RELIGIOUS HIRING BEYOND THE MINISTERIAL EXCEPTION

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Can a religious elementary school dismiss its secretary for entering a same-sex marriage? Under the well-known "ministerial exception," religious organizations have a constitutional right to select their "ministers"—broadly defined to include individuals who perform important religious functions. But what about employees, like a secretary, that do not qualify as ministers? What legal doctrines, if any, protect a religious organization's freedom to hire and fire nonministers?

This question has gone largely unaddressed in caselaw because there was little occasion, until recently, to litigate it. But that changed when the Supreme Court decided Bostock v. Clayton County *(2020), which construed federal law to prohibit employment discrimination based on sexual orientation and gender identity.* Bostock *has unleashed a wave of new lawsuits against religious organizations that ask all their employees, including nonministers, to refrain from sex outside traditional marriage.*

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This wave of lawsuits is now forcing courts and litigants to grapple with legal protections that have long been undertheorized in caselaw and scholarship.

This Article provides the first comprehensive taxonomy of legal protections for religious hiring beyond the ministerial exception. It analyzes six such protections. Three are statutory: (1) Title VII's religious exemption, (2) Title VII's bona fide occupational qualification exception, and (3) the Religious Freedom Restoration Act. Three are constitutional: (4) the church autonomy doctrine, (5) the freedom of expressive association, and (6) the Free Exercise Clause. For each protection, the Article examines the leading caselaw (where it exists), analyzes the arguments for and against the protection, and identifies key pressure points and unanswered questions. The result is a much-needed roadmap of emerging legal developments that will be of great value to scholars, jurists, and practitioners alike.

After providing this roadmap, the Article addresses the deeper, unresolved problem of determining which legal doctrines offer the best "fit" for protecting the religious hiring of nonministers. As the Article explains, Title VII's religious exemption offers a straightforward statutory basis for protecting the religious hiring of nonministers. But recent developments in state law are poised to take federal statutory protections off the table in some cases, forcing courts to grapple with the weighty constitutional doctrines those statutory protections are meant to embody. And those constitutional doctrines present thorny legal issues that neither courts nor commentators have yet explored.

INTRODUCTION

Can a religious elementary school dismiss its secretary for entering a same-sex marriage? Under the well-known "ministerial exception," religious organizations have a constitutional freedom from government interference in the selection of their "ministers"—broadly defined to include a wide variety of individuals who perform important religious functions.[1] But what about employees, like a secretary, that do not qualify as "ministers"? What legal doctrines, if any, protect a religious organization's freedom to hire and fire nonministers?

This question has gone largely unaddressed in caselaw because there was little occasion, until recently, to litigate it. Before 2020, federal employment laws rarely posed any direct conflict with religious hiring practices. And when a conflict did arise, the ministerial exception and related doctrines prohibiting judicial entanglement in religious questions typically sufficed to resolve it. Thus, courts and scholars had no occasion to explore the constellation of *other* legal protections for the religious hiring of *nonministers.*

But that has now changed, due to the Supreme Court's 2020 decision in *Bostock v. Clayton County*.[2] *Bostock* held that the federal ban on employment discrimination based on "sex" also prohibits discrimination based on sexual orientation or gender identity.[3] This creates a direct conflict between federal law and religious hiring practices for tens of thousands of religious organizations across the country—many of which ask all their employees, including nonministers, to refrain from sex outside traditional marriage. The result has been a wave of new lawsuits that is now forcing courts to grapple with legal protections that have long been undertheorized in caselaw and scholarship.

This Article provides the first comprehensive examination of potential legal protections for the religious hiring of nonministers.[4] It

1 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188, 190 (2012) (recounting history).

2 Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

3 *Id.* at 1754.

4 Some commentators have addressed one or more of these protections in isolation prior to *Bostock. See, e.g.*, 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 (2015) (Title VII's religious exemption); Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 297 (2016) (same); John T. Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J.L. & RELIGION 280 (2018) (same); Alex Reed, *RFRA V. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. SOC. POL'Y & L. 2, 18 (2016) (RFRA); Steven M. Shepard, Note, Hankins v. Lyght*: The RFRA Defense to Federal Discrimination Claims*, 26 YALE L. & POL'Y REV. 359 (2007); Lawrence Sager, *Why Churches (and, Possibly, the Tarpon Bay Women's Blue Water Fishing Club) Can Discriminate*, *in* THE RISE OF CORPORATE

addresses six such protections. Three are statutory: (1) Title VII's religious exemption, (2) Title VII's bona fide occupational qualification (BFOQ) exemption, and (3) the Religious Freedom Restoration Act (RFRA). Three are constitutional: (4) the church autonomy doctrine, (5) the freedom of expressive association, and (6) the Free Exercise Clause. For each protection, the Article examines the key caselaw (where it exists), analyzes the arguments for and against applying the protection, and identifies key pressure points and unanswered questions. The result is a much-needed roadmap of emerging legal developments that will be of great value to scholars, jurists, and practitioners alike.

