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Podcast Transcript

Version 1.1, 28 December 2019

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Separating Religion and Government . . . But What is Religion? A Look at the US Supreme Court

Podcast with **Maggie Garrett and Jennifer Hawks** (6 January 2020).

Interviewed by **Benjamin Marcus**

Transcribed by **Helen Bradstock**.

Audio and transcript available at:

<http://www.religiousstudiesproject.com/podcast/separating-religion-and-government-but-what-is-religion-a-look-at-the-us-supreme-court/>

[Benjamin Marcus](#) (BM): *Hello, and welcome to the Religious Studies Project. I'm here today with [Jennifer Hawks](#) and [Maggie Garrett](#) to talk about religion and law in the United States. What qualifies religion, and what merits religious freedom protection? We'll discuss those topics and more by taking a deep dive into the cases before the Supreme Court in the term beginning in October 2019. We're grateful to have two legal experts here with us today, to help us understand what religion means in the United States courts. Jennifer Hawks is the Associate General Counsel at the [BJC](#). She provides legal analysis on church-state issues that arise before congress, the courts and administrative agencies. Before coming to the BJC, Hawks was the director of advocacy and outreach services for the Family Abuse Centre in Waco Texas, where she conducted a legal clinic and led educational programmes. She previously worked for two judges in the state of Mississippi and served as a staff attorney for the state department of Human Services. Hawks also served in both paid and volunteer ministry positions in Tennessee, Mississippi and Texas. A graduate of Mississippi College and the University of Mississippi School of Law, Hawks earned a master of Divinity degree from George W. Truett Theological Seminary at Baylor University She's a member of the US Supreme Court, Texas and Mississippi bars and she was ordained into the Gospel Ministry by McLean Baptist Church in McLean, Virginia. Maggie Garrett is the vice president for public policy for [Americans United for Separation of Church and State](#). She represents Americans United before Congress, and in the Trump administration, and she oversees the state legislative programme. For the last eight years she has*

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served as the co-chair of the [National Coalition for Public Education](#), a coalition of more than fifty national organisations that opposes private school vouchers. She's also the chair of the Coalition Against Religious Discrimination. And before Maggie joined the AU's legislative department, she served as the legislative director and staff attorney at the ACLU of Georgia, where she litigated high-profile cases on issues including the separation of church and state, free speech, reproductive rights and voting rights. She was also a fellow at the ACLU of Alabama where she participated in litigation to remove Judge Roy Moore's Ten Commandments display from the Alabama Supreme Court. Maggie graduated from Hamilton College and the George Washington Law School. So, two fantastic people who can walk us through this Supreme Court term and talk to us about religion and law in the United States. So we'll begin with a question for Jennifer, which is really about a bit of context. So tell us a little bit more about the case before the Supreme Court, this term, that deals with religious freedom. I know that while the Supreme Court receives thousands of requests to take up cases each year, they only hear about two percent of them. So what is the religious liberty case that they're taking for this term?

Jennifer Hawks (JH): Well, it's a pleasure to be here. And while the court has taken one case already, it's important to note that the court could take additional cases as the year progresses – they take cases throughout the year. But the case for this next year is [Espinoza versus Montana Department of Revenue](#). And it's a case involving a state tuition tax credit programme, which is a type of voucher where state money ends up supporting financially religious and non-religious private schools. And the Montana Supreme Court struck down the programme, the parent who brought suit to enforce the programme appealed to the Supreme Court, and the US Supreme Court took the case. And we'll have arguments later on in the term.

BM: Great. And, maybe Maggie, could you tell us a little bit more about the school voucher programme and how they operate it in the United States – what their role is in private and public education?

MG: Sure. So in the United States we have public schools, and that has been the primary way that we've funded schools over the years, for many years. But what's happening recently is there is a real push to have private school vouchers – which essentially means that you take taxpayer dollars and you funnel them to private schools. And what happens is that it primarily funds religious schools. And the reason why is because religious schools are usually cheaper than secular private schools. And that is

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often because the religious entity that they are associated with will subsidise the education. And so they're cheaper, and then private school vouchers predominantly fund them. And at issue in this case is whether or not you can have a tuition tax credit at all. Can you give money to a secular school and say “No. We're not going to give money to a private school that's religious”? So that's really what's at issue here. (5:00) For the first time, someone wants the Supreme Court to say that a state has to fund religious education if they're going fund secular private schools.

