewresearch.org/fact-tank/2020/04/27/most-states-have-religious-exemptions-to-covid-19-social-distancing-rules/

2. Denial of the Applications for Emergency Relief

a. See *South Bay* opinion - https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Other/19a1044_pok0.pdf

b. See *Calvary Chapel* opinion - https://www.supremecourt.gov/opinions/19pdf/19a1070_08l1.pdf

c. Lack of precedential value

1) Consistent with previous observations that courts are deferential to declarations of emergency, both the Chief Justice's concurrence and the dissent recognized the need for governments to be able to respond to public health emergencies

d. Chief Justice Roberts' concurring opinion for himself

1) Roberts found that California's restriction of in-person worship services to the lesser of 25% of building capacity or 100 attendees "appear[s] consistent with the Free Exercise Clause of the First Amendment."

2) Gave great deference to the state's declaration of emergency, noting that in such instances the government "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence and expertise to assess public health and is not accountable to the people."

e. Justices Alito, Thomas, Gorsuch, and Kavanaugh dissent
   1) Would have granted the application
   2) Kavanaugh, Thomas, and Gorsuch acknowledged that "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens." The dissenting justices, however, would have held that California did not put forward a compelling justification for applying different restrictions to churches than to secular businesses.

3. Impact on religious freedom

a. Immediate impact on churches' challenges to governors' executive orders
   1) Notably, both California and Illinois significantly loosened their restrictions on religious congregations' gatherings after the churches sought relief in the Supreme Court.
   2) Illinois entirely removed its previous restrictions, while California expanded the number of people allowed to gather at the same time for worship.
   3) This means that even with the Supreme Court's denial, religious bodies in those states are freer to meet than prior to when the respective challenges were filed.

b. Long-term impact of Chief Justice Roberts' reasoning and whether he will need to change his vote for a case that arrives before the Court in a non-emergency posture
   1) With no majority opinion, the Court's denial of the application does not bind any lower court.
   2) Even as persuasive authority, the Chief Justice's concurrence emphasizes that this case does not come to the Court in a normal posture, but instead is a request for emergency injunctive relief that "demands a significantly higher justification than a stay."

c. Long-term implications of Chief Justice Roberts', Justice Alito's, and Justice Kavanaugh's differing understandings of the generally applicable standard set forth in *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520 (1993)
   1) Results in limited applicability of decisions to other lower court cases

II. Religious Freedom Cases in the Supreme Court's 2020 Term

A. *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted,* No. 19-123 (Feb. 24, 2020)

1. The facts and ruling below

a. Catholic Social Services (CSS) is one of thirty foster care organizations that contracts with the City of Philadelphia to provide foster care services. Because of its religious beliefs, CSS does not place children with same-sex couples or unmarried heterosexual couples, but would refer same-sex couples to one of the many other foster care organizations that place with them.

b. After learning of CSS's religious beliefs, the City of Philadelphia revised its contracts to require that foster care services could not discriminate on the basis of sexual orientation. The City refused to enter a new contract with CSS.

c. The Third Circuit held that the new contracts were made pursuant to a neutral, generally applicable law, and therefore upheld the City's actions under *Employment Division v. Smith*, 494 U.S. 872 (1990).

2. Implications for religious freedom

a. See CLS amicus brief – https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/19-123%20Christian%20Legal%20Socy%20Brief%20Fulton%20v.%20City%20of%20Philly.pdf

b. Arguments for overruling *Employment Division v. Smith*

1) Kim Colby, Free Exercise, RFRA, and the Need for a Constitutional Safety Net, https://www.scotusblog.com/2020/08/symposium-free-exercise-rfra-and-the-need-for-a-constitutional-safety-net/

c. Using the third-party harm theory to rule against CSS even if *Smith* is overruled

1) Mark Storslee, *Religious Accommodation, The Establishment Clause, and Third-Party Harm*, 86 U. Chi. L. Rev. 871 (2019)

2) Stephanie H. Barclay, *First Amendment "Harms,"* 95 Ind. L. J. 331 (2020)

3) Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause*, 106 Ken. L.J. 603 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2952370

3. **Reasons for protecting religious freedom in a post-modern culture**

a. Thomas C. Berg, *Religious Freedom Amid the Tumult*, 17 U. St. Thomas L.J. (forthcoming 2021)

b. Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion,* 88 Univ. Det. Mercy L. Rev. 407 (2011), https://www.clsnet.org/document.doc?id=1048

c. Michael W. McConnell, *Why Protect Religious Freedom,* 123 Yale L. J. 770 (2013), https://www.yalelawjournal.org/pdf/McConnellBookReview_pnmk5xnr.pdf

d. Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 Mich. L. Rev. 1043 (2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1018&context=mlr

e. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 Univ. Ill. L. Rev. 839, http://illinoislawreview.org/wp-content/ilr-content/articles/2014/3/Laycock.pdf

f. John D. Inazu, *Confident Pluralism: Surviving and Thriving through Deep Difference* (2016)

g. Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to NeJaime and Siegel,* Yale L. J. F. 369 (2016), https://www.yalelawjournal.org/pdf/Laycock_PDF_wgmv6xbh.pdf

h. Kim Colby, *Equipped to Defend Religious Freedom* (2016), https://www.clsnet.org/document.doc?id=1017

B. Tanzin v. Tanvir, 894 F.3d 499 (2d Cir. 2018), *cert. granted,* No. 19-71 (Nov. 22, 2019)

1. **The facts and ruling below**
   a. FBI agents allegedly placed three Muslim men on the "No-Fly List" in retaliation for their refusal to become informants within their religious congregation.
   b. The Muslim men brought a RFRA claim, among other claims, for money damages against the individual FBI agents.
   c. The Second Circuit ruled that money damages against government employees in their personal capacity are available under RFRA, but the U.S. government appealed that ruling.
2. **Arguments for and against money damages against federal employees in their personal capacity**
   a. See CLS amicus brief - https://www.clsreligiousfreedom.org/sites/default/files/site_files/Center%20Briefs/19-71%20Tanzin%20Relig%20Lib%20Scholars%20Brief.pdf
3. **Why religious freedom matters**
   a. See CLS' Religious Freedom Toolkit - https://www.clsreligiousfreedom.org/resources/religious-freedom-toolkit