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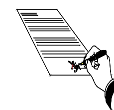
This *Report* summarizes cases granted review on December 18, 2019 (Part I).

I. Cases Granted Review



● *Our Lady of Guadalupe School v. Morrissey-Berru*, 19-267; *St. James School v. Biel*, 19-348. These consolidated cases present the same question: "Whether the Religion Clauses prevent civil courts from adjudicating employment discrimination claims brought by an employee against her religious employer, where the employee carried out important religious functions." In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012), the Court recognized the "ministerial exception," which "precludes application of [employment-discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." In holding that the exception applied to claims brought by a lay teacher at a school operated by a Lutheran church, the Court pointed to four "circumstances of her employment": (1) the schoolteacher's "formal title" (minister), (2) "the substance reflected in that title," (3) her "use of th[e] title," and (4) "the important religious functions she performed." At issue here is how courts should apply those factors and, in particular, whether the fourth one is the most important.

Morrisey-Berru. Agnes Morrissey-Berru taught fifth grade at Our Lady of Guadalupe School, a Catholic parish school in California. As the Ninth Circuit panel later found, "Morrissey-Berru did have significant religious responsibilities as a teacher at the School. She committed to incorporate Catholic values and teachings into her curriculum, as evidenced by several of the employment agreements she signed, led her students in daily prayer, was in charge of liturgy planning for a monthly Mass, and directed and produced a performance by her students during the School's Easter celebration every year." In May 2015, Our Lady declined to offer Morrisey-Berru a new contract, after she allegedly failed to implement a new reading program. One month later, she filed a charge with the EEOC alleging age discrimination in violation of the ADEA. She filed a complaint in federal district court in 2016. The district court granted Our Lady's motion for summary judgment, finding that the ministerial exception applied. The Ninth Circuit reversed. 769 F. App'x 460. Although (as noted) the court found that she had "significant religious responsibilities as a teacher," the court found that "an employee's duties alone are not dispositive under *Hosanna-Tabor*'s framework." The court concluded that "on balance" the exception did not apply, given that her title was "teacher," she barely had "any religious credential, training, or ministerial background," and she "did not hold herself out to the public as a religious leader or minister."

Biel. Kristen Biel taught fifth grade at the St. James School, a Catholic parish school in California. As the Ninth Circuit panel later put it, "Biel taught lessons on the Catholic faith four days a week. She also incorporated religious themes and symbols into her overall classroom environment and curriculum, as the school required." She claims she was fired after she told the school that she would need to miss work to undergo chemotherapy for breast cancer. She filed suit against the school alleging a violation of the ADA. The district court granted St. James' motion for summary judgment, finding that the ministerial exception applied. A divided panel of the Ninth Circuit reversed. 911 F.3d 603. As in *Morrisey-Berru*, the court concluded that the first three *Hosanna-Tabor* cut against the school's ministerial exception claim; only the fourth factor supported application of the exception.

But, held the court, that one factor alone is not dispositive. If it were, "most of the analysis in *Hosanna-Tabor* would be irrelevant dicta." Nine judges dissented from the denial of rehearing en banc.

The schools' argument. The schools contend that, "[b]oth before and after *Hosanna-Tabor*, the lower courts have with remarkable consistency put their primary focus on one of the four considerations—the 'important religious functions' assessment—in deciding whether a particular position is ministerial or not." Says the schools: "This is not an exclusive inquiry—there is no need for a 'function-only' test—but function is paramount." The schools point to a concurring opinion in *Hosanna-Tabor* by Justice Alito, which Justice Kagan joined, which said that the designation of the employee as "minister" should matter little. Rather, "courts should focus on the function performed by persons who work for religious bodies." They explained that "[t]he First Amendment protects the freedom of religious groups to engage in certain key religious activities, including the conducting of worship services and other religious ceremonies and rituals, as well as the critical process of communicating the faith. Accordingly, religious groups must be free to choose the personnel who are essential to the performance of these functions. The 'ministerial' exception should be tailored to this purpose." In the schools' view, the Ninth Circuit's "strict 'function-plus-one' test is inconsistent both with th[e] Court's explicit refusal to adopt a 'rigid formula' and with its command that the purpose of the exception is to serve 'the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission.'"