BM: *I imagine that one of the first questions by people who do want to support these tax credits going to religious school is that the US Constitution says that you shouldn't favour one religion over another. You shouldn't favour religion over non-religion, or vice versa. So why isn't a tax credit that goes to a private non-religious school – or funding that goes to public schools – not favouring non-religion over religion? Or is that a false binary? Is it not so easy to say what religion is, and what is not religion?*

MG: So traditionally, in the United States, we have said that freedom of religion means that no one is taxed by the government to fund anyone's religion. So, as a Lutheran, I am not taxed to pay for Lutheran schools. I'm not taxed to pay for anybody's religion, whether I agree with it or not. And that has really been the standard. And we have been slowly seeing the courts chip away at that. And we've been slowly seeing them say that, “It's actually ok for you to fund tax dollars going towards religious education.” I don't think that it is discrimination against religion to say that tax payer dollars are not going towards religious activities, religious education, religious learning. In my mind, *establishing* religion is really about funding religion education. That's sort-of at the core of religion, right, is teaching your religion? Here we are teaching the religion to children and that's sort-of the rock of the church is teaching young children, and raising them in the church. It is not, in my mind, discrimination against religion. It's the government maintaining neutrality, and the government saying “We just stay out of it. We don't fund it.” They get a lot of exemptions and then they also don't get government funding.

JH: I would add, as a Baptist minister and a constitutional lawyer, that the government not funding religious schools and religious organisations is what has allowed religion to flourish in our country in a way that is unmatched in any other country. It's up to us, as religious people, to fund our religious practices and to fund our religious communities, and to reach out to our neighbours to ensure that those communities continue. And so, because of this, the American church has to be responsive to the

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community around it. It has to find its place and its role. Because it's not going to get a cheque every month from the government, whether people attend or not. So to fundamentally alter the way that our religious communities are funded would be very harmful to the communities themselves. Religious schools have a lot of freedom and autonomy that are not experienced by public schools or public charter schools, or other types of school systems. And it's precisely because of that autonomy that we should want the maximum amount of separation so that religious schools are accountable to religious communities and not accountable to tax payers who could care less whether or not that religious community flourishes or dies.

BM: *Right. So I'm hearing a lot of arguments for why religious freedom is good not only for government, but also for religious institutions. And the separation of church and state allows religious communities a great deal of autonomy. It allows them – as the argument often goes – to flourish in the United States. And that really, at root here – from what I've heard from both of you – is the question of taxpayer funding: that taxpayer funding should not flow to religious institutions. I think that brings up another case that was already argued at the Supreme Court and decided, which is the [Trinity Lutheran case](#) – which is being brought up in the arguments for Espinoza. So could you walk us through the Trinity Lutheran decision and what it meant for religious freedom? In part, I'm very interested in exploring, with Trinity Lutheran, where a court sort-of sees religion ending and some other kinds of programmes beginning. Or deciding whether the funding in that particular case was supporting a religious institution as a religious institution, or whether it was really supporting something else. So could you talk a little bit more about that please?*

MG: Sure. So in Trinity Lutheran, at issue was a state grant. And a state grant would help public and private schools and other non-profit organisation purchase rubber playground materials. It was made from recycled tyres and so there was a grant programme. And the religious school applies for the grant and they, like Montana, have a constitutional provision that says that they can't spend money to aid religion. (10:00) And so the State of Missouri says, "I'm sorry, you're not eligible for this tyre . . . this playground grant." And so they said, "Well, that's really just a discrimination: that you're funding other secular organisations, but you're not funding us, simply because we're religious." Now I would argue that that's not what was happening. What was happening was that the government was saying, again, "You're a religious school. We don't aid you. We don't tax you." And so there's a separation of church and state. But what the court held was that they were being discriminated against. And they

were being excluded from the programme because of who they are. Because they were a religious

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entity. The Court made clear, though, that this was a really narrow decision and that they were talking about playground materials which wasn't a religious item. It wasn't translated into religious activity. That this case was, "You can't discriminate against them because of who they are." However, the government could still take into consideration how the money would be used. I mean, I think that is really the distinction here, is that they're not not-funding religious schools because they're religious schools, but because that money would be used for religious education. And religious schools normally entwine religion throughout the school day. It's not as though they teach one subject and then they take a break and they teach religion. It's entwined in what they do. There's Bible studies, there's mandatory religious activities, etc. And so this would really be a case about funding the religious activities, the religious education. It's not necessarily about who they are.