After providing this roadmap, the Article addresses the deeper, unresolved problem of determining which legal doctrines offer the best "fit" for protecting the religious hiring of nonministers. As I explain, Title VII's religious exemption offers a straightforward statutory basis for protecting the religious hiring of nonministers. It also allows courts to avoid answering difficult constitutional questions. However, almost all states have parallel laws prohibiting sex discrimination in employment, and several states have begun cutting back on their religious exemptions. That will likely force both state and federal courts—and eventually the Supreme Court—to grapple with the constitutional

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RELIGIOUS LIBERTY 77 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016) (focusing on association).

A handful of articles or student notes have addressed one or more of these protections in isolation post-*Bostock*. *See, e.g.*, R. Shawn Gunnarson, James C. Phillips & Christopher A. Bates, *Religious Employment and the Tensions Between Liberty and Equality*, 51 BYU L. REV. 279 (2025); Alex Reed, *Religious Organization Staffing Post-*Bostock, 43 BERKELEY J. EMP. & LAB. L. 203, 204 (2022) (Title VII's religious exemption); Sara K. Finnigan, Note, *The Conflict Between the Religious Freedom Restoration Act and Title VII of the Civil Rights Act of 1964*, 48 FLA. ST. U. L. REV. 257, 258 (2021) (RFRA); Bri Daniel-Harkins, Comment, *Battle of the Statutes: The Fifth Circuit's Decision in* Braidwood Management v. EEOC *Highlights the Conflict Between Religious Freedom and Antidiscrimination Laws*, 99 TUL. L. REV. 161, 164 (2024) (RFRA); Athanasius G. Sirilla, Note, *The "Nonministerial" Exception*, 99 NOTRE DAME L. REV. 393, 393–94 (2023) (church autonomy).

Three student notes have considered several of these protections through the lens of a particular case. Kevin Scott, Note, *Navigating the Legal Wilderness Facing LGBT Employees of Religious Organizations After* Bostock, 97 CHI.-KENT L. REV. 535, 544–45 (2022) (surveying the issues briefed in *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195 (S.D. Ind. 2020), but not addressing the church autonomy doctrine and the bona fide occupational qualification (BFOQ) exception); Trystan Melancon, Comment, *An Un-Flippable Switch: How Religious Organizations in Texas Are Seeking Widespread Religious Exemptions to Title VII and* Bostock*'s Prohibition on LGBTQ+ Employment Discrimination*, 84 LA. L. REV. 703, 705 (2024) (same, examining *Bear Creek Bible Church v. EEOC*, 571 F. Supp. 3d 571 (N.D. Tex. 2021)); Ashley E. Treible, Note, *When Civil Rights and Religious Freedom Collide: Discerning the Difference Between Statutory Exemptions to Anti-Discrimination Statutes and the Ministerial Exception*, 21 FIRST AMEND. L. REV. 61 (2023) (examining *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021)).

protections that these exemptions were originally meant to embody. And those constitutional protections present thorny legal issues that neither courts nor commentators have yet explored.

I. THE PROBLEM: *BOSTOCK* FORCES COURTS TO CONSIDER PROTECTIONS BEYOND THE MINISTERIAL EXCEPTION

To understand the novel church-state challenge posed by *Bostock*, it is first necessary to understand the basic contours of the ministerial exception. After that, we can see how *Bostock* is forcing courts to address additional legal defenses beyond the ministerial exception.

A. *The Scope of the Ministerial Exception*

Imagine a Baptist church fires its pastor and replaces him with someone younger. The pastor sues, claiming he was fired because of his age. The church says he was fired because he was an ineffective pastor. What happens next?[5]

In a typical employment discrimination suit, the key question would be a factual one: What was the *real* reason the pastor was fired? Was he fired because he was ineffective? Or was his alleged ineffectiveness merely a "pretext" for age discrimination?[6]

The pastor would try to offer evidence that the real reason was his age—perhaps citing evidence of ageist comments from church board members. He would also offer evidence that he was, in fact, a good pastor—perhaps citing positive performance reviews, increased church attendance, or the testimony of church members who liked his sermons.

