Religious Organization Staffing Post-*Bostock*

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Whereas Title VII has always contained an express exemption for religious organizations, ambiguities in the statutory text and legislative history render the exemption susceptible to three conflicting interpretations. This Article provides a detailed critique of each interpretation and demonstrates that while LGBTQ persons stand to retain meaningful employment protections under two of the three interpretations, the third construction threatens to leave LGBTQ individuals—together with women, pregnant persons, and racial and ethnic minorities—vulnerable to discrimination in a host of non-ministerial, ostensibly secular positions.

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INTRODUCTION

One of the many questions left unanswered by *Bostock v. Clayton County*,[1] wherein the Supreme Court held Title VII prohibits employment discrimination on the basis of a person's sexual orientation[2] or gender identity,[3] is whether and to what extent religious organizations may make non-ministerial staffing decisions consistent with their faith. While the First Amendment "precludes application of [employment nondiscrimination laws] . . . to claims concerning the employment relationship between a religious institution and its ministers"[4] and Title VII permits religious organizations to employ "individuals of a particular religion"[5] when filling non-ministerial positions,[6] neither Congress nor the Court has addressed whether religious organizations may consider other protected characteristics

1. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

2. "Sexual orientation refers to a person's erotic response tendency or sexual attractions, be they directed toward individuals of the same sex (homosexual), the other sex (heterosexual), or both sexes (bisexual)." *Id.* at 1758 n.8 (Alito, J., dissenting) (quoting B. SADOCK et al., COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2061 (9th ed. 2009)).

3. Gender identity refers to a person's "internal sense of being male, female or something else, which may or may not correspond to an individual's sex assigned at birth or sex characteristics." *Bostock*, 140 S. Ct. at 1756 n.6 (Alito, J., dissenting) (quoting Am. Psychiatric Ass'n, *A Glossary: Defining Transgender Terms*, 49 MONITOR ON PSYCH. 32, 32 (Sept. 2018)).

4. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012). In *Hosanna-Tabor*, the Court acknowledged "the ministerial exception is not limited to the head of a [Protestant] religious congregation" but declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." *Id.* at 190. Justice Thomas, meanwhile, argued courts should be prepared to defer to a religious organization's assessment of whether a particular employee is a minister: "A religious organization's right to choose its ministers would be hollow [] if secular courts could second-guess the organization's sincere determination that a given employee is a 'minister' under the organization's theological tenets." *Id.* at 196–97 (Thomas, J., concurring); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–64 (2020) (identifying factors relevant in determining whether someone is a "minister" so as to fall outside the protection of employment nondiscrimination laws); Allison H. Pope, *"Of Substantial Religious Importance": A Case for a Deferential Approach to the Ministerial Exception*, 95 NOTRE DAME L. REV. 2145, 2161 (2020) (acknowledging concerns the term "ministerial" would lead to an unintendedly narrow construction of the exception given its close association with Protestantism).

5. 42 U.S.C. § 2000e-1(a) (2018).

6. For a discussion of the various factors that may be relevant in determining whether someone is or is not a "minister" for the purposes of the ministerial exception, see *infra* notes 187–188 and accompanying text.

besides religion—such as sex or race[7]—when staffing non-ministerial positions, at least where those characteristics are claimed to implicate an employer's religious beliefs.

Although numerous amici raised the issue,[8] none of the party-employers in *Bostock* claimed to be religious organizations or contended that complying with federal antidiscrimination laws would in any way violate their sincerely held religious beliefs.[9] Therefore, the Court did not have cause to address the ruling's implications for religious organizations, but it did note the existence of various legal doctrines safeguarding religious liberty.[10] Writing for the majority, Justice Gorsuch acknowledged that "worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage."[11] Indeed, Congress included an express statutory exemption in Title VII permitting religious organizations to prefer persons of the same faith when filling non-ministerial positions.[12]

Yet ambiguities in the statutory text and legislative history render Title VII's religious exemption susceptible to three distinct interpretations. The first—the co-religionist interpretation—construes the exemption narrowly, allowing religious organizations to give preference to persons of a particular religious affiliation but otherwise requiring compliance with Title VII's antidiscrimination mandate.[13] Under this interpretation, a Catholic hospital may choose to only hire Catholics and decline to employ persons of other faiths in the same manner a Baptist college may forgo hiring Presbyterians, Jews, or Muslims in favor of employing fellow Baptists.

The second interpretation—the religiously motivated interpretation[14]—reads the exemption broadly so that a religious organization may discriminate on the basis of any of Title VII's protected characteristics (i.e., race, color, religion, sex, or national origin) provided the discrimination is motivated by the organization's religious beliefs.[15] Consistent with this interpretation, a

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7. *See* 42 U.S.C. § 2000e-2(a) (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin).

8. *See infra* notes 46–53 and accompanying text.

9. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1753–54 (2020).

10. *Id.*

11. *Id.* at 1754.

12. *Id.*

13. *See infra* notes 54–57 and accompanying text.

14. *See infra* notes 68–77 and accompanying text.

15. Whereas today few are prepared to defend racial discrimination on religious grounds, that was not always the case. *See* William N. Eskridge Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 665 (2011) ("For most of American history, . . . [f]undamentalist (Bible-based) theology, especially in the South, posited that the immoral conduct of African-Americans generated for them a degraded status as a matter of Christian belief."). *But see* Deon J. Hampton, *After Permit Approved for Whites-Only Church, Small Minnesota Town Insists It Isn't Racist*, NBC NEWS (Dec. 22, 2020, 5:58 AM), https://www.nbcnews.com/news/us-news/after-permit-approved-whites-only-church-small-minnesota-town-insists-n1251838

religious organization may terminate a pregnant employee who has never been married or decline to hire someone who is gay as long as the organization's actions are religiously motivated.

Occupying a conceptual middle ground between these two interpretations is the belief-and-conduct interpretation.[16] This interpretation permits religious organizations to prefer persons whose beliefs and conduct are consistent with the organization's faith unless that faith mandates discrimination on the basis of race, color, sex, or national origin.[17] Thus, an Islamic charity may fire a Muslim employee for consuming alcohol contrary to the tenets of Islam, but cannot engage in religiously motivated race or sex discrimination.

While LGBTQ persons stand to retain meaningful employment protections under either the co-religionist or belief-and-conduct interpretation, this Article demonstrates that the religiously motivated interpretation threatens to collapse the religious exemption of Title VII into the ministerial exception of the First Amendment, thereby leaving LGBTQ individuals—together with women, pregnant persons, and racial and ethnic minorities—vulnerable to discrimination in a host of non-ministerial, ostensibly secular positions. Part I provides a brief history of Title VII, with a focus on the religious exemption. Part II examines courts' and scholars' differing interpretations of the exemption over time. Part III critiques each of the three interpretations of Title VII's religious exemption, noting inconsistencies between the construction advocated and the statutory text, case law, and legislative history. Finally, Part IV analyzes each interpretation's implications for employment disputes between LGBTQ persons and religious organizations post-*Bostock*. While this Article is primarily concerned with the religious exemption of Title VII rather than the ministerial exception of the First Amendment, Part IV examines the ministerial exception's interplay with various interpretations of the religious exemption.

I. HISTORICAL BACKGROUND

In June 1963, President Kennedy called on Congress to pass omnibus civil rights legislation, warning that "continued Federal legislative inaction" would "endanger[] domestic tranquility, retard[] our Nation's economic and social progress, and weaken[] the respect with which the rest of the world regards us."[18] One year later, the Civil Rights Act of 1964 became the law of

[https://perma.cc/F3FM-WSQ5] (reporting on religious sect whose teachings "are for those of strictly European bloodlines").

16. *See infra* notes 58–67 and accompanying text.

17. *See id.*

18. H.R. DOC. NO. 88-124, at 3 (1963).

the land.[19] In addition to providing enhanced enforcement of voting rights, prohibiting discrimination in federal assistance programs and places of public accommodation, and mandating the desegregation of public education, the statute forbade employment discrimination on the basis of an individual's race, color, religion, sex, or national origin.[20] Known as Title VII, the latter provision reflected President Kennedy's goal of "enlist[ing] every employer . . . in the task of seeing to it that no false lines are drawn in assuring equality of the right and opportunity to make a decent living."[21]

Whether and to what extent religious organizations[22] would be subject to Title VII remained an open question for much of the 1963–1964 congressional session. As reported by the House Judiciary Committee in November 1963[23] and thereafter passed by the House of Representatives in February 1964,[24] Title VII stood to grant religious organizations complete immunity from employment discrimination claims.[25] However, the Senate downgraded religious organizations' prospective immunity from absolute to qualified shortly after it took up the bill. Specifically, whereas the House bill provided Title VII "shall not apply . . . to a religious corporation, association, or society,"[26] the Senate bill contained a more nuanced exemption, stating Title VII "shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion

19. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (2018)). The expediency with which the statute was enacted belies the arduous nature of the legislative process. *See generally* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) (providing a detailed account of the statute's progression through Congress); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966) (offering a contemporaneous and comparatively succinct history).

20. § 703(a), 78 Stat. at 255 (codified at 42 U.S.C. § 2000e-2).

21. H.R. DOC. NO. 88-124, at 11 (1963).

22. The circuit courts of appeals are divided over the proper test for determining whether an entity is a "religious organization" so as to be exempt from Title VII's religious nondiscrimination mandate. *See* Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 950 n.118 (2018) (identifying five unique tests); Alex J. Luchenitser, *A New Era of Inequality?* Hobby Lobby *and Religious Exemptions from Anti-discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 77 (2015) (noting factors considered often include "(1) overt expression of religious purpose; (2) affiliation with or control by religious organizations; (3) integration of religion in operations; (4) whether an entity holds itself out as secular or religious; (5) whether an entity's membership is made up of co-religionists; (6) whether an entity produces a secular product; and (7) whether an entity operates for a profit"). Significantly, newly issued EEOC guidance suggests that even for-profit corporations may be able to qualify as religious organizations: "Title VII case law has not definitively addressed whether a for-profit corporation . . . can constitute a religious corporation under Title VII." U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2021-3, COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination [https://perma.cc/9AEW-ZFEZ].

23. H.R. REP. NO. 88-914, at 10 (1963).

24. 110 CONG. REC. 2737, 2804–05 (1964).

25. *See* Equal Emp't Opportunity Comm'n v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1276–77 (9th Cir. 1982), *abrogated on other grounds by* Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991).