BM: *And I think that brings up a question that I heard at least in different sort-of moot courts that were leading up to the Trinity Lutheran case, which were really people pushing at the question of: what is a religious activity? So, is maintaining a playground a religious activity? Is buying textbooks for your math class a religious activity? Is buying textbooks for religious studies class a religious activity? Is maintaining If there's a generally-available fund of money to keep up historically significant buildings in a community, and there's a church that's historically significant building, can those funds be used to repair the pews in that church? And what generally-available activities or services are not available to religious institutions? Whether that's the fire department if there's a fire Those are the kinds of questions that I was hearing. And I think what they're getting at are questions of what is religion qua religion. What is religion really? And what is a secular activity or a secular programme or service? So, could you talk a little bit more about that? How did the Court come down on those questions? Did they have any answers to those questions? Or what are your thoughts about those questions?*

JH: Well, in my opinion, the Court largely overlooked the establishment clause problems. And so they did find that this was just a public safety programme. So they compared it to something like a fire department responding to a fire in a church. Or a police department responding to some type of criminal activity happening at the church. And so they said, "It's the same thing. And there's nothing particularly religious about the playground." I would add a fact to Maggie's summary, that this was not an independent religious school. This was a ministry of a church. So it was a church that had a preschool and it was that church ministry that had applied for this grant. And so BJC filed the brief

and we really looked the history of these provisions. And we looked at why it's important to have the

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separation. And we did want to get into the question of: when can a government come onto a church property and say, “This is secular, so we get to fund it and we get to regulate it. This is religious, so we don’t.” And walk through your church property like that. We want churches to be able to have their independence and autonomy, and be able to make those decisions, and use their property how they see best fit to carry out their religious mission. And so we think that Trinity Lutheran muddied that water by saying that not only could the church apply for it, but that the state needed to pay them the money, contrary to their own state constitution provision which had been enacted in multiple parts of its constitution. I think they had four different provisions that talked about not aiding . . . not using tax payer money to aid religious institutions.

MG: Yes. And these are like the really hard questions. And not punting, but . . . you know, as a church-state separationist I feel like the courts have kind-of created this problem for us, at this point (15:00). So there used to be much more strict lines. And therefore you didn't have to ask these questions of, is a playground religious? Or, are they going have religious ceremonies in the playground? Or, do they read religious books on the playground? It was much, much clearer – to prevent us having to get into those questions. And then as the courts – not to blame the courts entirely, I mean, Congress and states have been pushing the court to move this way – but as the court has been slowly chipping away at the wall of separation it is creating more and more problems. And it's interesting because we kind-of get to the problem of “We can't really say if it's religious or not, so we have to allow it.” And so it's almost by creating the problem, it's inching along to further erode the separation of church and state. We created this problem and now we're in a big mess.

BM: *So maybe that's a good opportunity to bring up another case that's been decided in the last few years, the [Hobby Lobby case](#), which held that [closely-held](#), for-profit corporations could use [RFRA](#) to deny healthcare benefits to their employees even though the benefits were required by law. And part of the holding was that the Court said that the government did not make a compelling enough case why closely-held, for-profit corporations should be treated differently from religious non-profits. So could you talk a little bit more about that case, and its implications for what the religious organisation is?*

MG: Sure. So the Religious Freedom Restoration Act – RFRA – is a federal statute that is supposed to protect religious freedom. The idea is that if your religion is burdened, you can go to the government and say that this government law or activity is burdening your religion. And the government has to have a compelling interest, and it has to be the least restrictive means for them to push the law on you.