● *Torres v. Madrid*, 19-292. The question presented is whether "an unsuccessful attempt to detain a suspect by use of physical force [is] a 'seizure' within the meaning of the Fourth Amendment, . . . or must physical force be successful in detaining a suspect to constitute a 'seizure.'" New Mexico State Police officers went to an apartment complex to arrest a woman, Kayenta Jackson, who was allegedly involved with organized crime. The officers—respondents Madrid and Williamson—saw two persons standing in front of the apartment near a Toyota FJ Cruiser. The officers approached the Cruiser in case one of them was Jackson. One of the individuals, petitioner Roxanne Torres, ran inside the Cruiser and started the engine. The officers approached the vehicle and told her to show her hands. She instead drove the vehicle forward, toward the officers, both of whom fired their weapons. Two bullets struck Torres. She continued forward, though, and drove to a nearby parking lot. She then stole a car that had been left running, drove it about 75 miles, and went to a hospital. She was eventually arrested by police and pleaded guilty to three crimes. Two years later she filed a §1983 action against the officers asserting an excessive-force claim against each. The district court granted summary judgment for the officers on the ground that they had not seized Torres at the time of the shooting. The Tenth Circuit affirmed. 769 F. App'x 654. The court relied on circuit precedent holding "that a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim. This is so, because a seizure requires restraint of one's freedom of movement. Thus, an officer's intentional shooting of a suspect does not effect a seizure unless the gunshot . . . terminate[s] [the suspect's] movement or otherwise cause[s] the government to have physical control over him." (Citations and quotation marks omitted.)

Torres argues in her petition that, whereas the D.C. Circuit agrees with the Tenth Circuit, three circuits have held "that a person is 'seized' for Fourth Amendment purposes when a law enforcement officer applies physical force with the intent to stop her, even if the person continues for a time to evade capture." That is the correct rule, says Torres, based on the Court's statement in *California v.*

Hodari D., 499 U.S. 621, 624 (1991), that "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence . . . [is] the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee." According to Torres, *Hodari D.* "posited two different kinds of seizures of a person under the Fourth Amendment: seizures achieved by applying physical force, and seizures effected by means of a show of authority." Submission to the assertion of authority is only necessary for the latter type of seizure. Torres also argues that the Tenth Circuit decision is contrary to the Fourth Amendment's common law backdrop, under which "an arrest could be effectuated by the slightest physical contact."

The officers counter by quoting *United States v. Mendenhall*, 446 U.S. 544, 553 (1980), as holding that a person is "seized" "only when, by means of physical force or a show of authority, his [or her] freedom of movement is restrained." They read *Hodari D.* as saying that the *Mendenhall* test states "a necessary, but not a sufficient, condition for seizure" And they cite *Florida v. Bostick*, 501 U.S. 429, 434 (1991), for the proposition that a seizure requires that "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." (Quotation marks omitted.) In sum, argue the officers, the Court's decisions can be "harmoniz[ed]" as follows: "the touchstone of a seizure is that there must be a taking of possession of the suspect—i.e. the termination or physical restraint of the suspect's liberty or freedom of movement—through means intentionally applied (i.e. by the use of force or a show of authority)."

● *City of Chicago, IL v. Fulton*, 19-357. This case presents the following issue: "Does the Bankruptcy Code's 'automatic stay' affirmatively require creditors, on pain of sanctions, to turn over lawfully repossessed property of the debtor as soon as the debtor files for bankruptcy, or may creditors with statutory defenses to turnover assert them and retain possession pending an order of the bankruptcy court resolving the issue?" The City of Chicago impounded four individuals' (respondents') cars for failure to pay penalties and fines. In response, each of them filed a Chapter 13 bankruptcy case and sought return of his or her car. The bankruptcy court in each case concluded that the automatic stay required the city to return the car. The Seventh Circuit granted the city's petition for direct appeal and affirmed based on circuit precedent, *Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009). 926 F.3d 916.

In *Thompson*, the Seventh Circuit relied on the automatic stay provision of the Bankruptcy Code, which provides that a bankruptcy petition "operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to *exercise control* over property of the estate." 11 U.S.C. §362(a)(3) (emphasis added by Seventh Circuit). The court reasoned that the provision applies to this situation because the city exercises control over cars it seizes. The Seventh Circuit then held that the automatic stay "becomes effective immediately upon filing the petition and is not dependent on the debtor first bringing a turnover action." The court pointed to §363(e), which places the burden on creditors to ask bankruptcy courts to protect their interests in estate property that the trustee or debtor seeks to use. But, said the Seventh Circuit in *Thompson*, "if a creditor is allowed to retain possession, then this burden is rendered meaningless—a creditor has no incentive to seek protection of an asset of which it already has possession." Plus, found the court, the Code's "turnover provision"—§542—"requires that a creditor in possession of property of the estate '*shall deliver* to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.'" 11 U.S.C.

§542(a) (emphasis added by Seventh Circuit). The court reasoned that the bankruptcy court can protect the creditor's interests in the property, per §363(e), when the property is returned and becomes part of the bankruptcy estate.