26. H.R. 7152, 88th Cong. § 703 (as passed by House, Feb. 10, 1964).

to perform work connected with the carrying on by such . . . [organization] of its religious activities."[27] The House concurred in the Senate bill as amended,[28] and on July 2, 1964, President Lyndon B. Johnson signed the Civil Rights Act into law.[29]

The religious exemption was subsequently broadened in 1972, but only after Congress again declined to grant religious organizations complete immunity from Title VII.[30] As the Senate was debating what would become the Equal Employment Opportunity Act,[31] Senator Sam Ervin offered an amendment designed to "take the political hands of Caesar off religious institutions and permit those religious institutions to hire people of their own religious persuasion rather than to have people selected by the EEOC."[32] Specifically, the amendment sought to revise Title VII's religious exemption by striking the word "religious" immediately before the word "activities."[33] According to Senator Ervin, the amendment's "only effect" would be to allow religious organizations "to employ people of any religion they see fit" regardless of what activities—religious or secular—the individuals were hired to perform.[34]

The Senate adopted the Ervin Amendment on a voice vote,[35] and the House subsequently acceded to the amendment in conference committee.[36] In a joint statement preceding the conference report, House and Senate managers described the Ervin Amendment as "expand[ing] the exemption for religious organizations . . . with respect to the employment of individuals of a particular religion in all their activities instead of the present limitation to religious activities."[37] Similarly, a section-by-section analysis of the

27. H.R. 7152, 88th Cong. § 702 (as ordered printed in Senate, Mar. 30, 1964).

28. 110 CONG. REC. 15869, 15897 (1964); H.R. Res. 789, 88th Cong. (1964).

29. Vaas, *supra* note 19, at 457.

30. S. SUBCOMM. ON LABOR, COMM. ON LABOR & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 881, 1259–60 (Comm. Print 1972), https://babel.hathitrust.org/cgi/pt?id=mdp.35128000298370&view=1up&seq=1[https://perma.cc/GRY6-FJGQ] [hereinafter 1972 LEGISLATIVE HISTORY] (rejecting Amendment No. 815 by a vote of 55 to 25). Had the amendment been adopted, the exemption would have read: "This title shall not apply . . . to the employment of any individuals . . . by any religious corporation, association, or society." *Id.* at 881.

31. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C. (2018)).

32. 1972 LEGISLATIVE HISTORY, *supra* note 30, at 1662.

33. *Id.* at 843, 1645.

34. *Id.* at 1645; *compare* Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 ("This title shall not apply . . . to a religious [organization] . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] . . . of its religious activities."), *with* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 104 ("This title shall not apply . . . to a religious [organization] . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] . . . of its activities.").

35. 1972 LEGISLATIVE HISTORY, *supra* note 30, at 1665–67.

36. *Id.* at 1814.

37. *Id.*

conference report described the effect of the amendment as follows: "The limited exemption . . . for religious corporations, associations, educational institutions[38] or societies has been broadened to allow such entities to employ individuals of a particular religion in all their activities instead of the present limitation to religious activities."[39] The analysis noted, however, that religious organizations "remain subject to the provisions of Title VII with regard to race, color, sex or national origin."[40] Both the House and the Senate promptly agreed to the conference report incorporating the Ervin Amendment, and on March 25, 1972, President Richard Nixon signed the Equal Employment Opportunity Act into law.[41]

Significantly, neither in 1972 nor at any time since has Congress specified the criteria an entity must satisfy to be deemed a religious organization, leaving courts to devise their own unique tests and

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38. As originally enacted, the academic staffing decisions of educational institutions were exempt from Title VII. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 ("This title shall not apply . . . to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."). When this provision was subsequently eliminated in 1972, the exemption for religious organizations was expanded to include religious educational institutions. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 104 ("This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); *see also* 1972 LEGISLATIVE HISTORY, *supra* note 30, at 1844–45, 1856.

Note that Title VII has always contained a separate exemption for religious educational institutions, permitting them "to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e) (2018). Unlike the religious exemption, however, the exemption for religious educational institutions was not included in early drafts of the Civil Rights Act. LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 236 (3d Cir. 2007) (Rendell, J., dissenting). Fearing the religious exemption "would not include situations in which an educational institution had aligned itself with a particular faith, but was not fully owned or supported by that faith, Representative Graham Purcell offered an amendment that would create the exception now located in § 703(e)(2) [the religious education institution exemption]." *Id.* The Eighty-Eighth Congress ultimately adopted the Purcell Amendment with the understanding that the "religious educational institution" exemption "require[s] a lesser degree of association between an entity and a religious sect than what would be required under" the religious exemption. *Id.* at 237; *see also* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 617 n.12 (9th Cir. 1988).

Nevertheless, the "religious educational institution" exemption is commonly perceived to be co-extensive with and redundant of the religious exemption. *See* Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, 11 ENGAGE 4, 5 (2010) ("There is a paucity of case law interpreting the provision, likely because many consider it redundant of the general [religious] exemption."); *see also* Esbeck, *infra* note 69, at 378 n.38.

39. 1972 LEGISLATIVE HISTORY, *supra* note 30, at 1845.

40. *Id.*

41. *Id.* at 1887.

methodologies. These approaches often consider some combination of the following factors:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the [entity's] management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[42]

Of course, not all of these factors are relevant in all cases, and the weight given to each factor often varies from case to case.[43] Complicating matters further, subsequent panels within the same circuit sometimes decline to follow prior panels' methodologies or disagree as to what those methodologies require. As amici noted in *Bostock v. Clayton County*: "[T]here is an as-yet-unresolved division among [circuit] courts—sometimes among judges on the same circuit court—as to the appropriate criteria for determining which organizations are eligible for" Title VII's religious exemption.[44] Thus, while courts are uniform in holding that the religious exemption extends beyond houses of worship, they agree on little else;[45] much like courts are uniform in holding that the exemption permits religious organizations to prefer persons of the same religious affiliation while concurring on little else.

II. TITLE VII'S RELIGIOUS EXEMPTION: THREE COMPETING INTERPRETATIONS

In *Bostock v. Clayton County*, a number of religious organizations signed onto amicus briefs opposing an LGBTQ-inclusive interpretation of Title VII.[46] Amici observed that while questions over the meaning and scope

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42. *LeBoon*, 503 F.3d at 226.

43. *Id.* at 227.

44. Brief Amici Curiae of U.S. Conference of Catholic Bishops & Other Religious Organizations in Support of Employers at 24–25, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623) (citing Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011)) [hereinafter U.S. Conference of Catholic Bishops Brief]; *see also* Roger W. Dyer Jr., *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split Over Proper Test*, 76 MO. L. REV. 545, 560–66 (2010) (discussing the *World Vision* panel's three conflicting interpretations of Ninth Circuit precedent).

45. Sepper, *supra* note 22, at 950.

46. *E.g.*, U.S. Conference of Catholic Bishops Brief, *supra* note 44; Brief for Amici Curiae Council for Christian Colleges & Universities et al. in Support of the Employers, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter Council for Christian Colleges & Universities Brief]; Brief of National Ass'n of Evangelicals et al. as Amici Curiae in Support of

of Title VII's religious exemption "have remained dormant" in recent years, an LGBTQ-inclusive ruling in *Bostock* would force courts to reengage with these issues.[47] Amici warned that "[y]ears of litigation will be necessary to distinguish between lawful religious standards under the exemption and religious standards that . . . constitute unlawful" discrimination on the basis of sexual orientation or gender identity.[48]

While amici acknowledged "Title VII's existing religious exemption would provide some defense to . . . [LGBTQ-related] employment discrimination claims," they argued that the exemption had been given "cramped interpretations" by some lower courts.[49] Specifically, amici observed that the exemption has been accorded three distinct constructions to date: (1) "Some courts interpret [the exemption] as 'permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts;'"[50] (2) Other courts interpret "the exemption narrowly, ruling that Title VII exempts religious employers from religious discrimination only when it does not adversely affect a member of a protected class;"[51] and (3) Some courts "narrow the exemption still further by characterizing it as a limited authority to reserve employment based on nominal religious affiliation."[52] According to amici, these varying interpretations "breed[] uncertainty and risk" for religious organizations that wish to make staffing decisions consistent with their faith. These risks, amici cautioned, "would be even greater" if the Supreme Court were to issue an LGBTQ-inclusive ruling in *Bostock*.[53]

To better understand amici's concerns, it is helpful to briefly review the case law and scholarship supporting each interpretation, beginning with the co-religionist approach, followed by the belief-and-conduct approach, and concluding with the religiously motivated approach.

A. The Co-religionist Interpretation

The co-religionist interpretation construes the exemption narrowly so that religious organizations may give preference to persons of a particular religious affiliation but must otherwise comply with Title VII's antidiscrimination mandate. Under this approach, a Catholic hospital may

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Employers, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) [hereinafter National Ass'n of Evangelicals Brief].

47. U.S. Conference of Catholic Bishops Brief, *supra* note 44, at 25.

48. National Ass'n of Evangelicals Brief, *supra* note 46, at 13.

49. *Id.* at 4.

50. Council for Christian Colleges & Universities Brief, *supra* note 46, at 5. This Article refers to this construction as the "religiously motivated interpretation."

51. *Id.* This Article refers to this construction as the "belief-and-conduct interpretation."

52. *Id.* This Article refers to this construction as the "co-religionist interpretation."

53. *Id.* at 6.

choose to only hire Catholics and decline to employ persons of other faiths in the same manner a Baptist college may forgo hiring Presbyterians, Jews, or Muslims in favor of employing fellow Baptists.

Whereas the co-religionist approach has garnered limited support in academic literature,[54] it has been endorsed by two circuit courts—with the Ninth Circuit being the first to do so.[55] Following a detailed review of the statute's legislative history, the Ninth Circuit concluded that "Title VII provides only a limited exemption enabling [religious organizations] to discriminate in favor of co-religionists."[56] Relying on the Ninth Circuit's reasoning, the Fourth Circuit endorsed the co-religionist interpretation in 1985.[57]

B. The Belief-and-Conduct Interpretation

The belief-and-conduct interpretation permits religious organizations to prefer persons whose beliefs and conduct are consistent with the organization's faith unless that faith mandates discrimination on the basis of race, color, sex, or national origin. Thus, an Islamic charity may fire a Muslim employee for consuming alcohol contrary to the tenets of Islam but cannot engage in religiously motivated race or sex discrimination.

The belief-and-conduct interpretation was first articulated by the Third Circuit in 1991.[58] After acknowledging that "the legislative history never directly addresses the question of whether being 'of a particular religion' applies to conduct as well as formal affiliation," the court found that Congress had, in fact, addressed the issue as reflected in certain statements made by the sponsors of the Ervin Amendment.[59] Based on these statements, the court concluded that Congress, in broadening the scope of Title VII's religious exemption, sought "to enable religious organizations to create and

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54. *Cf.* Letter from Professor Katherine Franke et al. to President Barack Obama (July 14, 2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive_ord_letter_final_0.pdf [https://perma.cc/B2C3-NKF5] (last visited Sept. 28, 2021) (advocating co-religionist interpretation of Title VII in letter opposing a belief-and-conduct interpretation of executive order).

55. Equal Emp't Opportunity Comm'n v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982), *abrogated on other grounds by* Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991).

56. *Id.* at 1276.

57. Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1166–67 (4th Cir. 1985). *Rayburn* is not commonly cited as a co-religionist case because the court's holding was ultimately predicated on the ministerial exception of the First Amendment rather than the religious exemption of Title VII. *Id.* at 1167–69. Nevertheless, in analyzing Title VII's religious exemption, the court seemingly endorsed a co-religionist approach. *See id.* at 1166 (observing Title VII allows religious organizations to "favor[] members of one faith or denomination over another").

58. Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).

59. *See id.* at 950 ("Question: Does the Senator's amendment limit itself to the opportunity of a religious organization to have the right to hire people of its own faith? . . . Senator Ervin: I would allow the religious corporation to do what it pleased. That is what my amendment would allow it to do. It would allow it liberty. It would take it out from under the control of the EEOC entirely.").

maintain communities composed solely of individuals faithful to their doctrinal practices."[60] Therefore, the court held that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."[61] Following the Third Circuit's lead, the Sixth[62] and Eleventh[63] Circuits adopted the belief-and-conduct interpretation.

While the belief-and-conduct interpretation seemingly reflects the majority view of federal courts,[64] it has failed to attract significant scholarly support. The lone exception is a 2018 article by John Melcon. There, Melcon described the belief-and-conduct interpretation as "allow[ing] a religious organization to make employment decisions on the basis of employees' religiously significant conduct—not just their religious affiliation—but not on the basis of Title VII's other protected statuses, even if the organization puts forth religious reasons for doing so."[65] Melcon has contended that a belief-and-conduct interpretation[66] is better supported by the text, the case law, and several practical considerations, such as ensuring that religious and secular organizations are treated equitably and lessening religious organizations' dependence on the ministerial exception, than either the co-religionist or religiously motivated interpretation.[67]

C. *The Religiously Motivated Interpretation*

The religiously motivated interpretation reads Title VII's religious exemption broadly so that religious organizations may discriminate on the

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60. *Id.* at 951.

61. *Id.*

62. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 627 (6th Cir. 2000) (affirming summary judgment for religious organization that fired employee "because she assumed a leadership position in an organization that publicly supported homosexual lifestyles").

63. Killinger v. Samford Univ., 113 F.3d 196, 200 (11th Cir. 1997) (holding Title VII's religious exemption "allows religious institutions to employ only persons whose beliefs are consistent with the employer's").

Although *Killinger* is commonly cited as a belief-and-conduct case, today the plaintiff would undoubtedly fall within the ministerial exception of the First Amendment because he worked as a Distinguished Professor of Religion and Culture in the University's divinity school. *Id.* at 198. As of 1997, however, the Supreme Court had not yet recognized the ministerial exception and would not do so for another fifteen years. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171 (2012). This ostensibly explains the University's reticence to invoke the exception and instead rely exclusively on Title VII's religious exemption.

64. *See* John T. Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J.L. & RELIGION 280, 301–06 (2018) (asserting "the Courts of Appeals have consistently brushed aside both the [co-religionist interpretation] . . . and the [religiously motivated interpretation]" in favor of the belief-and-conduct interpretation).

65. *Id.* at 289.

66. Melcon referred to the belief-and-conduct interpretation as the "Religious Conduct View." *Id.* at 288–89.

67. Melcon referred to the co-religionist interpretation as the "Coreligionist View" and the religiously motivated interpretation as the "Broad View." *Id.*

basis of any protected characteristic—race, color, religion, sex, or national origin—provided the discrimination is motivated by the organization's religious beliefs. Consistent with this view, a religious organization may terminate an employee who marries a person of a different race or decline to hire someone who is transgender as long as the organization's actions are religiously motivated.

While no court has adopted the religiously motivated interpretation to date,[68] it has garnered support among academics. For example, Professor Carl Esbeck has contended that a religious organization need only show two things to qualify for Title VII's religious exemption: that "it is a religious organization and there is a religious belief behind its employment decision."[69] He rejected the notion that the exemption is only available "when an employee-plaintiff's primary claim is one of religious discrimination," asserting "there is no limitation that turns on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to claiming under some other protected class such as sex."[70]

68. *See* Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1203 (S.D. Ind. 2020) ("The court is not aware of any cases dealing with the questions presented here[:] . . . Does a [religious organization's] religious reason for an employment decision bar a plaintiff's Title VII claim when the religious reason also implicates another protected class?"); *see also* Memorandum from Randolph D. Moss, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice to William P. Marshall, Deputy Counsel to the President, Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, at 31 (Oct. 12, 2000), https://www.justice.gov/olc/page/file//download [https://perma.cc/5CN7-JEK4] ("[T]he courts uniformly have concluded that [the religious exemption] . . . does not exempt qualifying employers from title VII's prohibitions on any form of discrimination other than preferences for coreligionists, even where such discrimination is religiously motivated.").

69. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368, 376 (2015).

70. *Id.*; *see also* Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 312 (2016) ("[W]henever religious employers make employment decisions based on their religious tenets, they are exempt from Title VII . . . regardless of the type of discrimination a plaintiff claims.").

Recently proposed[71] Equal Employment Opportunity Commission (EEOC) guidance[72] lends additional support to the religiously motivated interpretation. In a proffered update to its compliance manual,[73] the EEOC characterizes Title VII's religious exemption as "allow[ing] religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs."[74] While seemingly consistent with a belief-and-conduct interpretation, the EEOC goes on to aver that "[r]eligious organizations . . . are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, or national origin" but may "assert as an affirmative defense that [they] made the challenged employment decision on the basis of religion."[75]

According to the EEOC, if "a religious institution presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion," the exemption "deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."[76] Thus, the guidance—which the Commission approved with minor revisions on January 15, 2021 following a contentious 3-2 vote[77]—ultimately endorses a

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71. Press Release, U.S. Equal Emp't Opportunity Comm'n, EEOC Seeks Public Input on Revised Enforcement Guidance on Religious Discrimination (Nov. 17, 2020), https://www.eeoc.gov/newsroom/eeoc-seeks-public-input-revised-enforcement-guidance-religious-discrimination [https://perma.cc/J4L8-M4Y3]. The EEOC's process in preparing the proposed guidance has been subject to withering criticism by members of Congress. *See* Jerrold Nadler et al., Comment Letter on Proposed Updated Compliance Manual on Religious Discrimination (Dec. 17, 2020), https://beta.regulations.gov/comment/EEOC-2020-0007-0047 [https://perma.cc/YSU5-4YHW]. Specifically, they note that whereas "[t]he EEOC has only devoted two years to working on the current update"—and further that "the EEOC drafted th[e] update before a majority of the current Commissioners joined the Commission," provided the newly-confirmed Commissioners "only five working days to review and vote on the Proposed Manual Revision," and then adopted the update on a contentious 3-2 vote—in 2008, "the EEOC unanimously approved the existing guidance . . . after six years of work." *Id.* at 1–2.

Separately, practitioners have criticized the proposed guidance as being "conspicuously devoid of substantive discussion about the Supreme Court's *Bostock* ruling" and its implications for religious employers. *What Employers and Educational Institutions Need to Know About EEOC's Proposed Guidance on Religious Discrimination*, Fisher Phillips (Nov. 24, 2020), https://www.fisherphillips.com/resources-alerts-what-employers-educainstitutions-need[https://perma.cc/DHT8-GG3Y].

72. Equal Emp't Opportunity Comm'n, Proposed Updated Compliance Manual on Religious Discrimination, 85 Fed. Reg. 74719 (proposed Nov. 17, 2020).

73. The EEOC's compliance manual "does not have the force and effect of law and is not meant to bind the public in any way." *Id.* at 4. Rather, it "is designed to be a practical resource for employers, employees, practitioners, and EEOC enforcement staff." *Id.*

74. *Id.* at 24.

75. *Id.* at 21–22.

76. *Id.* at 23.

77. Press Release, U.S. Equal Emp't Opportunity Comm'n, Commission Approves Revised Enforcement Guidance on Religious Discrimination (Jan. 15, 2021), https://www.eeoc.gov/newsroom/commission-approves-revised-enforcement-guidance-religious-discrimination[https://perma.cc/C2WD-R9HN].

religiously motivated interpretation. That guidance lends significant credibility and support to the argument that religious organizations may discriminate against LGBTQ individuals, as well as women and pregnant persons, notwithstanding Title VII's categorical ban on sex discrimination.

III. EACH INTERPRETATION CRITIQUED

This Part critiques each of the three interpretations of Title VII's religious exemption, noting inconsistencies between the construction advocated and the statutory text, case law, and legislative history. While all three interpretations are vulnerable to criticism, the belief-and-conduct and co-religionist interpretations find at least some support in the case law or statutory text. In contrast, the religiously motivated interpretation is seemingly undermined by both the case law and the text such that it should be understood to reflect the policy preferences of its proponents rather than a legally cognizable interpretation of Title VII's religious exemption.

A. The Religiously Motivated Interpretation

Proponents of the religiously motivated interpretation make two arguments for why Title VII's religious exemption should be construed to permit religious organizations to engage in faith-based discrimination on the basis of race, color, sex, or national origin. First, they contend courts generally permit religious organizations to defend against claims of race or sex discrimination by establishing a religious motivation for the challenged employment action.[78] Second, proponents claim that Title VII's expansive definition of religion counsels against a narrow, co-religionist interpretation focusing on individuals' self-identified religious affiliation.[79] However, both of these arguments are suspect.

In asserting that most courts have adopted the religiously motivated interpretation, proponents can cite only two cases, both of which appear inapposite. Proponents claim that the first case, *EEOC v. Mississippi College*,[80] found that Title VII's religious exemption "was available to a Baptist College defending against claims of sex . . . discrimination brought by a [Presbyterian] female applicant for a faculty position" that was ultimately filled by a male Baptist.[81] Proponents concede, however, that the case was actually remanded, with the Fifth Circuit instructing as follows: "If

78. Esbeck, *supra* note 69, at 369 ("[M]ost courts have allowed religious employers to defend against a claim [of employment discrimination] no matter the protected class by introducing evidence of the employer's religious motivation behind its adverse employment decision."); *see also* Phillips, *supra* note 70, at 307 n.62.

79. Esbeck, *supra* note 69, at 369; *see also* Phillips, *supra* note 70, at 302–06.

80. Equal Emp't Opportunity Comm'n v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980).

81. Esbeck, *supra* note 69, at 378–79.

the district court determines . . . the College applied its policy of preferring Baptists over non-Baptists . . . then . . . that decision [is exempt] from the application of Title VII."[82] Alternatively, the Fifth Circuit cautioned that if "the evidence disclose[s] only that the College's preference policy [for Baptists] could have been applied, but in fact it was not considered, . . . [the religious exemption] does not bar" investigation of the plaintiff's sex discrimination allegations.[83] Because the College never claimed to have a personnel policy favoring men over women, much less that such a policy was motivated by the College's religious beliefs, the case cannot be read to support the religiously motivated interpretation.[84] Rather, *Mississippi College* appears to confirm the unremarkable proposition that Title VII's religious exemption protects religious organizations against claims of religious discrimination.