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I know that's a lot of legalese. But the question in that case was: does RFRA apply to corporations? And many of us said, "No. It doesn't apply to corporations." Like, what religion does a corporation have? It doesn't. It was not envisioned that a corporation like [Hobby Lobby](#), that has craft stores around the country, could get out of having to adhere to the law because they're a religious organisation. So the Court really based that opinion in the statute itself. It said, "Let's look at how they defined 'person'." They did a bunch of legal stuff, and said "'Person' included corporations, and there's no reason why religious corporations are different than secular corporations. It applies to all corporations. They all get to use it if they say they have a religious objection." And the danger there . . . I mean, I think that was dangerous to begin with. But now that is really seeping out into other areas of the law. So even if they were right – which I think they weren't – that RFRA applied to Hobby Lobby, now the question is, what happens in other federal statute? So, for example, there is a federal statute that says that corporations can't discriminate in hiring. And so then the question becomes . . . and there's a religious exemption for that. So religious corporations can discriminate in hiring. And the Trump administration has been leaning towards, now, an interpretation that for-profit corporations, even there, could discriminate because they're religious. So it is this complicated question, again, of where do you draw these lines? Is Hobby Lobby – who just happens to say "Our owners are religious" – do they get religious exemptions everywhere now? I remember back when the contraception regulations were being passed in the Obama administration. Someone said, "Well I think [Taco Bell](#) should be able to get an exemption from providing contraception." And does it mean that MacDonald's, and Taco Bell, and all these corporations . . . does it mean if you own a franchise of Taco Bell and you are religious, that you get to say, "Well, my Taco Bell is religious. And I get out of whatever I want, because I get a religious exemption." I would say that far exceeds the line. But there are arguments today that that should be true.

JH: Yes. So I would agree that there are certainly groups that are looking to expand Hobby Lobby well beyond what the Court ruled. The Court ruled for Hobby Lobby in that case, because they found a win-win situation. They found the government had created this other programme and couldn't explain why for-profit corporations couldn't participate in that programme. So there was a way for the female employees, and female relatives of male employees, to get the contraception without it coming from . . . the Green family, in this case (20:00). I don't think that that means the default position is that employers always win in these cases. But we certainly have people making that argument, and trying to espouse that as the true interpretation of Hobby Lobby, which we would both vehemently disagree

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with.

BM: *So, I think you bring up so many interesting and important questions about what constitutes a corporation that's able to claim an exemption: who gets to claim an exemption, whether it's only limited to religions? So, for example, could you tell . . . ? Some of our audience might not be familiar with US case law, and how we treat these issues. Could someone who identifies as a humanist or an atheist – but sincerely held convictions that are as totalising as what we often think of as a religious world view – go before the court and claim an exemption from a neutrally applicable law, and say that it is grounded in a sincerely held belief, even if it's not linked with a traditional religion? So I know that that's been allowed in certain conscientious objection . . . for example in military service. Does it extend beyond that? Or could you talk about the conscientious objection cases that it does apply to?*

JH: Well, in the conscientious objector cases the court looked at . . . again, went to the text of the statute. And they found that between various iterations that congress had passed, and had been enacted into law, Congress broadened the definition of who would be covered by religion. And so the court followed suit, and ensured that that protection was as broad as the language in the statute. And so these cases really depend on how we define words in statutes, and how we use them in context, and how we reference other statutes. So if Congress wants to pass a law with a very expansive definition of a religious person or organisation, there are many examples of that throughout the law that the courts have interpreted. The question is whether they could write something more narrow, that would exclude some groups. And that would be more difficult to do, especially given the other statutes that seem to be on this path of towards increasing the number of people who can claim the ability to live out their beliefs, that that might be all-encompassing and similar to a religious belief or practice.