The church, in turn, would try to offer evidence that he was an ineffective pastor—perhaps citing testimony from church board members who thought his sermons were poor, his counseling tone-deaf, or his theology suspect.

A jury would then decide what it believed was the real reason for the firing. If the jury believed the pastor, he would win his case. The court would order the church to reinstate the pastor or pay damages in lieu of reinstatement.

This result presents two significant problems. First, it interferes with the church's freedom to choose its own pastor. Indeed, the church *cannot* choose a new pastor unless it endures the cost and intrusion of litigation and pays significant damages. And the

5 For a similar discussion, see LUKE GOODRICH, FREE TO BELIEVE: THE BATTLE OVER RELIGIOUS LIBERTY IN AMERICA 76–77 (2019).

6 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

government, through the enforcement of its employment laws, influences who can serve as the church's pastor.

Second, this result entangles courts and juries in religious questions. To determine the *real* reason for the firing, the court or jury must decide whether the pastor's sermons were truly poor, his counseling was truly tone-deaf, or his theology was truly suspect—or whether these allegations were merely a pretext for age discrimination.

For these reasons, soon after Congress enacted employment discrimination laws, lower courts uniformly recognized the ministerial exception.[7] While the name of the doctrine came from early decisions involving "ministers,"[8] the doctrine was not confined to pastors, priests, imams, and rabbis. Rather, lower courts applied it to a wide variety of employees who played "certain key roles"[9]—from the music director at a Catholic elementary school,[10] to the communications director for a Catholic diocese,[11] to the kosher food supervisor at a Jewish nursing home,[12] among others.

In 2012, the Supreme Court unanimously affirmed the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, applying it to a fourth grade teacher in a Lutheran school.[13] And in 2020, it elaborated on the doctrine in *Our Lady of Guadalupe School v. Morrissey-Berru*, applying it to a pair of teachers in Catholic elementary schools.[14]

As the Court explained, the First Amendment protects the freedom of religious organizations to decide matters of "faith," "doctrine," and "church government" without government interference.[15] One "component of this autonomy is the selection of the individuals who play certain key roles" within a religious organization.[16] This is the source of the ministerial exception.

The core elements of the ministerial exception are now well established. The ministerial exception applies to any employee of a religious organization who performs "vital religious duties."[17] This is

7 *See, e.g.*, McClure v. Salvation Army, 460 F.2d 553, 558–59 (5th Cir. 1972); Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168 (4th Cir. 1985).

8 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

9 *Id.*

10 EEOC v. Roman Cath. Diocese of Raleigh, 213 F.3d 795, 797 (4th Cir. 2000).

11 Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698, 700 (7th Cir. 2003).

12 Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 301 (4th Cir. 2004).

13 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 178, 190 (2012).

14 *Our Lady*, 140 S. Ct. at 2055.

15 *Id.* at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186).

16 *Id.*

17 *Id.* at 2066.

determined mainly by examining "what an employee does."[18] It can also be informed by other considerations, such as the employee's title, religious training, or whether she is held out as a minister.[19] And in conducting this inquiry, "[a] religious institution's explanation of the role of such employees in the life of the religion in question is important."[20]

If the ministerial exception applies, it acts as an affirmative defense that bars any claim challenging a religious organization's selection, supervision, or control over its ministers.[21] This means a minister's claims of employment discrimination based on race, sex, national origin, age, or disability are barred.[22] It also means tort or contract claims are barred when they challenge ministerial selection or control.[23]

Importantly, when an employee falls within the ministerial exception, the religious organization doesn't need to offer a *religious reason* for its employment action.[24] It can fire ministers for any reason or no reason at all—even for invidious reasons.[25] As the Supreme Court has explained, probing the reason for the employment decision "misses the point of the ministerial exception."[26] This is because "[t]he purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful . . . is the church's alone."[27]

In short, the ministerial exception is a longstanding, settled doctrine that protects the freedom of religious organizations to choose their ministers.[28]

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18 *Id.* at 2064.

19 *Hosanna-Tabor*, 565 U.S. at 191–92.

20 *Our Lady*, 140 S. Ct. at 2066.

21 *See* Combs v. Cent. Tex. Ann. Conf. of the United Methodist Church, 173 F.3d 343, 350 (5th Cir. 1999).

22 *Hosanna-Tabor*, 565 U.S. at 196; *Our Lady*, 140 S. Ct. at 2072.

