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Supreme Court Denies Certiorari in Seattle's Union Gospel Mission, Evading Ruling on Expansive Ministerial Exemption Claim

Arthur S. Leonard

voters would likely determine the outcome, and both faced opposition for renomination. Abbott, in particular, was concerned about winning renomination in light of his loss of popularity due to pandemic measures he had ordered that ran contrary to the perceived views of his electoral base, as well as his feckless handling of widespread power outages due to the failure of the state to take steps to adapt its power grid to the vicissitudes of extreme weather as a result of climate change. (Despite extreme fires, heat, cold, flooding and snow and ice storms, Texas Republicans as a group apparently still contest whether anything unusual is going on that would require affirmative action by the state.) Abbott's highly publicized action in this case was calculated to fire up his base to turn out in the primary, and it apparently succeeded in that. He was handily renominated, as was Paxton. Some commentators harshly criticized Abbott and Paxon for using transgender youth and their parents as pawns in a political game to win renomination, but such criticisms evidently didn't cut much ice with the voters they were seeking to motivate.

Another aspect of the politics has to do with the political geography of Texas. Although Republicans have been winning statewide electoral contests and controlling the legislature statewide-elected Supreme Court for decades, there are pockets of progressive voters, especially in Austin, the capital of the state, Houston, and San Antonio. Suits against the governor and heads of state departments can be brought in Austin, where the local state courts tend to be populated by locally elected Democratic judges. That gave the plaintiffs a good head start in this case, as did the all-Democratic panel of the 3rd Court of Appeal. But all the justices of the Supreme Court are Republicans who were initially appointed by Rick Perry or Greg Abbott to fill vacancies and subsequently elected to full terms. What may happen if this case ends up in the Texas Supreme Court is anybody's guess.

But the Texas Supreme Court may not have the last word, as the Biden Administration has weighed in by pointing out that what Texas is doing here can be challenged under the 14th Amendment – Judge Meachum referred to constitutional rights in her findings on the TRO and temporary injunction rulings – so a grant of permanent injunctive relief by the trial court and/or the Court of Appeals, if reversed by the Supreme Court, could result in a petition for *certiorari* to the U.S. Supreme Court on issues of constitutional rights and federal preemption (Affordable Care Act, for example), assuming that plaintiffs will at all stages of the litigation assert federal statutory and constitutional claims as part of their case.

The Westlaw version of the Court of Appeals order of March 21 lists the following counsel for plaintiffs, some of whom are affiliated with ACLU or Lambda and others being local Texas counsel, but the opinion we obtained does not specify the organizations or firms with which each is affiliated: Maddy R. Dwertman, Chase Strangio, Karen L. Loewy, James D. Esseks, Brian Klosterboer, M. Currey Cook, Shelly L. Skeen, Paul Castillo, Camilla B. Taylor, Anjana Samant, Kathleen L. Xu, Nischay Bhan, Andre Segura, Nicholas Guillory, Derek McDonald, and Omar Gonzalez-Pagan. A protective order of March 11 shielding the identities of the Does was signed for plaintiffs by Brandt Thomas Roessler, a Texas state bar member with Baker Botts LLP. Evidently, it takes a village to litigate this case! ■

Supreme Court Denies *Certiorari* in Seattle's Union Gospel Mission, Evading Ruling on Expansive Ministerial Exemption Claim

By Arthur S. Leonard

On March 21, the U.S. Supreme Court denied a petition for *certiorari* filed by Alliance Defending Freedom (ADF) in *Seattle's Union Gospel Mission v. Woods*, No. 21-144, declining to review the Washington Supreme Court's ruling in *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021).

ADF has a long-term goal of getting the Supreme Court to hold that the 1st American Free Exercise Clause privileges religious organizations to discriminate against employees and applicants on any religiously-related ground, by getting the Court to agree to Justice Samuel Alito's contention that the so-called "ministerial exception" applies to all employees who are in any way involved in advancing the religious goals of the organization.

