Case Brief from the Center for Gender and Sexuality Law

Fifth Circuit Court of Appeals Tees up Case Destined for the Supreme Court Carving out Broad Religious Exemptions from Federal Employment Discrimination Laws and Elevating Employer Religious Liberty Rights Over Workplace Equality

On June 20, 2023, the Fifth Circuit Court of Appeals issued a ruling in a case in which the owners of a Houston-based private, for-profit company sought a ruling that federal anti-discrimination laws do not, and cannot, apply to them because of their religious beliefs that all people should be heterosexual and cisgender. The court of appeals ruled in favor of the company in an opinion that radically expands the scope of religious exemption law and undermines the power of federal anti-discrimination laws to reach workplace discrimination.

This case is likely to go to the Supreme Court and could be heard by the Court next year. It is important that journalists, advocates, and others understand the stakes in this case.

What follows explains the parties, the case, and its significance for the principles of religious liberty and sex, sexual orientation, and gender identity-based equality.

Background

- The case was brought by Braidwood Management, a company wholly owned and run by Steven Hotze, a conservative, evangelical talk show host, conspiracy theorist, physician, and Republican megadonor who gained his wealth running a chain of controversial "health and wellness centers" in Texas. Hotze has filed several other lawsuits challenging the Affordable Care Act's mandate that employers include preventive care (including contraception and HIV prevention medication) in employee health plans, and challenging early voting in Texas.
- Hotze employs approximately 70 people through Braidwood and says that he runs his corporations as "Christian" businesses. Hotze believes that homosexuality is a sin, and does not permit Braidwood Management to employ individuals who engage in behavior he considers sexually immoral or gender non-conforming. He also does not permit his companies to recognize same-sex marriage or extend spousal benefits to an employee's same-sex spouse; according to Hotze, doing so would lend approval to homosexual "behavior" and make him complicit in sin, in violation of his sincere religious beliefs.
- In 2018, Braidwood Management filed a lawsuit in federal court in Fort Worth, Texas claiming that the federal Religious Freedom Restoration Act (or "RFRA") requires the federal government to exempt it from compliance with Title VII of the 1964 Civil Rights Act, which prohibits discrimination based on an employee's race, color, religion, sex, or national origin. RFRA is a 1993 federal law that prohibits the federal government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability (as opposed to a law that targets religious practice specifically). To justify a substantial burden on someone's religious exercise, the government must show that the burden is necessary to advance a compelling state interest. In the *Bostock v. Clayton County* case in 2020, the Supreme Court ruled that Title VII's sex discrimination protections necessarily included protections against sexual orientation and gender identity-based discrimination. Braidwood claims that under RFRA, it must be exempt from Title VII's prohibition against sexual orientation or gender identity discrimination because of the sincerely held religious beliefs of Braidwood's owner.

- Hotze/Braidwood brought this lawsuit before the EEOC had taken any action of any kind against them for violating Title VII. Termed a "pre-enforcement action," they are seeking a court order barring, on religious liberty grounds, any legal claim challenging their employment policies as discriminatory. Ordinary rules of "legal standing" typically require an employer to raise their RFRA defense in response to an investigation by the EEOC or lawsuit brought by a person claiming to have been discriminated against in their job. Notably, this case is similar to *303 Creative v. Elenis*—a case currently pending before the Supreme Court—in which Lorie Smith, the owner of a wedding website design company, sought a pre-enforcement order barring her from being sued for discrimination for refusing to provide services to same-sex couples. She too sought an exemption from complying with anti-discrimination laws before anyone had actually sued her.

On June 20, 2023, a three-judge panel of the Fifth Circuit (comprised of Reagan, George W. Bush, and Trump appointees) unanimously upheld a lower court ruling in Braidwood's favor. The most important takeaways from the Fifth Circuit's ruling are:

1. **The Tiering of Fundamental Rights – Federal Courts Continue to Elevate the Religious Liberty Rights of Conservative Christians Over All Other "Regular Laws."**
   The opinion rests on the notion that religious liberty rights generally, and RFRA rights specifically, stand above and supersede "the normal operation of other federal laws." This approach to religious liberty rights continues and solidifies a trend we have seen in the last several years in the Supreme Court and lower federal courts, creating tiers of rights, and placing certain forms of religious liberty (almost exclusively asserted by conservative Christians) at the top of a hierarchy of fundamental rights.
2. **The Weakening of the Importance of Federal Anti-Discrimination Law Protections.**
   At the same time that the opinion elevates RFRA rights over and above rights created by other "regular laws," it downgrades the importance of federal anti-discrimination law, and the government's obligation to enforce workplace anti-discrimination protections, specifically Title VII. It dismisses the EEOC's (the federal agency charged with enforcing Title VII) position that it has a compelling interest in enforcing Title VII's sex discrimination protections. Recall that in *Burwell v. Hobby Lobby* (2014), which challenged the contraceptive mandate in the Affordable Care Act, the Supreme Court assumed for the sake of argument

that the federal government had a compelling interest in protecting sex-based equality and that access to contraception advanced sex equality in the workplace. In *Braidwood*, the Fifth Circuit took the radical step of discharging the EEOC of any compelling interest in protecting employees against sexual orientation and gender identity discrimination.

3. **The Supreme Court's Conservatives Are Leaving Breadcrumbs for Like-Minded Lower Court Judges.**

   In *Bostock,* the Supreme Court explicitly declined to rule on the question of whether religious objectors would be entitled to exemptions from complying with Title VII's prohibition of sexual orientation and gender identity discrimination, ("[H]ow . . . doctrines protecting religious liberty interact with Title VII are questions for future cases . . . ."). However in his dissent in *Bostock*, Justice Kavanaugh referenced RFRA, noting that it provided exemptions from federal laws that substantially burden the exercise of religion (*Bostock*, 140 S.Ct. 1731, 1823 n. 2 (2020)). Of course, it was only Justice Kavanaugh who raised the specter of religious exemptions from Title VII, not joined by the other Justices. But it was a signal to conservative religious liberty advocates to pick up this issue and run with it, as they've now done. In *Braidwood*, the Fifth Circuit approached the Supreme Court majority's silence on this issue in *Bostock*, coupled with Justice Kavanaugh's aside, in a way that is uncharacteristically aggressive for federal appellate courts, treating the Supreme Court's refusal to address the matter not as declining to rule on the issue, but rather as an invitation to lower courts to do so: "this court [is not] required to plug its ears and ignore *Bostock*'s siren call, indicating the issues presented by this case require attention and have a chilling effect on employers whose religious exercises, until resolved, conflict with Title VII." What we witness in the *Braidwood* decision is lower courts picking up breadcrumbs left by the Supreme Court's right wing when it can't get a majority to support its most extreme positions—in this case, suggestions for what legal arguments and theories to push next. This is also precisely what Justice Clarence Thomas was doing in *Dobbs v. Jackson Women's Health Organization* when he signaled that contraception, same-sex marriage, sodomy laws, and substantive due process were the next issues right-wing advocates should pursue, even though the majority opinion was clear that it didn't reach those questions when it overruled *Roe v. Wade*.

What to Make of the Fifth Circuit's Braidwood v. EEOC Opinion?

- First, keep an eye on this case, as it is likely to end up in the Supreme Court, providing the Justices with a new opportunity to further distort religious liberty doctrine and advance the cause of white Christian nationalism, while undermining workplace equality rights without specifically overruling prior precedent such as *Bostock*, thus softening the landing of the decision.
- Second, this case provides a salient new example of why it is critical to finally ratify the Equal Rights Amendment as the 28th amendment to the U.S. Constitution, adding to our founding document explicit sex equality protections. Because the Constitution does not currently mention sex equality, let alone sexual orientation or gender identity-based equality, any constitutional protections against sex-based discrimination are subject to the Supreme Court's interpretation and reinterpretation, reading them into and out of the law as they wish. Ratifying the ERA would signal not only that the constitution secures and guarantees sex equality on an equal basis with other constitutional rights, but also that the government has a compelling interest in protecting those rights.
- Third, if the Supreme Court affirms the Fifth Circuit's ruling, it is unlikely that religious exemptions to Title VII for private companies would be limited to discrimination based on sexual orientation and gender identity. Private employers could also legally refuse to employ individuals who practice a faith different from their own, who are in interracial or interfaith marriages, or who have had abortions. Indeed, nearly *any* law or policy, including those protecting crucial interests like workers' rights, public health, environmental welfare, emergency response, and religious pluralism, may be limited and/or significantly undermined by the Fifth Circuit's broad reading of RFRA. See our recent report, *Parading the Horribles: The Risks of Expanding Religious Exemptions*, documenting the wide range of contexts in which religious exemptions have been raised to stymie the enforcement of neutral, generally applicable laws.