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Christopher Smith

Brigham Young University, cpsmith96@gmail.com

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BOSTOCK’S PARADOX: INTERSECTIONS IN LGBTQ EMPLOYMENT RIGHTS AND PRIVATE, RELIGIOUS BUSINESSES

*Christopher P. Smith*¹

INTRODUCTION

Since the early 1970’s, the burgeoning LGBTQ civil rights movement has resulted in the progression of the freedoms and privileges that LGBTQ individuals can now enjoy. Same-sex marriage was legalized in 2015, and as of 2020, workplace protections have been extended to those who are LGBTQ. However, certain exemptions exist for both religious institutions and businesses owned by religions. These exemptions exist because the First Amendment of the United States Constitution protects the right to the free exercise of religion. This includes protecting how religions hire ministers and secular, non-religious workers such as accountants or building custodians.

Inevitably, the difference between both the protections afforded to religious institutions and LGBTQ employment leads to a paradox regarding LGBTQ employees since they are currently supposed to be offered the same workplace protections as those who are discriminated against on the basis of race, gender, religion, age, and disability. At the same time, they are not offered similar protections when working for an employer who, by legal standards, is considered a private religious business. However, with the introduction of a new legal precedent set forth by *Bostock v. Clayton County*, although religious institutions themselves can continue to discriminate against

1 Christopher is a senior studying Communications at Brigham Young University. He would like to recognize Kaylin Hill for her diligence, skill, and insight as an editor.

LGBTQ employees, private, religious businesses must follow the same jurisdiction as secular, non-religious businesses, meaning they can no longer discriminate against LGBTQ employees.

I. BACKGROUND

To understand the legal problems that surround by the Supreme Court's ruling in *Bostock v. Clayton County*, one must first understand: (A) the nature of religious freedom according to current legal jurisprudence in the United States of America, (B) the history and current understanding of private business practice in the United States today, and (C) the history of civil rights for LGBTQ persons in the United States.

A. Religious Freedom in the United States of America.

As it pertains to freedom of religion, the First Amendment to the Constitution established that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."² The free exercise of religious belief is a pivotal part American rights, in conjunction with the right to redress, and the right to free assembly. Therefore, knowing how the government can interact with religions and religious employers is crucial to understanding the First Amendment's relationship to *Bostock v. Clayton County*.

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC established a definition to determine who is a minister: a preaching member of a faith whose position allows them the opportunity to educate either a member of the public or someone within the faith about the faith's beliefs and ideals. This ruling was established to protect ministers from Title VII of the 1964 Civil Rights Act, which protects a certain status of employee. This idea is essential because Title VII allows religious institutions to bar certain types of employees from participating as ministers, meaning that a religious institution could discriminate against potential employees if they were to be serving a ministerial function within the institution.

While a ministerial exemption was established when Title VII was passed into law, *Tabor* was the first time that the ministerial exemption was examined within a court of law.

B. Rights of Private, Religious Businesses

In 1994, the United States Congress passed the Restoration of Freedom of Religion Act³ that reduced the scope of *Employment Division v. Smith*, a landmark ruling that reduced a private religion's power to discriminate in hiring employees. The act also included a definition separating religions from "[p]rivate, closely-held businesses of and guided by religious principles."⁴ A private business is any business owned by a single-person, or a select group of people and is not owned by stockholders in a stock-exchange. A closely-held business is any business that is kept within a very small group of people, such as a family unit. A recent example of a conflict over such a business is the 2014 case of *Burwell vs Hobby Lobby Stores Inc.*⁵, wherein the Supreme Court reaffirmed the rights of businesses like Hobby Lobby (that are guided by Christian religious principles) to deny birth control and abortion coverage to its employees because of the company's closely held religious values.

C. LGBTQ Civil Rights in the Workplace

Finally, to begin to unravel the paradox brought on by *Bostock v. Clayton County*, one must understand the history of LGBTQ Civil Rights. In 1967, the United States legislature passed the 1967 Civil Rights Act.⁶ Incorporated into this law was Title VII, which served to protect the working rights of minority groups. Specifically, Title VII states:

3 107 U.S.C. §1488 (1993).