Proponents' reliance on *Maguire v. Marquette University*[85] is similarly misplaced. Proponents describe the Seventh Circuit's decision as "[a]nother example where a case of alleged sex discrimination was found exempt under" Title VII's religious exemption.[86] In reality, the court never reached the ultimate issue of the exemption's applicability.[87] Rather, after acknowledging that "[t]he district court conscientiously grappled with the difficult and complex issues concerning the scope of the religious-employer exemption," the Seventh Circuit concluded that such analysis would not be necessary on appeal: "Fortunately we need not determine whether [the defendant] qualifies as a religious employer under the terms of the exemption and if so whether the exemption covers the type of hiring decision involved here, for this case can be resolved on a much narrower ground."[88] Specifically, because the plaintiff failed to establish a prima facie case of sex discrimination, the Seventh Circuit declined to address the ancillary question of the exemption's availability as an affirmative defense.[89]

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82. *Miss. Coll.*, 626 F.2d at 486.

83. *Id.*

84. Although the College conceded that it had only ever hired men to teach Bible courses, that was not because the College had a general preference of hiring men over women but "[b]ecause no woman ha[d] been ordained as a minister in a Southern Baptist Church in Mississippi." *Id.* at 479. Moreover, that discrepancy had no bearing on the court's decision as the relevant position was in educational psychology, not Bible studies. *Id.*

85. Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987).

86. Esbeck, *supra* note 69, at 379.

87. *Maguire*, 814 F.2d at 1216.

88. *Id.*

89. *Id.* Proponents indirectly rely on a third case, *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189 (4th Cir. 2011). In *Kennedy*, the Fourth Circuit concluded the exemption is not limited to "hiring and firing decisions" but instead "covers the breadth of the relationship between employer and employee." *Id.* at 193. The exemption was therefore held to preclude not just the plaintiff's discriminatory discharge claim but also her religious harassment and retaliation claims. *Id.*

Proponents of a religiously motivated interpretation contend that "[t]he logic of *Kennedy* necessarily applies to claims for discrimination on the basis of race, color, sex, or national origin." Esbeck, *supra* note

Although proponents' reliance on the text of Title VII presents a more compelling defense of the religiously motivated interpretation than does proponents' reliance on the existing case law, it, too, suffers from serious defects. To understand the text-based argument for the religiously motivated interpretation, it is helpful to revisit the exemption's text: "This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . [organization] of its activities."[90] From this, proponents opine that some may wrongly conclude that the exemption is narrow by "read[ing] the prepositional phrase 'of a particular religion' with a focus on the adjective 'particular' while overlooking the noun 'religion,'" leading to the text being read as "'particular denomination' or 'particular church.'"[91] Proponents contend, however, that such a reading is inconsistent with the statutory text. They emphasize that Title VII defines the term "religion" as "includ[ing] all aspects of religious observance and practice, as well as belief."[92] According to proponents, "[t]hat definition makes 'religion' essentially the religion thought best by the employer to further its work."[93] Consequently, proponents argue the phrase "of a particular religion" should be construed to mean "the religion particular to each employer," including any religious beliefs and practices that have the effect of discriminating on the basis of race, color, sex, or national origin.[94]

Ironically, in seeking to advance a text-based argument for the religiously motivated interpretation, proponents seemingly discount key provisions of Title VII's text. Specifically, proponents' contention that Congress intended "of a particular religion" to mean "the religion particular to each employer" is belied by the text, which speaks to individuals' religion

69, at 380. While proponents are free to argue by analogy, they overstate their case in asserting that *Kennedy's* rationale "necessarily applies" to Title VII's other characteristics. Indeed, the discrimination at issue in *Kennedy* stemmed from the plaintiff's attire, specifically her wearing of "modest garb" consistent with her religious beliefs. 657 F.3d at 190. At no point did she allege discrimination on the basis of her race, color, sex, or national origin. *Id.* at 191. Furthermore, while proponents' argument is conceivably consistent with the Fourth Circuit's rationale, it errs in elevating a court decision on an unrelated, secondary issue over the exemption's text, which speaks to "the employment of individuals of a particular religion." *Id.* at 192.

90. 42 U.S.C. § 2000e-1(a) (2018).

91. Esbeck, *supra* note 69, at 383.

92. *Id.* at 376. *But see* 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

93. Esbeck, *supra* note 69, at 383.

94. *Id.*; *see also* Phillips, *supra* note 70, at 312.

rather than organizations' religion.[95] Had Congress favored the interpretation advanced by proponents, legislators presumably would have used different language. Indeed, at the same time Congress was debating the Equal Employment Opportunity Act of 1972 and its proposed revisions to Title VII's religious exemption,[96] Congress was considering another piece of legislation—the Education Amendments of 1972[97]—that contained a religious exemption of its own. As ultimately enacted, Title VII's religious exemption retained its focus on individuals' religion while the Education Amendments' religious exemption addresses the religious beliefs and practices of organizations.[98] The textual differences in these contemporaneous pieces of legislation should be read to reflect deliberate drafting decisions by Congress, leaving the religiously motivated interpretation at odds not only with the statutory text but also the legislative history.[99]

Another problem with the text-based argument for the religiously motivated interpretation is its reliance on the statutory definition of "religion." In arguing for an expansive interpretation of Title VII's religious exemption, proponents of the religiously motivated interpretation note that the term "religion" is defined to include "all aspects of religious observance and practice, as well as belief."[100] While accurate, proponents' proffered definition is conspicuously incomplete. In its entirety, Title VII defines "religion" to include: "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[101] Thus, it is employees'—not employers'—

95. 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply . . . to a religious [organization] . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] . . . of its activities.").

96. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C. (2018)).

97. Pub. L. No. 92-318, 86 Stat. 235 (codified as amended in scattered sections of 7, 12, 20, 29, and 42 U.S.C.).

98. *Compare* 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . [organization] of its activities."), *with* 20 U.S.C. § 1681(a)(3) ("[T]his section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.").

99. *See generally* United States v. Blackmon, 839 F.2d 900, 913–14 (2d Cir. 1988) (consulting contemporaneously enacted legislation in construing ambiguous statutory provision).

100. Esbeck, *supra* note 69, at 376 n.27; *see also* Phillips, *supra* note 70, at 299.

101. 42 U.S.C. § 2000e(j).

religious observance, practice, and belief with which Title VII is ostensibly concerned,[102] as the statute's legislative history further confirms.

At the time of its enactment in 1964, Title VII did not define the term "religion" or otherwise require that employers accommodate their employees' religious beliefs and practices.[103] After receiving several complaints "raising the question whether it is religious discrimination to discharge or refuse to hire employees who regularly observe a day other than Sunday as the Sabbath,"[104] the EEOC issued new guidance in 1967 addressing the issue: "The Commission believes that the duty not to discriminate on religious grounds . . . includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees," including but not limited to employees' Sabbath observance.[105] However, the guidance was met with resistance. Some courts—including an equally divided Supreme Court[106]—continued to reject religious discrimination claims predicated on a failure to accommodate theory.[107] Therefore, the issue was ripe for consideration in 1971 when Congress began debating the Equal Employment Opportunity Act.

The language that would become Title VII's definition of "religion" was initially offered as an amendment to the Senate version of the Equal Employment Opportunity Act.[108] The impetus for the amendment, according to its sponsor, was the "refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to abstain from work . . . on particular days."[109] Following a brief debate, the Senate voted unanimously to adopt the amendment.[110] Subsequently, the Senate prepared a section-by-section analysis of the bill, describing the amendment as follows: "This subsection, which is new, defines 'religion' to include all aspects of religious observance, practice and belief, so as to prohibit discrimination against employees whose 'religion' requires observances, practices and beliefs which differ from the employer's or potential employer's norm."[111] The House agreed to the amendment in

102. *See* Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1387 (1987) (observing Title VII's definition of religion "does not apply expressly to the exemption section for religious organizations").

103. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2018)).

104. 118 CONG. REC. 714 (1972).

105. *Id.*

106. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam*, 402 U.S. 689 (1971).

107. 118 CONG. REC. 705–06 (1972) (statement of Sen. Randolph).

108. *Id.* at 705.

109. *Id.* (statement of Sen. Randolph).

110. *Id.* at 730–31 (passing in a vote of 55 to 0 with 45 senators absent).

111. *Id.* at 4940.

conference committee and prepared a section-by-section analysis of its own, describing the amendment as "requir[ing] employers to make reasonable accommodations for employees whose 'religion' may include observances, practices and beliefs such as sabbath observance, which differ from the employer's or potential employer's requirements regarding standards, schedules, or other business-related employment conditions."[112]

At no time during the debate did any legislator—either in the House or Senate—make an oral or written statement indicating that the amendment was designed for, or had the ancillary effect of, expanding Title VII's religious exemption.[113] The amendment's sponsor, Senator Jennings Randolph, certainly never made such an assertion, as his only stated objective was to protect employees' religious rights rather than those of employers.[114] The sole concern raised by Senator Randolph's colleagues was whether the amendment's "undue hardship" standard would be sufficiently flexible to accommodate the unique facts of each case.[115] Moreover, neither the Senate's nor House's written analysis indicated that the amendment would serve to broaden Title VII's religious exemption or even acknowledged that outcome as a possibility.[116] Thus, both Title VII's text and legislative history counsel against a religiously motivated interpretation of the statute's religious exemption.

Apart from the foregoing arguments offered in support of their preferred construction, proponents of the religiously motivated interpretation claim that several courts have rejected the co-religionist interpretation.[117] Although factually correct, this contention is somewhat misleading as each of the cases relied upon by proponents actually adopts the belief-and-conduct interpretation—a construction at odds with the religiously motivated interpretation.[118] While the religiously motivated interpretation would permit

112. *Id.* at 7564.

113. *See* Little v. Wuerl, 929 F.2d 944, 950 (3d Cir. 1991) ("There appears to be no legislative history to indicate that Congress considered the effect of this definition on the scope of the exemptions for religious organizations."). For a complete legislative history of the EEOA, see EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, PROQUEST LEGISLATIVE INSIGHT, https://li.proquest.com/legislativeinsight/LegHistMain.jsp?searchtype=DOCPAGE&parentAccNo=PL92-261&docAccNo=PL92-261&docType=LEG_HIST&resultsClick=true&id=1609174243414 (last visited Jan. 7, 2021).

114. 118 CONG. REC. 705–06 (1972) (statement of Sen. Randolph).

115. *Id.* at 706.

116. *Id.* at 4940–44 and 7563–67.