MG: Yes. In the conscientious objector cases, the idea was that it would apply to people who maybe didn't say that they were religious but had a belief that was held as strongly and similarly to a religious belief. And some of the statutory things . . . I don't know that there's ever been a claim under RFRA where someone has tried to make that claim. I do think it's interesting, though, that under RFRA and under some of the other laws, you can't really – and I think this is right – you can't really question whether or not it's a real religious belief, right? So you can't say – and again I use Lutheran, because it's me, and so I'm not offending anyone – but you can't say, “Maggie, what's your religious belief? I'm now going to look and see whether your pastor says that your belief . . .” And sort-of go up the chain of the Lutheran church, and the Lutheran doctrine and see if it all matches up. I could say, “I'm

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Lutheran”, and I could also say that my views completely are different than the traditional Lutheran church beliefs. Which is the way that it should be. The danger of course, though, is that now everyone who has any religious belief can come and say, “I’m going to challenge the law because, as applied to me, you know, it’s a substantial burden on my religion.” And I don’t often say that I agree with [Justice Scalia](#). But Justice Scalia, many years ago, decided the Smith case – [Employment Division versus Smith](#) – and he was talking about religious exemptions, and the free exercise clause, and whether or not this test that is now RFRA is the right test. And he spoke about how there’d be anarchy because every person would be a law amongst themselves. Because they could sort-of say, “Whatever fits with my religion, now I want to get a religious exemption.” And, of course, it’s not like . . . RFRA isn’t a trump card. There is the other side balancing: is there a compelling interest, and is it narrowly tailored? But that is getting harder for the government to meet. And so, yes. That creates, again, this quandary that if we are saying that every person’s religious beliefs should be recognised under RFRA – if they say it’s a burden, and it’s a substantial burden and the court now sort-of agrees with them – what does this mean? Does it mean that we are getting ourselves into this . . . ? Well, we’re not quite there. I don’t mean to be too alarmist (25:00). But we’re moving down the line that Scalia is talking about.

JH: Well, and one of the things I always like to point out when I teach RFRA to college groups who come to visit BJC, is RFRA is, if you look at the statutory language, protects against a substantial burden on an *exercise* of religion. And I think sometimes exercise of religion has gotten lost. And people try to substitute religious belief with that. There is a big difference between exercising belief – and Congress, when the law was enacted, they chose exercise – and so that has to have some kind of meaning. And so I look forward to the day when the courts are looking at all parts of RFRA. And sometimes, you know, the religious objector needs to win. And then sometimes the religious burden just cannot be accommodated. But it should be a situation where we all have the ability to be able to come into court and be able to make our claim. But we have to look at all parts of the test, otherwise the test is not working in the balanced way that it was intended.

BM: *Right. And that actually brings up a case that is not currently before the court, although certainly has been filed. So this is the [Ricks versus Idaho Board of Contractors case](#) in which someone says that for reasons of sincerely held religious belief, he doesn’t want to have to offer a social security number to the state in order to have a contract. So here we have someone who . . . it’s not a commonly-held religious belief, but it’s sincerely held by this particular person. So what, as we try to balance truly recognising that religious belief might be sincerely held even if it’s not commonly held, and*

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recognising that the state has a compelling interest sometimes in asking people to do things that they don't want to do, for reasons of sincerely held religious belief . . . how do we balance those two things? You mentioned the difference between belief and exercise. I know when I'm in spaces with a lot of, especially, conservative religious folks – and progressive – they say that a belief without the option to exercise that belief is not really a strong protection. That if you can't act on a thing that you feel most strongly about, then that is that is certainly a substantial burden at some point. So if you're a judge sitting before some of these decisions, trying to decide whether to force people to do what it is that they didn't want to do, and saying, at the same time, “Here's someone who believes in religious freedom”, how do you reconcile those two things in your head, or for the public? Do we just recognise that sometimes we abridge religious freedom, or that certain things we don't necessarily consider as religious as others? So, for example, if someone says that they do . . . something that we think of as a core practice, something they do in a church or a mosque or a synagogue, I think it would be very difficult for a court to say that that wasn't allowed. It would take a lot for them to say, “We are going to stop you doing that activity.” But as things leave the four walls of a house of worship, we often think that whatever activity is being conducted is not as religious as the activity in the church. So would you just walk us through, from a religious studies angle, how we think about religion and law, and where it becomes less and less important for the government to safeguard that particular act?