4 *Id.*

5 *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, JUSTIA 573 U.S. 682 at *1 (2014).

6 Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964).

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.⁷

While same-sex marriage has been legal since 2015, and an equal right initiative for LGBTQ persons has been ongoing since 1970, it was not until 2020 that equal workplace protections for LGBTQ employees were codified by the United States Supreme Court through *Bostock v. Clayton County*. In a 6-3 decision, Justice Gorsuch wrote that “These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff’s sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group.”⁸ Because of this ruling, LGBTQ employees now benefit from the same protections as other classes protected by Title VII. In addition to workplace protections for sex, race, and political preference, individuals cannot be discriminated against for their sexual orientation.

To protect LGBTQ employees as required by *Bostock vs. Clayton County*, private religious businesses should be required to follow the ruling of *Bostock* and not deny working rights to LGBTQ employees, regardless of their status as private, religious businesses.

7 78 U.S.C. §241 (1964).

8 *Bostock v. Clayton County*, 590 U.S. 2. (2020).

II. UNRAVELING THE BOSTOCK PARADOX

The claim of freedom to work must come from Title VII, as it is the vehicle by which all protected persons receive the right to work. As stated previously, Title VII declared in subsection 703 that it is unlawful for an employer to discriminate against employees on the basis of certain protected statuses. Such discrimination would be a violation of the Civil Rights Act of 1964 as amended in 1971. However, there is nothing stated within the text of Title VII that explicitly protects LGBTQ employees from discrimination. As of June of 2020, there have been numerous changes allowing for protections of employment and workplace behavior thanks to *Bostock*. *Bostock* makes no distinction between sex and LGBTQ rights; to *Bostock*, they are one and the same. A man being discriminated against for his love for another man is experiencing discrimination because of his gender since a woman would not be treated the same way if she were in love with a man. Thus, *Bostock* makes firm the notion that LGBTQ employees have rights like any other person. However, this ruling makes no explicit distinction between which organizations are exempt and which are not; therefore, we cannot yet rule that private religious businesses can feasibly be required to obey this law since they are currently allowed a couple of notable exemptions that would hinder the protection of LGBTQ employees.

The primary and most important exemption is the right of any religious employer to require an employee to follow their religious standards. Under *Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*,⁹ four employees were fired because of their non-compliance in upholding the religious temple standards of the Church of Jesus Christ of Latter-day Saints. The men argued that the Church of Jesus Christ's use of section 702, which allowed for the church to hire and fire according to religious belief, was not only spurious, but that it violated the Constitution entirely since the men were performing non-religious, secular work. The Supreme Court's unanimous decision declared that section 702 did not violate

9 *Corp. of Presiding Bishop v. Amos*, No. 86-179, JUSTIA 483 U.S. 327, at *1 (1987).

the Constitution and determined that any religious institution has the right to require a person to follow its religious tenets. This case had a broad impact on case law regarding the ministerial exemption that had been previously ruled-under in *Hosanna-Tabor*.¹⁰

Second, according to *Hosanna-Tabor*, religious institutions also have a right to select their own ministers.¹¹ While *Tabor* employed a specific four-fold measure to help decide who or who was not a minister, *Our Lady of Guadalupe School v. Morrissey-Berru*, a 2020 case, stated that it was not the place of a court nor any government entity to set a specific, hard rule about the ministers of a religion since doing so would violate the First Amendment.¹² Mrs. Morrissey-Berru had filed a complaint against the private catholic school where she had taught. The school had in 2012 required teachers to become certified in catechist teaching, something Mrs. Morrissey-Berru could not do as she was not a practicing catholic. The Supreme Court decided to undo the precedent set by *Hosanna-Tabor* by removing the ministerial test and instead following a more simplistic model.¹³ As a result, courts could rule on a case-by-case basis, but in general would assume that a person was a minister rather than not. Because of this, protecting LGBTQ employees outright in a religious institution regardless of the work that they were performing at the time would be almost impossible because all employees working for a religious institution would be at the discretion of the religion.