117. Esbeck, *supra* note 69, at 380–83.

118. *See* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 627–28 (6th Cir. 2000) (affirming summary judgment for Baptist college on employee's religious discrimination claim where "[t]he College contend[ed] that it terminated [the employee] because she assumed a leadership position in an organization that publicly supported homosexual lifestyles, a view that clashed with the Southern Baptist Convention's outspoken denunciation of homosexuality and the College's avowed mission"); Killinger v. Samford Univ., 113 F.3d 196, 198 (11th Cir. 1997) (affirming summary judgment for Baptist university on faculty member's religious discrimination claim where the professor alleged he was discriminated against

religious organizations to discriminate on the basis of any of Title VII's protected characteristics if consistent with the organizations' religious beliefs, the belief-and-conduct interpretation would not allow religious organizations to discriminate on the basis of race, color, sex, or national origin, even if mandated by the organizations' faith. Consistent with the belief-and-conduct interpretation, each of the cited cases entails a claim of religious discrimination completely unrelated to the plaintiff's race, color, sex, or national origin.[119] Hence, the case law is a mixed bag for proponents of the religiously motivated interpretation, undermining not only the co-religionist interpretation but also their preferred construction.[120]

B. The Belief-and-Conduct Interpretation

Seeking to refute the co-religionist view, proponents of the belief-and-conduct interpretation invoke much of the same case law as their colleagues who support the religiously motivated interpretation.[121] Unlike the latter group, however, proponents of the belief-and-conduct interpretation are able to rely on the cases' actual holdings which not only reject the co-religionist approach but also endorse the belief-and-conduct interpretation.[122]

"because he did not adhere to and sometimes questioned the fundamentalist theology advanced by the leadership of the" divinity school); *Little*, 929 F.2d at 946 (affirming summary judgment for Catholic school on teacher's religious discrimination claim where the school had declined to renew the teacher's contract "because she had remarried without pursuing the proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage").

119. *See Hall*, 215 F.3d at 627–28; *Killinger*, 113 F.3d at 197–98; Little v. Wuerl, 929 F.2d 944, 946, 951 (3d Cir. 1991).

120. An additional criticism of the religiously motivated interpretation is that it may violate the Establishment Clause. *See* Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980) ("[T]o construe [the exemption] to exempt All Forms of discrimination . . . would itself raise first amendment problems since it would imply the government's special preference of sectarian schools over nonsectarian schools.").

121. Melcon, *supra* note 64, at 301–02 n.122 (asserting that *Little* "is not reconcilable with" and *Hall* is "similarly inconsistent with" the co-religionist approach).

122. *See Hall*, 215 F.3d at 627–28; *Killinger*, 113 F.3d at 197–98; *Little*, 929 F.2d at 946, 951. Proponents of the belief-and-conduct interpretation cite two additional cases not referenced by advocates of the religiously motivated approach, Melcon, *supra* note 64, at 302 n.122, and—unlike the authority offered in support of the latter view—these cases do appear to support the proposition for which they are cited. *See* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000) (observing "religious schools cannot discriminate based on pregnancy," while qualifying that "if the school's purported 'discrimination' is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy"); Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (holding religious exemption barred employee's claim she was terminated for wearing attire consistent with her non-Catholic religious beliefs that was deemed "inappropriate for a Catholic facility"); *see also* Larsen v. Kirkham, 499 F. Supp. 960, 966–67 (D. Utah 1980) (upholding religious exemption against constitutional challenge and faulting plaintiff for "fail[ing] to detail the constitutional nuances which permit a religious organization to hire its own members to teach, but prohibit it from refusing to retain nominal members who are perceived as not in conformity with the currently expressed ideals of religious practice").

Conversely, in attempting to repudiate the religiously motivated approach, proponents of the belief-and-conduct interpretation rely on much of the same case law as those advocating a co-religionist interpretation.[123] Unlike the latter faction, however, proponents of the belief-and-conduct interpretation contend these courts erred in limiting the scope of Title VII's religious exemption to individuals' self-identified religious affiliation to the exclusion of belief and practice.[124]

1. Proponents' Arguments against a Co-religionist Interpretation

Shifting from case law to the statutory text, proponents of the belief-and-conduct interpretation advance two arguments for why a co-religionist construction cannot be reconciled with the exemption's text. First, they cite Title VII's expansive definition of "religion,"[125] which is problematic for all of the reasons already discussed.[126] Second, proponents assert that an analogous provision of the Americans with Disabilities Act of 1990[127] (ADA) counsels against a co-religionist interpretation of Title VII's religious exemption.[128] The latter argument notes that the religious exemptions found in Title VII and the ADA are virtually identical,[129] with one major caveat.[130] The ADA's exemption is not limited to the "particular religion" provision found in Title VII but includes a second provision stating that "[u]nder this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization."[131] Although proponents of the belief-and-conduct interpretation concede that "Congress has not inserted this ['religious tenets'] language into Title VII," they contend "[i]t would be odd if the identical 'particular religion' language in Title VII

123. *See* Equal Emp't Opportunity Comm'n v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); Equal Emp't Opportunity Comm'n v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982), *abrogated on other grounds by* Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991); Melcon, *supra* note 64, at 303.

124. *See* Melcon, *supra* note 64, at 307–12.

125. *Id.* at 297; *see also* 42 U.S.C. § 2000e(j) (2018) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

126. *See supra* notes 100–116 and accompanying text.

127. 42 U.S.C. §§ 12101–12213.

128. *See* Melcon, *supra* note 64, at 298–99.

129. *Compare* 42 U.S.C. § 2000e-1(a) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."), *with* 42 U.S.C. § 12113(d)(1) ("This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

130. Melcon, *supra* note 64, at 298.

131. 42 U.S.C. § 12113(d)(2).

and the ADA carried significantly different meanings."[132] At a minimum, they argue, the ADA's exemption is "suggestive as to how" Title VII's exemption should be interpreted.[133] The ADA's legislative history suggests otherwise.

Indeed, Congress left no doubt whether or to what extent the religious exemptions of Title VII and the ADA should be construed consistently. With regard to the ADA's "particular religion" provision, Congress made clear that "the ADA [should] be interpreted in a manner consistent with title VII of the Civil Rights Act of 1964."[134] Conversely, Congress cautioned that the ADA's "religious tenets" provision was "not intended to affect in any way the scope given to . . . title VII" as the provision was instead "modeled after . . . title IX of the Education Amendments of 1972."[135] Accordingly, Congress expected the "terms 'religious organizations' and 'religious tenets' [to] be interpreted consistent with the Department of Education's regulations" promulgated pursuant to Title IX[136] rather than Title VII.

Additionally, because the phrase "religious tenets" appears in both the ADA and Title IX, its omission from Title VII presumably reflects a conscious drafting choice by Congress. Indeed, at the same time Congress was debating Title IX of the Education Amendments of 1972[137]—upon which the ADA's "religious tenets" provision would later be modeled—it was also considering the Equal Employment Opportunity Act of 1972[138] and its proposed revisions to Title VII's religious exemption. That Congress ultimately chose to modify certain portions of Title VII's religious exemption

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132. Melcon, *supra* note 64, at 299. *But see* Douglas Laycock, *Defense Authorization Bill Needs to Protect Religious Liberty*, THE HILL (Nov. 17, 2016, 10:45 AM), https://thehill.com/blogs/congress-blog/labor/306539-defense-authorization-bill-needs-to-protect-religious-liberty [https://perma.cc/KF4A-3VA5] (observing "this sensible [religious tenets] language applies only to the Disabilities Act, not to other statutes and regulations prohibiting employment discrimination").

133. Melcon, *supra* note 64, at 299. *But see* Bridget Bowman & Niels Lesniewski, *Democrats Draw Line over LGBT Provision in Defense Authorization Bill*, ROLL CALL (Oct. 25, 2016, 10:28 AM), https://www.rollcall.com/2016/10/25/democrats-draw-line-over-lgbt-provision-in-defense-authorization-bill/ [https://perma.cc/Y6X4-QDR8] (reporting President Obama and forty-two senators successfully opposed efforts to amend the existing religious exemption for federal contractors, which is modeled after Title VII, to include a "religious tenets" provision).

134. H.R. REP. NO. 101-485, pt. 2, at 76–77 (1990); S. REP. NO. 101-116, at 38–39 (1989); *see also* H.R. REP. NO. 101-485, pt. 3, at 46 (1990) (observing the "particular religion" provision "is similar to [the religious exemption] . . . included in . . . the Civil Rights Act of 1964, and should be interpreted in a consistent manner").

135. H.R. REP. NO. 101-485, pt. 2, at 77 (1990); S. REP. NO. 101-116, at 38–39 (1989); *see also* H.R. REP. NO. 101-485, pt. 3, at 46 (1990) ("Nothing in this section should be interpreted to affect [the religious exemption] . . . of the Civil Rights Act of 1964.").

136. H.R. REP. NO. 101-485, pt. 2, at 77 (1990); H.R. REP. NO. 101-485, pt. 3, at 46 (1990); S. REP. NO. 101-116, at 38–39 (1989).

137. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended in scattered sections of 7, 12, 20, 29, and 42 U.S.C. (2018)).

138. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C.).

without adding a "religious tenets" provision similar to the one included in Title IX suggests that although Congress was aware of this disparity, it chose not to include similar language in Title VII.

Proponents' argument that the ADA counsels against a co-religionist interpretation of Title VII's religious exemption is further undermined by the ADA's text. If the "particular religion" provision of Title VII—as incorporated almost verbatim in the ADA—already permits religious organizations to prefer persons whose beliefs and conduct are consistent with the organizations' faith, what purpose does the ADA's "religious tenets" provision serve? Why was Congress not content to adopt Title VII's religious exemption as revised in 1972 and be done with the matter?

Proponents may respond that the "religious tenets" provision was included in the ADA in response to the specious co-religionist interpretation adopted by the Ninth[139] and Fourth[140] Circuits. Specifically, proponents may argue that while Title VII has always permitted religious organizations to consider individuals' beliefs and conduct—in addition to self-identified religious affiliation—when making staffing decisions, Congress chose to include a second, ostensibly redundant "religious tenets" provision in the ADA to eliminate any doubt on the matter and foreclose application of the narrow, co-religionist interpretation that, as of 1990, had been endorsed by two circuit courts.[141] Had that been the case, however, Congress presumably would have acknowledged that fact somewhere in the ADA's "purposes" section or in the voluminous committee reports, hearings, or floor debates, but it did not.[142] And while Congress has at times taken a belt-and-suspenders approach to legislating,[143] its failure to in any way note or acknowledge that fact in relation to the ADA's "religious tenets" provision suggests that the

139. Equal Emp't Opportunity Comm'n v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982), *abrogated on other grounds by* Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991).

140. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166–67 (4th Cir. 1985).

141. *Cf.* Equality Act, H.R. 5, 116th Cong. § 2(12)(13) (2019) (observing that while "[n]umerous provisions of Federal law expressly prohibit discrimination on the basis of sex, and Federal agencies and courts have correctly interpreted these prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity, and sex stereotypes, . . . [t]he absence of explicit prohibitions of discrimination on the basis of sexual orientation and gender identity under Federal statutory law has created uncertainty" necessitating that "sexual orientation" and "gender identity" be added to Title VII alongside "sex").

