



The Religious Institutions Practice of Sidley Austin LLP

Sidley Austin LLP's nationwide Religious Institutions practice assists a diverse array of religiously affiliated organizations with legal issues and problems that uniquely affect those organizations. Churches, religious schools and universities, religious broadcasters, religious health care institutions, and religiously-affiliated philanthropic and community organizations have benefited from our depth of experience, not only with the constitutional and statutory protections for religion generally, but with many other features of the legal landscape that particularly affect these institutions.

To receive future copies of this and other Sidley Updates via email, please sign up at www.sidley.com/subscribe

This **Sidley Update** has been prepared by Sidley Austin LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

Attorney Advertising - For purposes of compliance with New York State Bar rules, our headquarters are Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, 212.839.5300 and One South Dearborn, Chicago, IL 60603, 312.853.7000. Prior results do not guarantee a similar outcome.

Ninth Circuit Issues Two Religion Opinions

Within the last few weeks, the Ninth Circuit issued two important religion opinions. The first of the two involved the application of the “ministerial exemption” to an overtime claim brought under a state statute. The second involved a challenge to the “under God” phrase contained in the Pledge of Allegiance.

Ministerial Exemption: *Rosas v. Corp. of the Catholic Archbishop*

Although the “ministerial exemption” was first recognized nearly 40 years ago in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), it continues to be the subject of much litigation. (See past Sidley Updates on the topic **March 2008, July 2007, May 2006, August 2004, February 2000.**) The ministerial exemption is a constitutional defense to lawsuits brought under various statutes that is premised on the understanding that the Free Exercise Clause strictly protects the rights of religious organizations to select their own religious representatives, including members of the clergy, free from government interference. See *Equal Employment Opportunity Comm. v. Catholic University of America*, 83 F.3d 455, 461 (D.C. Cir. 1996). Several courts have held that the ministerial exemption is valid even following the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1989). *E.g.*, *Catholic University*, 83 F.3d at 461.

In *Rosas v. Corp. of the Catholic Archbishop*, No. 09-35003 (9th Cir. Mar. 16, 2010), the Ninth Circuit examined the application of the ministerial exemption to a claim brought under the Washington Minimum Wage Act. In doing so, the Court adopted a test for determining whether a person is a “minister” under the exemption. The Court held that the ministerial exemption barred a Catholic seminarian’s claim for unpaid overtime wages. Citing its decision in *Bollard v. California Province of the Society of Jesus, et al.*, 196 F.3d 940 (9th Cir. 1999), the Court stated, “‘On a substantive level, applying [a] statute to the clergy-church employment relationship creates a constitutionally impermissible entanglement with religion if the church’s freedom to choose its ministers is at stake.’ . . . As for the procedural dimension, the very process of civil court inquiry into the clergy-church relationship can be sufficient entanglement.”

In response to arguments advanced by *Rosas*, the Court held that (1) there is no “actual burden” element to the ministerial exemption “because government interference with the church-minister relationship *inherently* burdens religion,” (2) requiring the Catholic Church to pay overtime wages implicates a protected employment decision because

the “Free Exercise Clause rationale for protecting a church’s personnel decisions concerning its ministers is the necessity of allowing the church to choose its representatives using whatever criteria it deems relevant,” and (3) plaintiff qualified as a “minister” under the ministerial exemption.

With respect to the test for determining whether a particular individual qualifies as a “minister,” *Rosas* advanced the “primary duties” test adopted by the Fourth and D.C. Circuits. The Court stated that the primary duties test was “problematic” because it “could create the very government entanglement into the church–minister relationship that the ministerial exception seeks to prevent.” Instead, the Court adopted a test similar to the test set out by the Fifth Circuit in *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999), holding “that if a person (1) is employed by a religious institution, (2) was chosen for the position based ‘largely on religious criteria,’ and (3) performs some religious duties and responsibilities, that person is a ‘minister’ for purposes of the ministerial exception.” Here, *Rosas* (1) was employed by the Catholic Church, (2) was chosen for the position as a seminarian preparing for the priesthood, and (3) performed at least some religious duties such as assisting with mass. The Court therefore considered *Rosas* a “minister.”

Pledge of Allegiance: *Newdow v. Rio Linda Union School District*

In *Newdow v. Rio Linda Union School District*, No. 05–17257 (9th Cir. Mar. 11, 2010), a 57–page decision with a 137–page dissent, the Ninth Circuit considered whether the teacher–led recitation of the Pledge of Allegiance to the Flag of the United States of America by students in public schools constitutes an establishment of religion prohibited by the U.S. Constitution.

Examining the Pledge as a whole, and not the words “under God” in isolation, the Court held that “the Pledge of Allegiance does not violate the Establishment Clause because Congress’ ostensible and predominant purpose was to inspire patriotism and that the context of the Pledge – its wording as a whole, the preamble to the statute, and this nation’s history – demonstrate that it is a predominantly patriotic exercise.” For these reasons, the Court found that “the phrase ‘one Nation under God’ does not turn this patriotic exercise into a religious activity.”

The lengthy dissent by Judge Reinhardt places great emphasis on the 1954 Congressional amendment of the Pledge to include the words “under God,” arguing that the Pledge, as amended, cannot stand under any of the Circuit’s prevailing Establishment Clause tests because of its “undeniably religious purpose.”

If you have questions about any of these items, please contact your regular Sidley Austin LLP contact.

BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK PALO ALTO SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, D.C.

www.sidley.com

Sidley Austin LLP, a Delaware limited liability partnership which operates at the firm’s offices other than Chicago, London, Hong Kong, Singapore and Sydney, is affiliated with other partnerships, including Sidley Austin LLP, an Illinois limited liability partnership (Chicago); Sidley Austin LLP, a separate Delaware limited liability partnership (London); Sidley Austin LLP, a separate Delaware limited liability partnership (Singapore); Sidley Austin, a New York general partnership (Hong Kong); Sidley Austin, a Delaware general partnership of registered foreign lawyers restricted to practicing foreign law (Sydney); and Sidley Austin Nishikawa Foreign Law Joint Enterprise (Tokyo). The affiliated partnerships are referred to herein collectively as Sidley Austin, Sidley, or the firm.

SIDLEY AUSTIN LLP
SIDLEY