Another problem that arises when examining current law surrounding religious rights and employment can be found in the Religious Freedom Restoration Act of 1994 (RFRA). The key text of this act reads: “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; governments should not substantially burden religious exercise

10 *Id.*

11 *Hosanna-Tabor Evangelical Lutheran Church v. Equal Emp. Opportunity Commission*, No.10-553 JUSTIA 565 U.S. 171 at *3 (2012).

12 *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, No. 19–267 591 U.S. at *6 (2020).

13 *Id.* at *6 (2020).

without compelling justification.”¹⁴ This reasoning was contrary to the at-the-time recent reasoning of *Employment Division v. Smith*,¹⁵ which stated that no religion nor religious person could refuse to obey a law that was neutral to anyone. This reasoning came from two men who had used illegal substances as part of their religious faith. While the use of these substances was considered fair use for their beliefs, the Supreme Court determined that religious belief could not outweigh the needs of the law.

While the constitutionality of the RFRA has been challenged in later court cases, subsequent laws passed have allowed the essential core of the RFRA that has been cited previously to remain. One such important piece of context is the restoration of the Sherbert test¹⁶ in determining the burden that government might place upon religious individuals. This test calls for a strict scrutiny of any and all applicable laws and rulings, requiring the law to be as narrowly tailored to provide for as much religious freedom as possible. Finally, the government may not burden any individual (and in legal context, a business constitutes an individual just as a person does) on their free exercise of religion.¹⁷ Therefore, it may seem that a private religious business is exempt from following *Bostock* because *Bostock* places a burden upon the privately held belief of a business. This seems to be the case in *Burwell v. Hobby Lobby*,¹⁸ where the Supreme Court ruled in favor of Hobby Lobby.

However, as we will discuss further in this paper, this does not apply to non-religious, but privately religious businesses like Hobby Lobby. Because there is an inherent distinction between private, religious-oriented businesses and a religious institution, the result is that the law cannot be applied in the same way. To explore this, we will examine Hobby Lobby as it is related to Deseret Book.

14 107 U.S.C. §1488 (1993).

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

16 107 U.S.C. §1488 (1993).

17 *Id.*

18 *Burwell*, 573 U.S. at *1-*95.

To relate back to our previous case in *Amos*, let us examine the differences found between a business owned by a religion and that of a private, religious business. There are important distinctions to note about *Hobby Lobby* versus *Amos* in dealing with religion. Let us examine first a business that might seem like Hobby Lobby: Deseret Book is a private bookstore and publishing company owned by the Deseret Management Corporation, which in turn is owned by the Church of Jesus Christ of Latter-day Saints. It is operated separately from the rest of the Church, maintaining its own CEO and retaining a unique style and brand. Hobby Lobby is privately owned by a family that maintains a core set of religious values that governs how the store operates. While it might initially appear similar to Hobby Lobby, as both organizations are founded upon religious principles, because of their business structure, they function differently according to the law. Because Deseret Book is religion-owned, it is legally governed through religion law, and therefore precedents like *Amos* are applicable to Deseret Book. Unlike Deseret Book, Hobby Lobby is a private business and therefore the laws that govern it will diverge from Deseret Book. While Deseret Book can appeal to its subsidiary position underneath the Church of Jesus Christ as a shield from laws like *Bostock*, Hobby cannot as it is a private business.

Second, *Lobby* is restricted to just the Health and Human Services Department. Quoting Justice Alito: “We do not hold...that for-profit corporations and other commercial enterprises can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”¹⁹ According to Alito, private, religious businesses are not allowed to opt out of any law they choose and must obey any laws that do not directly conflict with their rights to religious freedom, such as in the case with *Hobby Lobby*.