In this case, Matthew S. Woods, a lawyer who had volunteered for the legal services program for poor people operated by Seattle's Union Gospel Mission, inquired about a full-time staff position that had been announced as open. When he disclosed that he is bisexual and has a male partner, he was told his application would not be accepted because of SUGM's religious doctrine. He sued under Washington's anti-discrimination law, which includes sexual orientation as a forbidden ground of discrimination, but also has a broadly worded exemption of religious organizations. There is no dispute that Seattle's Union Gospel Mission is a religious organization, and it claims that its legal services program is just one aspect of its overall religiously-based mission to serve the poor and

bring them to Christ, with the staff lawyers expected to play an active role in that mission. Woods contended that the provision of legal services to poor people is not a religious activity.

The state trial judge agreed with SUGM and dismissed the case pursuant to the statutory total exemption of religious organizations. On appeal, the Washington Supreme Court ruled that the total exemption provision conflicted with other provisions of the state constitution, so that Wood would have a cause of action under the anti-discrimination law unless the job in question would be deemed "ministerial" under the 1st Amendment, and the court remanded for fact-finding on that issue by the trial court.

In its Petition, ADF asked the Supreme Court to determine (1) whether the 1st Amendment protects the Mission's right "to hire coreligionists," (2) whether denying SUGM "a total exemption that the state grants to secular, small businesses violates the Free Exercise Clause," and whether the Washington Supreme Court's decision showed at least a "slight suspicion of hostility to religious beliefs" by "deleting the total exemption the legislature bestowed."

Employment discrimination laws frequently include an exemption for very small businesses, so an affirmative answer to the second question would virtually extend a total exemption to religious organizations from compliance with anti-discrimination laws in any jurisdiction which exempts very small businesses.

The Supreme Court denied *certiorari* without explanation, although an explanation may be inferred from the "Statement of Justice Alito, with whom Justice Thomas joins," which was attached to the cert denial, 2022 WL 827849. Justice Alito, unsurprisingly, sympathizes with SUGM's (and ADF's) broad view of the right of religious organizations to discriminate against whomever they want so long as the discrimination is religiously motivated, since, as per his opinion from the Court in *Our Lady of Guadalupe School v. Morrissey-Berru,* 591 U.S. – (2020), when a religious organization undertakes an activity, anybody involved in carrying out that activity is presumptively engaged in the religious mission of the organization. However, he doesn't dissent from the denial of certiorari, presumably going along with his colleagues' view that granting the petition would be premature at this stage of the case when the Washington Supreme Court has given SUGM an opportunity to prove to the trial court that the "ministerial exception" applies to staff attorneys for SUGM's legal services program. If SUGM loses that issue below, an appeal based on a hearing record with factual findings by the trial court might ultimately be appealed to the Supreme Court, providing an opportunity for the super-charged free exercise majority on the Court to address the issue. ■

Third Circuit Reinstates Religious Discrimination Claims of Anti-LGBT New Jersey Foster Parents

By Matthew Goodwin

On March 1, 2022, a three-judge panel of the U.S. Court of Appeals for the 3rd Circuit revived three religious-freedom based claims asserted by an anti-LGBT New Jersey couple who claimed that the state had improperly revoked their foster care license and removed a foster child from their home because of their religious opposition to same-sex marriage. *Lasche v. New Jersey*, 2022 U.S. App. Lexis 5364; 2022 WL 60425.

Specifically, the court reinstated and remanded the couple's 42 U.S.C. § 1983 claim of First Amendment retaliation for revocation of their foster license; their 42 U.S.C. § 1985(3) claim of a conspiracy by defendants against them based on their religious beliefs; and their state law claim alleging violation of New Jersey's anti-discrimination statute.

The facts of the case began in 2017, when two children—identified only as Child 1 and Child 2 in the opinion—were placed with New Jersey foster parents, plaintiffs Michael and Jennifer Lasche. According to the opinion, the Lasches " . . . have traditional values about family, marriage and sex" and, more particularly, oppose same-sex marriage on religious grounds. The Lasches had served as foster parents in New Jersey for over ten years.

Following foster placement, the New Jersey Division of Child Placement and Permanency ("DCPP") caseworkers informed the Lasches that they were under consideration to adopt the children. However, a few weeks later, the caseworkers also relayed to the Lasches that a couple in Illinois was