MG: So one of the things you were asking in that is, “If you were a judge, where would you start?” I would start with one of the questions that should be asked in the Establishment Clause, which is: are we giving a religious accommodation that is harming others? And I think there's a basic civics class thing that we learn as kids which is: your rights end where my rights begin. And so at Americans United we always say, “Is this going to cause harm to other people?” And so I think that, right out of the gate, is one of the first questions you ask. So in the case about the social security number, is it causing harm to other people? I don't know that case that well, but maybe it is, maybe it isn't. In cases where it's an issue of “Can I get out of a non-discrimination law?” So, I live in a state that says I can't discriminate against LGBT employees and I say that that violates my religious beliefs. The question should be, if I give you that accommodation, what happens to someone else? And the answer is, they are discriminated against. And that is not . . . to me that is the end of the question, right? There is a dignity harm. There is a loss of a job (30:00). There is a loss of a promotion. And therefore you don't get your religious exemption, because you are causing serious impacts on other people. That's where I start.

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JH: Yes. And my answer would be very similar. But I would also look at the harm to others outside of the religious community. So we all . . . as a Baptist I go to my church and there are certain expectations on me, as a member, that visitors . . . if Maggie were to visit my church with me on Sunday, she would not have those same expectations put upon her. And so if the exemption is primarily going to affect people who have voluntarily chosen to be part of that religious community, then I think there should be a thumb on the scale towards granting that exemption. But if the exemption is largely going to impact those outside of the religious community – those who have not voluntarily come to this belief or practice – then the government should look seriously at: how do we minimise this harm outside of the religious community? And if it cannot be minimised, then maybe it cannot be granted. But we have a long history of religious exemptions. So I think that's something we always have to keep in mind. There are even people who say that our first exemption is in the constitution itself, when the president is allowed to swear *or affirm* an oath of office. Because, in our colonial days, our Quaker brothers and sisters could not swear an oath and so, in order to permit them to be able to run for the highest office in the land, an exemption was made so that the oath could be affirmed instead of sworn. And that obviously impacts no-one. It has no negative harm for someone else. So that's an easy one to grant. The much more difficult cases are when the primary impacts of that exemption would be on someone outside of the religious community.

MG: Another line, I think, that becomes a clear line is when the religious organisation gets money. And this kind-of takes us, in a way, back to Espinoza – where they're asking for government funds. To me, once The idea of religious exemptions for religious organisations, and the government staying out, is for them to have autonomy for them to make their own rules, you know. They're kept separate. But once you take government funds voluntarily, to perform a programme, to get some form of a benefit to me, the government, now . . . you've sort-of lost your “I want to remain autonomous” argument. And now the government, I think, has the right to go in and say, “You have to go by government rules.” So if you take a voucher, a private school voucher in Montana or any other place, then you should have to adhere to the same rules as everyone else. You should not still get the religious exemption that you're getting. You're getting the religious exemption because you are religious and you want to maintain your autonomy. But if you get government funds you've already sort-of given up your autonomy, and you don't get to get special exemptions at the same time that you get government money. This has been an issue since George W Bush's years, about employment discrimination, where they put in place rules that say you can get government contracts and

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government grants so you're taking money from the government to perform a social service, and then you are still allowed to have your own religious hiring litmus test. To me that is wrong. It is one thing for the Lutheran Church to be able to say “We hire Lutherans for certain positions” – obviously we hire a Lutheran pastor to be our pastor. It is another thing to say, “We want to get a government contract to provide services for the public and we still get to place our religious litmus test.” To me that's a line.

BM: *I think that's a really helpful set of distinctions of how people can think about these issues. I'm curious, could you give us just some easy examples where you maybe both agree, “This is an obvious case where an exemption should be granted”? I think it's helpful. Often we spend a lot of time talking about the limits of exemptions, and where they start perhaps creating [dignitary harm](#) or leading to improper use of government funds. What are some obvious examples of exemptions, and why are they not leading to this kind-of slippery slope of “everyone has their own law that applies to them”?*

MG: I'm going to go first because you're probably broader in your exemptions than I am (Laughs). So, we filed a brief on behalf of a Muslim man who was incarcerated. He wanted to wear a beard in accordance with his religious faith. It was a short beard and the prison system said “No, he can't”, for two reasons. We have a compelling interest because, one, he could have his photo taken without the beard and then have his photo taken with his – it's like a quarter-inch beard or something – and we'll never know who he is. And the court was like, “Yeah, that's not really that compelling.” (35:00) And another one was, he could hide weapons in there. Which . . . probably not many weapons are being hidden in this quarter-inch beard. But we argued that, yes, he has a sincere religious belief. The government's compelling interest is really not believable. He is not hurting anybody. So that is something where we came down on his side. We came down on the side of a student in a school where there was a no hat rule, and they want to wear a *yarmulke*. That is not hurting anybody, and clearly should be provided. Some cases where you want a day off to celebrate your religious Sabbath etc., etc. Those are some of the ones that are very clear for us.