Third, we can compare a concurrent case with *Bostock*. *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*²⁰ is a similar case to that of our Hobby Lobby example. *R.G.* is a privately-held, closely-held religious business that

19 *Id.* at *9 (2014).

20 *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d at 560. (2018).

runs its operations similar to Hobby Lobby. It had previously fired an employee because of their transgender status. While the Supreme Court had withheld from determining if these rules also applied to religions themselves, they did affirm that transgender employees were protected under Title VII.²¹

Requiring religious, private businesses to not discriminate against LGBTQ employees according to *Bostock* would not impose a significant burden upon these businesses. Unlike *Lobby*, where the court had concluded that the financial burden of paying for birth control was a significant burden, no such burden exists when dealing with LGBTQ employees. However, financial burdens are not the only burdens that can be laid upon a business; thus, it is possible to argue that requiring a private religious business to hire LGBTQ employees would be a burden upon the free exercise of a business to spread their religious message. Even so, in reviewing *R.G. & G.R.*, a key aspect of their business model stands out. The United States 5 Circuit Court of Appeals had argued that requiring a transgender employee to remain in R.G.'s employ was injurious to the beliefs and practice of *R.G.* Contrary to this, the United States Supreme Court reversed the 5th Court's mandate.²² While the Supreme Court acknowledged the religious question raised by *R.G.*, they ruled in favor of the employee, recognizing the lack of burden that the employee had placed upon R.G. citing it as not "substantial enough" to fail the Sherbert test. Therefore, we can reasonably conclude that this same measure can apply to any other religious, private business. While protecting LGBTQ employees from willful termination by their religious employers might place a burden, it is not significant enough to raise any questions regarding the RFRA.

As civil rights have pushed toward progress on behalf of LGBTQ people, the need for protections for LGBTQ employees has become an important issue. However, legal freedoms carry little weight if they are not supported by protections from discrimination. Therefore, the compelling nature of this issue makes it important to solve. Due to the lack of reasoning behind refusing to hire LGBTQ

21 *Id.*

22 *Id.* at *37.

employees, the fact that the Sherbert test is not an issue, and that our test case of *R.G. and G.R.* passes the Sherbert test, we can conclude that there is no reason that private, religious businesses can deny employment to LGBTQ employees.

III. IMPACT AND ISSUES

The impact of *Bostock*, as I have described, is significant namely for how the divide between religious freedom and LGBTQ rights are working in contrast to expose the more difficult and nuanced questions regarding the limits of freedom of religion and the need to preserve the rights of all Americans. A significant movement of conservative-leaning legal thinkers would concur that ruling as I have argued above would narrow the current scope of the “free exercise” clause. It is true that what has been given above would result in a more nuanced interpretation of the RFRA and redefine the meaning of the question between the free exercise of a religious business as it relates to non-discriminatory practice. For some, this may pose a problem because of how they interpret the First Amendment.

Regardless, it would be incorrect to treat a private, religious business the same as a religious institution itself. Although their motives may be aligned, they are inherently different at their core. While such a ruling, as has been argued, would have ramifications for religious businesses and raise further questions that have been previously discussed by the Supreme Court (in cases like *Lobby*), these questions would hopefully lead to further nuanced discussions about such rights.

IV. CONCLUSION

It is significant to recognize the value that *Bostock* has given to current LGBTQ employees today. Thanks to *Bostock*, LGBTQ employees now are free to work without fear of discrimination. The dreams of life, liberty, and the pursuit of happiness are more open to such employees. With thanks to the First Amendment as interpreted in *Amos* and most recently in *Beru*, religion remains a difficult subject when discussing protecting LGBTQ rights. Further laws and rulings

like the RFRA and *Sherbert*, with subsequent cases like *Lobby*, might pose a difficult challenge to protecting such rights. It can be determined that even with cases like *Lobby* and the RFRA, LGBTQ employees should retain their right to work free of discrimination inside a private religious-oriented business.