142. *See* PROQUEST LEGISLATIVE INSIGHT, https://li.proquest.com/legislativeinsight/.jsp?searchtype=DOCPAGE&parentAccNo=PL101-336&docAccNo=PL101-336&docType=LEG_HIST&resultsClick=true&id=1609010906425 (last visited Jan. 8, 2021).

143. *See* Ethan J. Leib & James J. Brudney, *The Belt-and-Suspenders Canon*, 105 IOWA L. REV. 735, 743–50 (2020) (cataloguing "instances of belt-and-suspenders drafting by Congress since the early 1990s").

provision should be interpreted consistent with longstanding rules of statutory construction, including the canon against surplusage.[144]

2. Proponents' Arguments against a Religiously Motivated Interpretation

Separately, proponents of the belief-and-conduct interpretation advance two arguments for why a religiously motivated construction of Title VII's religious exemption cannot be squared with the statutory text. First, they contend that "[i]f Congress intended to permit religious employers to discriminate in virtually any fashion so long as they provide a religious justification, then in all likelihood Congress would have written the exemption to emphasize the employer's religion"—as they did in Title IX—rather than the employee's religion as they did in Title VII,[145] both as originally enacted in 1964 and as subsequently amended in 1972.[146] This argument is compelling for the reasons previously discussed,[147] and particularly because the statutes were contemporaries so that one may presume Congress was aware of, and comfortable with, this discrepancy when it enacted the statutes in 1972.[148]

Second, proponents cite Congress's repeated rejection of proposals seeking to grant religious organizations complete immunity from Title VII as confirmation that these entities are liable for discrimination on the basis of any of the statute's enumerated characteristics other than religion.[149] This argument appears consistent with Congress's section-by-section analysis of the Equal Employment Opportunity Act of 1972, which noted that—notwithstanding the broadening of Title VII's religious exemption—religious organizations "remain subject to the provisions of Title VII with regard to race, color, sex or national origin."[150] However, some commentators have dismissed this statement as "an oft-repeated truism" which, while

144. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995) ("The Court will avoid a reading which renders some words [of the statute] altogether redundant."); *see also* John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 653–55 (2016) (noting federal courts' frequent invocation of the canon against surplusage).

145. Melcon, *supra* note 64, at 299. *Compare* 20 U.S.C. § 1681(a)(3) (2018) ("[T]his section shall not apply . . . if the application of this subsection would not be consistent with the religious tenets of such organization."), *with* 42 U.S.C. § 2000e-1(a) (2018) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion.").

146. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 104.

147. *See supra* notes 95–99, 137–138 and accompanying text.

148. *Cf.* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015) (holding Congress "accepted and ratified" the Courts of Appeals' unanimous interpretation of a disputed statutory provision where "Congress was aware of this unanimous precedent" and "made a considered judgment to retain the relevant statutory text" while amending other portions of the statute).

149. Melcon, *supra* note 64, at 300.

150. 1972 LEGISLATIVE HISTORY, *supra* note 30, at 1844–45, 1856.

provisionally accurate, is "not the whole story."[151] Indeed, advocates of a religiously motivated interpretation contend the exemption's text is meant to be preempting so that "when the other elements of the affirmative defence are proven" the religious exemption "will sweep away all possible claims by a Title VII plaintiff," including those for "race, color, sex, or national origin" discrimination.[152] Proponents of the belief-and-conduct interpretation seemingly have the better argument, however, as to date no court has endorsed the latter view.[153]

C. The Co-religionist Interpretation

Proponents of the co-religionist interpretation advance two arguments for why Title VII's religious exemption should be read narrowly so that organizations' staffing discretion is limited to preferring persons of a particular religious affiliation. First, they contend circuit courts "ha[ve] long held that the Title VII religious organization exemption provides a 'limited exemption . . . in favor of co-religionists'" such that it would be a "depart[ure] from this understanding" if religious organizations were permitted "to condition employment on [a worker's] acceptance of or adherence to religious tenets."[154] Second, proponents assert "Congress was emphatic that the religious organization exemption was not a license for an employer to discriminate . . . based on the employer's personal religious values."[155] However, upon closer examination, these sources seem less an endorsement of the co-religionist interpretation than a repudiation of the religiously motivated interpretation.[156] Consequently, while these sources may be construed to favor the co-religionist interpretation, they also support a belief-and-conduct construction.

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151. Esbeck, *supra* note 69, at 384.

152. *Id. But see* Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1368 (2016) (warning that "if and when sexual orientation becomes a prohibited category in the law and a plaintiff sues on that ground, a[religious] organization's moral-conduct policy that makes any distinction between same-sex and opposite-sex conduct would not be sheltered by the exemption—no matter how deeply that rule is grounded in the religion's moral teachings"); Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, 11 ENGAGE 4 & n.1 (2010) ("[I]f ENDA amended Title VII by adding sexual orientation and gender identity as statuses protected by Title VII, then religious organizations would be subject to these new nondiscrimination requirements, for the religious exemption in Title VII only exempts religious organizations from the requirement not to engage in religious employment discrimination, while not removing the obligation not to engage in employment discrimination with respect to the other protected statuses.").

153. *See* sources cited *supra* note 68.

154. Letter from Josh Shapiro, Att'y Gen. of Pa., et al., *Notice of Proposed Rulemaking: Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption* 13, 15 (Sept. 17, 2019), https://attorneysgeneral.org/wp-content/uploads/2019/09/.09.17-Comments-re-Religious-Exemptions-in-the-Workplace.pdf [http://perma.cc/VP4Y-DHWV].

155. *Id.* at 14.

156. *See infra* notes 157–164 and accompanying text.

Proponents cite only two cases in support of the first argument, both of which are from the Ninth Circuit.[157] In *EEOC v. Pacific Press Publishing Ass'n*, the court observed that "Title VII provides only a limited exemption enabling [religious organizations] to discriminate in favor of co-religionists," and held that a religious organization was not immune from a female employee's claim of sex discrimination.[158] Because the court rejected the religiously motivated interpretation without elaborating on what it meant by "co-religionists"—i.e., persons of the same religious affiliation versus persons holding the same spiritual beliefs and observing the same religious practices—a co-religionist or belief-and-conduct interpretation appears equally plausible.[159]

This same ambiguity is present in the second case, *EEOC v. Fremont Christian School*. There, the court reaffirmed that religious organizations may be liable for sex discrimination notwithstanding Title VII's religious exemption.[160] Specifically, the court observed that "[w]hile the [exemption's] language . . . makes clear that religious institutions may base relevant hiring decisions upon religious preferences, 'religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex.'"[161] Here, the court's reference to "religious preferences" rather than "co-religionists" seems to afford religious organizations greater leeway when it comes to staffing decisions than simply preferring persons of a particular religious affiliation. This variation in terminology is by no means conclusive, however, such that the case remains susceptible to either interpretation.

Proponents of the co-religionist interpretation also rely upon legislative history in support of their construction, but that history likewise seems to reflect congressional repudiation of the religiously motivated interpretation rather than an endorsement of the co-religionist interpretation. Proponents cite *EEOC v. Pacific Press Publishing Ass'n* to support their contention that "Congress was emphatic that the religious organization exemption was not a

157. Shapiro, *supra* note 154, at 13–14. Although proponents cite a third case, *id.* at 13 n.92, subsequent circuit precedent appears to endorse a belief-and-conduct approach over a co-religionist interpretation. *Compare* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996) (observing religious organizations "may choose to employ members of their own religion without fear of being charged with religious discrimination," yet remain liable for discrimination on the basis of sex), *with* Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000) (observing "religious schools cannot discriminate on the basis of pregnancy," while qualifying that "if the school's purported 'discrimination' is based on a policy of preventing nonmarital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated based on pregnancy").

158. Equal Emp't Opportunity Comm'n v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1276 (9th Cir. 1982), *abrogated on other grounds by* Am. Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir. 1991).

159. *See id.* at 1276.

160. Equal Emp't Opportunity Comm'n v. Fremont Christian Sch., 781 F.2d 1362, 1364 (9th Cir. 1986).

161. *Id.* at 1366 (quoting *Pac. Press Publ'g Ass'n*, 676 F.2d at 1276).

license for an employer to discriminate . . . based on the employer's personal religious values."[162] Yet, the case simply notes that in 1972, Congress declined to adopt a "blanket exemption" for religious organizations in favor of broadening the exemption's scope "only slightly to allow religious employers to discriminate on the basis of religion with respect to all—not just religious activities."[163] Thus, rather than implicitly endorsing the co-religionist interpretation by explicitly rejecting the belief-and-conduct interpretation, the case appears to make no distinction between the two. The case is unequivocal, however, in disavowing the religiously motivated interpretation: "The legislative history shows that . . . [religious organizations] remain subject to the provisions of Title VII with regard to race, color, sex, or national origin."[164]

Surprisingly, co-religionist proponents overlook the Civil Rights Act of 1991[165] (the "Act"), which—unlike the Equal Employment Opportunity Act of 1972—actually supports a co-religionist interpretation. Passed in response to a controversial Supreme Court decision, the Act amended Title VII in several respects.[166] One provision left conspicuously unaltered, however, was Title VII's religious exemption.[167] As discussed in greater detail below, this fact seemingly cuts in favor of the co-religionist interpretation and against more expansive constructions, such as the belief-and-conduct and religiously motivated interpretations.

At the time of the Act's introduction, the only two circuit courts to have addressed the issue had both adopted what could be construed as a co-religionist interpretation of Title VII's religious exemption.[168] If Congress had disagreed with that construction, the Act would have been the obvious legislative vehicle for codifying the belief-and-conduct or religiously motivated interpretation. Thus, Congress's silence on the matter could reflect tacit approval of the co-religionist interpretation.[169] Conversely, if a significant minority of legislators had sought to include a provision repudiating the co-religionist interpretation only to come up a few votes short, it would have at least shown that Congress was of two minds on the

162. Shapiro, *supra* note 154, at 14 (citing *Pac. Press Publ'g Ass'n*).

163. *Pac. Press Publ'g Ass'n*, 676 F.2d at 1277.

164. *Id.* (quoting 118 CONG. REC. 7167 (1972)).

165. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 5, 9, 28, 29, and 42 U.S.C. (2018)).

166. *Id.* at 1071 ("The purposes of this Act are . . . to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.").

167. *Id.*

168. *See supra* text accompanying notes 55–57.

169. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015) (holding Congress "accepted and ratified" the Courts of Appeals' unanimous interpretation of a disputed statutory provision where "Congress was aware of this unanimous precedent" and "made a considered judgment to retain the relevant statutory text" while amending other portions of the statute).

matter while providing further legislative cover for courts inclined to take a more expansive approach. However, at no point during the Act's consideration was an amendment proposed or debate held regarding Title VII's religious exemption.[170] Even the Congressional Record's voluminous supplementary materials make no mention of the religious exemption.[171] This dearth of legislative history may indicate Congress's endorsement of the co-religionist approach or, at the very least, suggest legislative indifference to how Title VII's religious exemption should be interpreted.