The City of Chicago agrees with the Tenth and D.C. Circuits, which rejected that reasoning. The city points out that the automatic stay provision, §362(a)(3), stays only "*any act* to obtain possession of property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3) (emphasis added by city). Thus, argues the city, "[t]he automatic stay does not require a party already lawfully in possession of property in which the estate has an interest to turn that property over or face sanctions. By its terms, the statute bars only affirmative 'acts' to exercise control over estate property—not mere passive retention of property already in the creditor's possession." The city contends that this interpretation fulfills the automatic stay's purpose, which is "to preserve the status quo as it existed on the petition date during the bankruptcy proceeding." Put another way, "[t]he automatic stay [ ] does not expand a debtor's rights vis-à-vis creditors beyond what the debtor had before the bankruptcy filing. Other provisions of the Bankruptcy Code, such as the turnover provision, do enable the trustee or debtor-in-possession to bring back into the estate certain property in which the estate has an interest. Achieving that objective, however, is outside the ambit of the automatic stay, which stays creditor actions to preserve the status quo." The city insists that the proper way by which a debtor can obtain property held by a creditor pre-petition is through a turnover action under §542(a), which requires an adversary proceeding in which the creditor can assert defenses to turnover.

● *Pereida v. Barr*, 19-438. Noncitizens convicted of certain crimes may be ordered removed from the United States. Most such noncitizens may ask the Attorney General for discretionary relief from removal, such as asylum and cancellation of removal. But noncitizens are ineligible for such relief if they have been convicted of a disqualifying offense described in various sections of the Immigration and Nationality Act. Courts have used a "categorical approach" to determine whether a state conviction meets the definition of a listed disqualifying offense. Under that approach, judges look not to the facts of the prior state case, but instead ask whether the elements of the crime of conviction match the elements of the generic federal offense. A state offense thus counts as a disqualifying offense only if it "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). This case involves the "modified categorical approach," which the Supreme Court has applied when the state statute defines "multiple crimes," at least one of which falls within the scope of the federal definition. For such a "divisible statute," courts can look to "a limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of" before "compar[ing] that crime, as the categorical approach commands, with the relevant generic offense." *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). But what happens when the alien "has been convicted under a [state] statute defining multiple crimes, at least some of which would constitute disqualifying offenses, but it is inconclusive as to which crime formed the basis of the alien's conviction"? That is the issue here.

Petitioner Clemente Pereida is a 48-year-old native and citizen of Mexico who has lived in the United States for nearly 25 years. After the government charged him as removable for being unlawfully present in the United States, Pereida applied for cancellation of removal. The immigration judge held, however, that he was ineligible for removal because he had been convicted of a disqualifying

offense, namely, a "crime involving moral turpitude." Specifically, he had been convicted of the misdemeanor offense of attempted criminal impersonation under Neb. Rev. Stat. §§28-201 & 28-608 (2008). The Board of Immigration Appeals dismissed Pereida's appeal, and the Eighth Circuit denied his petition for review. 916 F.3d 1128. All three tribunals applied the "modified categorical approach," finding that conviction under three subsections of Neb. Rev. Stat. §28-608 constitutes a crime involving moral turpitude, but conviction under one subsection does not. The Eighth Circuit concluded that the Nebraska statute is divisible, and that the record was inconclusive as to the subsection of § 28-608 under which Pereida was convicted. The court then reasoned that the alien bears the burden of proving he is eligible for cancellation of removal. And where "it is not possible to ascertain which subsection formed the basis for Pereida's conviction," Pereida must "bear[] the adverse consequences of this inconclusive record."

Pereida argues that the circuits are divided 4-4 "on the question whether an ambiguous record of conviction renders a noncitizen ineligible for discretionary relief from removal." And he maintains that the Eighth Circuit got it wrong on the merits. He points to the language from *Moncrieffe* (quoted above) that the inquiry into "what offense the noncitizen was 'convicted of'" requires courts to examine whether "a conviction of the state offense 'necessarily' involved . . . facts equating to the generic federal offense." According to Pereida, "[t]he key word is 'necessarily.' . . . Under this Court's cases, then, when a state statute sweeps in conduct that extends beyond the federal definition, a conviction under that statute presumptively is not disqualifying." That is so, he says, even under the modified categorical approach. Pereida insists that the Eighth Circuit's reliance on who bears the burden of proof is misplaced: "that burden affects only factual questions of eligibility," not "legal questions." "In short," he says, "the Eighth Circuit's rule improperly reverses *Moncrieffe*'s legal presumption." The United States counters that *Moncrieffe* "addressed a different stage of the categorical approach in different circumstances." It did not speak to "[t]he only question under the modified categorical approach here," which "is the factual one of whether 'the actual crime of which the alien was convicted' was" a disqualifying crime. What speaks to that question, says the United States, is "the INA's burden-of-proof provision," which places the burden on the alien.

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