JH: Yes, another big case which was around the time of the case of the prisoner, was about an applicant at Abercrombie and Fitch stores And she wanted to wear her *hijab* as a part of her religious practice. And Abercrombie didn't want to hire her on that basis. And so that was a case that unified the religious liberty community. Every religious or religious liberty group that filed a brief in that case, filed on her side and said “No. An applicant should be able to wear the religious garb that does not

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interfere with any safety concerns that might have been present in that employment role.” And so there's a number of cases that unify us. Of course the ones that get the most attention are the ones that divide us.

BM: *So, with the time that we have left, going back to Espinoza, where do we stand? I have two questions: one is to wrap up on Espinoza, and think about where this conversation leads us with the tax credits and what the different things that we've talked about – whether it's funding or dignitary harm, or leading to an excessive entanglement between a religious institution and secular institution. So, trying to bring together some of the different tests or legal ideas that we've talked about, and how it applies to this case. And then my second question, which is somewhat related, is, as lawyers, as people in the litigation arena thinking about our audience, what are ways that Religious Studies scholars can communicate their research and findings to the legal field so that they can better inform how we think about religious liberty cases - what constitutes a religion, what is religion, what is religious freedom – and how we think about the separation of church and state? You can tackle one, or both, or neither of those!*

MG: I'm going to start with your second question about how religious scholars could be helpful in cases like this. I feel like I sound so sceptical, today. But I'm sort-of looking at free exercise cases and Establishment Clause cases. Oftentimes I think that if you are of a minority faith, and it is something that is not well known to the justices, or not well known to the public, you will lose your case, right? Because you know if it's about communion wine, people understand about what that means. Or if it's about *kosher* food people sort-of understand, in this culture, what that means and the justices would understand that. But if it's a Native American religion, or if it is something about observing as a Muslim, sometimes those things sound different. And when they sound different they don't . . . it doesn't click, sometimes, that that could be a substantial burden on your religion. And so I think some religious education about some of the meaning that these practices have to other religions could be helpful, pretty much to everybody.

JH: Yes. I would certainly agree with that point. And I love reading our Baptist historians. And we have used them in our briefs on a number of occasions. So any ability to continue the scholarly work and research – but figure out ways that are more contextual that we could cite, or that we could use in telling a story – would certainly be helpful. Back to the wrapping up of Espinoza: I do think, as religious organisations are asking for more and more to be treated like everyone else, that we need to

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be careful what we ask for. We are given a lot of exemptions and treated differently in a lot of ways that benefit us. And those exemptions and special treatments become harder to defend if we're funded just like everyone else (40:00). And so I would certainly want to remind religious Listeners whether they be scholars or just people who attend church, that whenever the institutions of religion and government have mixed, history has shown us that religion has always, always lost. So if we want to maintain our uniqueness and our special legal characteristics, then we're going to have to fight to maintain our separateness. Which is why separation of church and state has always been a move led by religious groups, here in the US, from our colonial days till now. It's not a secular versus a religious fight, it's a religious versus religious fight.

BM: *Great. Well, I think that's a great place to leave things. I want to thank you both so much for coming on. It's been a really fascinating and generative discussion. I hope our scholars and other audience members who are listening – whether you are in academia, outside academia, in a religious community, not in a religious community – that this has helped open up some of our thinking about what it means to protect religious freedom, to think about the separation of church and state – and the complicated questions that it brings up, when we say that we support or don't support religious freedom. So thank you both so much for being here today, and I look forward to having discussions with you in the future.*

JH: Excellent.

MG: Thanks for having us.

If you spot any errors in this transcription, please let us know at editors@religiousstudiesproject.com. If you would be willing to help with transcription, or know of any sources of funding for the broader [transcription project](#), please get in touch. Thanks for reading.

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