In response, proponents of a more expansive interpretation may argue that in 1991 Congress was likely unaware of *EEOC v. Pacific Press Publishing Ass'n*[172] and *Rayburn v. General Conference of Seventh-Day Adventists*[173] such that it would be improper to read its silence on the matter as acceptance of the co-religionist approach. Although the Supreme Court has found congressional inaction in the face of unanimous circuit court precedent to be "convincing support for the conclusion that Congress accepted and ratified" a particular statutory interpretation, the Court predicated its holding on the fact that "all nine Courts of Appeals to have addressed the question" had adopted the same construction and "Congress was aware of this unanimous precedent."[174] Here, however, the Act's legislative history is completely devoid of any reference to Title VII's religious exemption, and the related precedent is far less compelling, reflecting the consensus of two circuit courts rather than nine. Accordingly, Congress may simply have been unaware of these two decisions in 1991, in which case the Act's silence on the matter should be understood to reflect congressional nescience rather than affirmation.

Yet, even if Congress was unaware of these two circuit court rulings, the Act may still be construed as supporting a co-religionist interpretation provided Congress is presumed to be familiar with its own legislation.[175] Between the passage of Title VII and the Civil Rights Act of 1991, Congress enacted the Education Amendments of 1972[176] and the Americans with Disabilities Act of 1990,[177] both of which (1) contain expansive religious exemptions extending beyond mere affiliation to include belief and practice;

170. *See* PROQUEST LEGISLATIVE INSIGHT, https://li.proquest.com/legislativeinsight/HistMain.jsp?searchtype=DOCPAGE&parentAccNo=PL102-166&docAccNo=PL102-166&docType=LEG_HIST&resultsClick=true&id=1609089446130 (last visited Jan. 8, 2021).

171. *Id.*

172. EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982).

173. Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

174. *Inclusive Cmtys. Project*, 576 U.S. at 535–36.

175. *See* Bowen v. Massachusetts, 487 U.S. 879, 896 (1988) (acknowledging "the well-settled presumption that Congress understands the state of existing law when it legislates").

176. Pub. L. No. 92-318, 86 Stat. 235 (codified as amended in scattered sections of 7, 12, 20, 29, and 42 U.S.C. (2018)).

177. 42 U.S.C. §§ 12101–12213.

and (2) explicitly reference religious organizations' religious tenets.[178] Thus, the intervening enactment of these two statutes indicates that Congress understands the difference between religious affiliation and religious practice and knows how to legislate protection for the latter when it wishes to do so. If Congress is presumed to have been familiar with these two statutes at the time of the Act's passage in 1991—an assumption that does not seem unreasonable with regard to the ADA in particular given that it had been passed less than a year before and only after its "religious tenets" provision had been debated extensively in both chambers[179]—Congress's failure to add similar language to Title VII presumably should be construed as endorsing the co-religionist approach.[180]

In summary, although each construction is vulnerable to criticism, the religiously motivated interpretation appears the least defensible of the three. Whereas the other interpretations find support in either the case law (as with the belief-and-conduct approach) or the statutory text as informed by legislative history (as with the co-religionist approach), the religiously motivated interpretation is undermined by both the case law and the text. Indeed, to date, the religiously motivated interpretation has not been endorsed by a single federal court, and its proffered textual justification is belied by Title VII's legislative history.

IV. THE INTERPRETATIONS' IMPLICATIONS FOR LGBTQ WORKERS

This Part examines each interpretation's implications for religious organizations wishing to make non-ministerial staffing decisions on the basis of one or more protected characteristics. Whereas LGBTQ persons stand to retain meaningful employment protections under either a co-religionist or belief-and-conduct interpretation of Title VII's religious exemption, the religiously motivated interpretation threatens to collapse the religious exemption of Title VII into the ministerial exception of the First Amendment, thereby leaving LGBTQ individuals—together with women, pregnant persons, and racial and ethnic minorities—vulnerable to discrimination in a host of non-ministerial, ostensibly secular positions.

A. The Co-religionist Interpretation

Under a co-religionist interpretation of Title VII's religious exemption, religious organizations could not discriminate against LGBTQ persons—or women or pregnant persons—when staffing non-ministerial positions unless the individuals were of a different religious affiliation than the organization.

178. *Id.* § 12113(d)(2); Pub. L. No. 92-318, 86 Stat. 235, 373.

179. *See supra* notes 134–136 and accompanying text.

180. *See generally* United States v. Blackmon, 839 F.2d 900, 914 (2d Cir. 1988) (consulting contemporaneously enacted legislation when construing ambiguous provision).

Accordingly, a Catholic charity would be allowed to reject a Methodist applicant who is also transgender or terminate a gay employee who converts from Catholicism to Judaism, provided the parties' disparate religious affiliation is not simply pretext for unlawful sex discrimination.[181] Likewise, a Presbyterian retirement home would be permitted to fire a longtime female employee upon learning she now considers herself an atheist just as a Lutheran hospital would be able to reject a pregnant applicant who discloses she is Greek Orthodox—again, provided the organizations' proffered religious justification is not merely pretext for sex discrimination.

With respect to ministerial positions, however, these organizations would remain free to prefer individuals of a certain race, color, national origin, or sex (including sexual orientation, gender identity, and pregnancy status).[182] That is because the ministerial exception is "grounded in the First Amendment"—specifically, the Establishment Clause and Free Exercise Clause[183]—rather than the religious exemption of Title VII.[184] As recognized by the Supreme Court, the ministerial exception protects a religious organization's "autonomy with respect to internal management decisions that are essential to the institution's central mission" in part by ensuring courts

181. Lacking direct evidence of discrimination, a Title VII plaintiff must rely on the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to advance their claim. *McDonnell Douglas* allows plaintiffs to establish a prima facie case of discrimination using indirect or circumstantial evidence. *Id.* Specifically, once a plaintiff has established a prima facie case of discrimination—by showing (1) membership in a protected class; (2) qualification for the position; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination on the basis of membership in the protected class—the burden shifts to the employer to come forward with evidence indicating the contested action was taken for legitimate, non-discriminatory reasons. *Id.* at 802–03. If the employer does so, the burden then shifts back to the plaintiff to prove that the employer's proffered reason is pretext. *Id.* at 803–04. Dissimilar treatment of similarly situated individuals is one means of establishing pretext. *Id.* at 804.

Returning to the hypothetical above, if the Catholic charity hired a cisgender Methodist applicant for the position and that individual's qualifications were comparable to those of the transgender applicant who was rejected, that would suggest it was the latter candidate's gender identity/sex that led to the adverse employment action rather than the individual's religion. Similarly, if the charity retained a heterosexual employee who converted from Catholicism to Judaism and that person was similarly situated to the gay employee who was fired after converting from Catholicism to Judaism, that would suggest it was the individual's sexual orientation/sex that led to the adverse employment action rather than the person's religion.

182. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting) ("When it applies, the [ministerial] exception is extraordinarily potent: It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their 'ministers,' even when the discrimination is wholly unrelated to the employer's religious beliefs or practices.").

183. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

184. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012).

"stay out of employment disputes involving those holding certain important positions."[185]

Thus, even under a co-religionist interpretation of Title VII, religious organizations would retain unfettered discretion over a wide range of staffing decisions as the First Amendment's ministerial exception is not limited to the heads of religious congregations.[186] While the Supreme Court has "declined to adopt a rigid formula for deciding when an employee qualifies as a minister," the Court has identified several factors that "may be important" in that determination: the title, if any, conferred on the person ("minister" or otherwise), the person's academic and religious training, and whether the person presents themself as responsible for inculcating others in the faith.[187] The most important factor, however, "is what an employee does," i.e., the individual's day-to-day job responsibilities.[188] Consistent with this flexible, fact-based approach, the ministerial exception has been found to apply to a primary school teacher charged with "the faith formation of [her] students" even though she did not hold a clerical title or occupy an administrative position.[189] Other persons deemed "ministers" under the exception include individuals working in such diverse capacities as communication managers,[190] music directors,[191] and kosher supervisors.[192] Religious organizations, therefore, would remain free to discriminate against LGBTQ persons in an array of ministerial positions notwithstanding a co-religionist interpretation of Title VII's religious exemption.

B. *The Belief-and-Conduct Interpretation*

Under a belief-and-conduct interpretation, religious organizations would be permitted to discriminate against LGBTQ persons who do not share the entities' beliefs or adhere to the entities' faith-based conduct requirements but could not discriminate on the basis of a person's LGBTQ status.[193] Hence, an Islamic aid society would be able to reject a lesbian applicant who, despite being celibate and genuinely repentant for her same-sex attraction,

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185. *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

186. *Hosanna-Tabor*, 565 U.S. at 190, 198 (Alito, J., concurring).

187. *Our Lady of Guadalupe*, 140 S. Ct. at 2062–64.

188. *Id.* at 2064.

189. *Id.* at 2057.

190. Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 704 (7th Cir. 2003).

191. Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1041 (7th Cir. 2006).

192. Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309 (4th Cir. 2004).

193. Conversely, LGB persons working for secular organizations may be able to contest sexual orientation discrimination as a form of religious nonadherence discrimination, whereby employers discriminate against employees because the employees do not share or follow their employers' religious beliefs. *See* Alex Reed, *Religious Nonadherence Claims as a Means of Contesting LGB-Related Employment Bias*, 40 BERKELEY J. EMP. & LAB. L. 339 (2019).

sometimes drinks alcohol or fails to pray the salat[194] in contravention of the society's religious tenets. However, the society could not reject her solely on the basis of her sexual orientation in light of *Bostock's* holding that sexual orientation discrimination is sex discrimination under Title VII.[195] Likewise, a Catholic hospital would be able to fire a transgender employee who, despite presenting and conducting themselves in a manner consistent with the sex they were assigned at birth, volunteers with pro-choice organizations or supports the legalization of physician-assisted suicide. Conversely, the hospital could not fire the employee on the basis of their gender identity given *Bostock's* holding that gender identity discrimination is a form of sex discrimination.[196] In these scenarios, application of the belief-and-conduct interpretation is relatively straightforward because the religious organization is discriminating on the basis of beliefs and conduct unrelated to the individual's sexual orientation or gender identity such that there can be no claim—absent evidence of pretext—that the organization is discriminating on the basis of a protected characteristic (i.e., sex) in violation of Title VII.

Here again, though, the outcome would be very different if the LGBTQ individuals held "certain important positions" in the organizations so as to constitute "ministers" within the ambit of the First Amendment's ministerial exception. In that scenario, the organizations would be free to discriminate openly and explicitly against these individuals on account of their LGBTQ status regardless of the persons' underlying beliefs or conduct and regardless of the organizations' motivation for doing so.[197] Indeed, once the entities were found to be religious organizations[198] and the LGBTQ individuals were deemed "ministers," any discrimination claims would necessarily fail on summary judgment.[199]

Shifting from the First Amendment's ministerial exception back to Title VII's religious exemption, a more complex situation would arise where religious organizations seek to discriminate against non-ministerial LGBTQ employees on the grounds their conduct as LGBTQ persons (engaging in same-sex intimacy or expressing gender inconsistently with birth sex) conflicts with the organizations' religious beliefs or practices. For example, assume a religious organization fires a gay man upon learning that he recently married another man. Although the organization had been content to employ the individual so long as he remained single and celibate, his entering into a

194. *See* Hudson v. Dennehy, 538 F. Supp. 2d 400, 403 n.2 (D. Mass. 2008) ("Salat . . . is the ritual prayer performed five times daily by an observant Muslim.").

195. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1743 (2020).

196. *Id.*

197. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (2020) (Sotomayor, J., dissenting) (observing the ministerial exception permits discrimination for any reason, even animus).

198. *See supra* note 22.

199. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 180–81 (2012).

romantic relationship with a person of the same sex prompts the organization to fire him.[200] If sued for sex discrimination, the organization may argue it was not the man's sexual orientation (i.e., his status) that led to his termination but rather his conduct.[201] While the status-based discrimination would be prohibited under a belief-and-conduct interpretation of Title VII, the latter, conduct-based distinction would—at least superficially—appear permissible. Upon closer examination, however, this argument would likely fail as the Supreme Court has rejected such conduct/status distinctions, at least as applied to homosexuality.

In *Christian Legal Society v. Martinez*, the Court repudiated the conduct/status distinction after the religious organization defendant asserted that it did "not exclude individuals because of sexual orientation," i.e., homosexuality, "but rather on the basis of a conjunction of conduct and the belief that the conduct is not wrong."[202] In response, the Court observed that "[o]ur decisions have declined to distinguish between status and conduct in this context"[203] and cited *Lawrence v. Texas*, the 2003 decision legalizing same-sex intimacy between consenting adults, in support of that proposition.[204] The Court quoted from *Lawrence's* majority opinion as follows: "When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination."[205] The Court also quoted Justice O'Connor's concurrence in *Lawrence*, where she stated, "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."[206] Although the Court has not addressed the conduct/status distinction in the employment context, any such argument is likely to fail under the reasoning of *Christian Legal Society* and *Lawrence*.

How the Court might respond if the conduct/status distinction were raised in relation to a transgender person is less clear, as to date the Court has

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200. *See* U.S. Conference of Catholic Bishops Brief, *supra* note 44, at 8 ("In the view of many faith traditions and religious believers, there is a difference between an inclination toward homosexual conduct, which they do not regard as per se immoral, and homosexual conduct, which they do."); National Ass'n of Evangelicals Brief, *supra* note 46, at 11 ("[A] traditional church will judge a believing, celibate gay man to be in full fellowship and thus fully eligible for religious employment, but then deem the same man ineligible if he later engages in homosexual intimacy.").

201. *Cf.* Demkovich v. St. Andrew the Apostle Par., 973 F.3d 718, 721 (7th Cir. 2020) (noting supervisor harassed openly gay subordinate over two-year period only to then fire him once he married his same-sex partner), *reh'g en banc granted*, (slip op. Dec. 9, 2020).

202. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 689 (2010).

203. *Id.*

204. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

205. *Christian Legal Soc'y*, 561 U.S. at 689 (quoting *Lawrence*, 539 U.S. at 575).

206. *Id.* (quoting *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring)).

not been confronted with that argument in any setting, employment or otherwise. Nevertheless, the Court's rationale for rejecting the distinction in relation to homosexual individuals would seem to apply with equal force to transgender persons. Indeed, the Eleventh Circuit has acknowledged that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[207] Various scholars have made similar observations. They note that "[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."[208] This, in turn, has led to recognition that there is "a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms."[209] Accordingly, if a religious organization sought to invoke the conduct/status distinction to defeat a transgender person's employment discrimination claim, courts taking a belief-and-conduct view would likely respond that the relevant conduct is closely correlated with being transgender such that discrimination on the basis of transgender conduct is necessarily discrimination on the basis of transgender status.

Apart from being likely to fail, religious organizations should decline to raise the conduct/status argument because it is conceptually incompatible with a belief-and-conduct interpretation of Title VII's religious exemption. Indeed, if it is permissible to discriminate against LGBTQ persons based on conduct closely associated with their LGBTQ status, why should that not also be true with respect to organizations whose conduct is closely associated with or required by their religion? One can imagine a scenario in which a religious organization fires an employee for drinking alcohol or for questioning key tenets of the faith. If the terminated employee were to accuse the organization of religious discrimination, would the organization be prepared to argue that it did not discriminate on the basis of the individual's faith but only their conduct? Alternatively, would religious organizations support a secular employer's right to fire an employee for praying during designated break periods or for wearing a turban, cross, or Star of David on the theory they were not discriminating on the basis of the employee's faith but rather their conduct? Presumably, the answer to both questions is no. Religious organizations, therefore, should be reticent to invoke the conduct/status distinction in response to LGBTQ persons' employment discrimination claims, not only because it is likely to fail as a legal matter but because it stands to put religious organizations in an intellectually untenable position.

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207. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

208. Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563 (2007); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001) (observing the term "transgender" describes persons "whose appearance, behavior, or other personal characteristics differ from traditional gender norms").

209. *Glenn*, 663 F.3d at 1316.

C. The Religiously Motivated Interpretation

Under a religiously motivated interpretation, religious organizations would be allowed to openly and explicitly discriminate against LGBTQ persons in non-ministerial positions, provided such actions are consistent with the organizations' religious beliefs. Thus, a Baptist college would be free to terminate a transgender person employed in any capacity, be it as a custodian, groundskeeper, administrative assistant, or IT worker, based on a belief that "gender is divinely given and intrinsically connected to one's sex at birth."[210] Similarly, a Jewish hospice would be allowed to reject a gay applicant for any number of positions, whether in maintenance, billing, dietetics, or otherwise, as long as it was premised on a belief that "sexual relationships are divinely sanctioned only between a man and a woman."[211] The lone constraint on these organizations' ability to discriminate would be the entities' own comfort with and conviction in claiming that such action is divinely mandated or otherwise consistent with the organizations' religious beliefs.

Religious organizations' staffing discretion would not be limited to sexual orientation and gender identity, however. Such discretion would extend to all of Title VII's protected characteristics, including race and color.[212] Thus, religious organizations would be able to terminate a pregnant employee on the "belief that . . . [a] mother's place is in the home"[213] or pay a female employee less than her similarly situated male colleagues based on a conviction that men are "the [Biblical] head of the household" and therefore "required to provide for th[e] household."[214] Likewise, these organizations would be free to institute "Whites-only" employment policies or terminate employees in interracial relationships as long as they claimed such policies stemmed from the organizations' religious beliefs.[215]

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210. National Ass'n of Evangelicals Brief, *supra* note 46, at 2–3.

211. *Id.* at 2.

212. Conversely, Title VII's bona fide occupational qualification (BFOQ) defense is not available in cases alleging race or color discrimination. Ferrill v. Parker Grp., Inc., 168 F.3d 468, 473 (11th Cir. 1999) (collecting cases); Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980) (noting the omission of "race" and "color" from Title VII's list of BFOQ-eligible characteristics and stating "[o]ur interpretation of the legislative history of this section is that Congress did not view race as a qualification which could, conceptually, be reasonably necessary to the efficient operation of any business").

213. Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 938 (6th Cir. 1985).

214. Equal Emp't Opportunity Comm'n v. Fremont Christian Sch., 781 F.2d 1362, 1364 (9th Cir. 1986).

215. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) (affirming denial of tax-exempt status where university permitted unmarried African Americans to enroll but forbade interracial dating and marriage on the belief such conduct is prohibited by the Bible); Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting state trial judge as stating "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . show[ing] that he did not intend for the races to mix").

The result would be much the same if the affected individuals held ministerial positions. The only difference would be that the organizations could discriminate without having to provide a religious justification for doing so. In practice, however, this is often a meaningless distinction because courts are generally hesitant to second-guess religious organizations' stated motivations in adjudicating Title VII claims.[216] Indeed, once a religious organization provides a faith-based justification for an employment practice or decision, any subsequent pretext inquiry "must be limited to 'sincerity' and cannot be used to challenge the validity or plausibility of the underlying religious doctrine."[217] Even so, such analysis is seldom necessary given the legal and factual impediments plaintiffs' face in asserting a viable claim of pretext.[218] The religiously motivated interpretation would therefore seem to obviate any meaningful distinction between the religious exemption of Title VII and the ministerial exception of the First Amendment, despite the fact there is no evidence indicating the two were meant to be coextensive.[219]

CONCLUSION

One of the many questions left unanswered in *Bostock v. Clayton County* is whether and to what extent religious organizations may make non-ministerial staffing decisions consistent with their faith. While various amici raised the issue, none of the party-employers in *Bostock* claimed to be religious organizations. The Supreme Court, therefore, declined to speculate as to *Bostock's* implications for religious organizations, ensuring that Title VII's religious exemption would remain susceptible to three conflicting interpretations for the foreseeable future.

While each approach is vulnerable to criticism, the religiously motivated interpretation appears particularly flawed. Unlike the other interpretations,

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For a discussion of associational discrimination theory in the context of race and its potential application to sexual orientation, see Alex Reed, *Associational Discrimination Theory & Sexual Orientation-Based Employment Bias*, 20 U. PA. J. BUS. L. 731 (2018).

216. *See, e.g.*, DeMarco v. Holy Cross High Sch., 4 F.3d 166, 170–71 (2d Cir. 1993) ("[I]n applying the *McDonnell Douglas* test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable" but instead determine "whether the articulated purpose is the actual purpose for the challenged employment-related action.").

217. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 22.

218. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1238–39 (1995) (discussing the difficulties of demonstrating pretext); *see also* Esbeck, *supra* note 69, at 388 ("[T]he employee-plaintiff cannot merely rely on bald allegations of discriminatory treatment and pretext" but must instead "uncover some definite and competent evidence creating a genuine issue of fact.").

219. Indeed, at the time of Title VII's passage in 1964, as well as its subsequent amendment in 1972 and 1991, the ministerial exception's viability was an open question. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 188 (2012) (formally recognizing the ministerial exception in 2012).

which find support in either the case law (as with the belief-and-conduct interpretation) or statutory text (as with the co-religionist interpretation), the religiously motivated interpretation is seemingly undermined by both the case law and the text. Nevertheless, the EEOC's recent endorsement will likely breathe new life into the religiously motivated interpretation, leaving LGBTQ Americans—together with women, pregnant persons, and racial and ethnic minorities—vulnerable to discrimination in a host of non-ministerial positions.