23 *See e.g.*, Hutchison v. Thomas, 789 F.2d 392, 392–93, 396 n.2 (6th Cir. 1986); Natal v. Christian & Missionary All., 878 F.2d 1575, 1576–78 (1st Cir. 1989); Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 944 (7th Cir. 2022) (tort); Lee v. Sixth Mount Zion Baptist Church of Pittsburgh, 903 F.3d 113, 123 (3d Cir. 2018) (contract).

24 *See Hosanna-Tabor*, 565 U.S. at 194–95.

25 *See id.*

26 *Id.* at 194.

27 *Id.* at 194–95; *see also* Markel v. Union of Orthodox Jewish Congregations of Am., 124 F.4th 796, 811 (9th Cir. 2024) ("[R]eligious organizations need not have a specific religious purpose to invoke the ministerial exception.") (collecting cases), *cert. denied*, 145 S. Ct. 2822 (2025) (mem.).

28 The core of the ministerial exception, as described above, is settled. At the outer boundaries of the ministerial exception, however, a number of interesting questions remain. These are beyond the scope of this Article, but they include:

B. Bostock *Prompts New Conflicts*

But what about the freedom of religious organizations to choose their *nonministers*? One might think this question has been heavily litigated. But it hasn't. The reason is that, in many cases involving nonministers, there is little to no conflict between employment laws and religious autonomy. If an employee has no important religious functions (e.g., he is a secretary, cafeteria worker, or groundskeeper) and the religious organization has no religious reason for dismissing the employee (e.g., he was dismissed for tardiness, poor performance, or budgetary reasons), the dispute often can be resolved like any other employment discrimination claim without trenching on religious autonomy.

But *Bostock* changes the playing field. In *Bostock*, the Supreme Court held that Title VII's ban on "sex" discrimination in employment extends to "discriminat[ion] against employees for being homosexual or transgender."[29] Thus, if a religious organization asks its nonministers to refrain from sex outside traditional marriage or to accept their biological sex—as many religious organizations do—it can now be sued for sex discrimination. *Bostock* itself recognized that this "may require some employers to violate their religious convictions."[30] But it said the question of how "doctrines protecting religious liberty interact with Title VII are questions for future cases."[31]

Many of those "future cases" have now been filed. And these cases are now forcing courts to grapple with the "doctrines protecting religious liberty" that *Bostock* declined to address.

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(1) How far down the chain of command does the ministerial exception apply? *See, e.g.*, Gordon Coll. v. DeWeese-Boyd, 142 S. Ct. 952 (2022) (Alito, J., respecting denial of certiorari).

(2) What kinds of tort, contract, or other claims might escape application of the ministerial exception? *See supra* note 23.

(3) In what ways does the assertion of a ministerial exception defense limit discovery? *See* Fitzgerald v. Roncalli High Sch., Inc., No. 1:19-cv-04291, 2021 WL 4539199, at *1 (S.D. Ind. Sep. 30, 2021) (noting that "courts regularly bifurcate discovery in ministerial cases").

(4) Is the denial of a ministerial exception defense immediately appealable under the collateral order doctrine? Belya v. Kapral, 59 F.4th 570, 573 (2d Cir. 2023) (Park, J., dissenting from denial of rehearing en banc) ("Denials of church autonomy defenses should be included in the narrow class of collateral orders that are immediately appealable."); *see also* Lael Weinberger & Branton Nestor, *Church Autonomy and Interlocutory Appeals*, 102 NOTRE DAME L. REV. (forthcoming 2027), https://ssrn.com/abstract=6073729 [https://perma.cc/23GN-BLQJ].

29 Bostock v. Clayton County, 140 S. Ct. 1731, 1743 (2020).

30 *Id.* at 1753–54.

31 *Id.* at 1754.

1. Typical Conflicts Before *Bostock*

At the outset, it is important to recognize that conflict between employment laws and religious autonomy is not inevitable. In many cases, there is no conflict at all, as religious organizations typically condemn employment discrimination and want to comply with employment discrimination laws.

Imagine, for example, a Catholic school fires one of its secretaries and replaces her with someone younger. The secretary sues, claiming she was fired because of her age. The school doesn't claim the secretary had any important religious duties or was fired for a religious reason; instead, it says she was fired because she was disorganized and habitually late. In this case, the court or jury can assess the reason for the firing without wading into religious questions. Treating the school like every other employer creates little to no church-state conflict.

Prior to *Bostock*, church-state conflicts typically arose in two types of cases. The first, as we've already discussed, is cases involving ministers. If the school fires its theology teacher instead of its secretary, and the theology teacher sues to get her job back, that creates significant church-state conflict by depriving a religious school of control over who will teach its theology.[32] Such conflicts are addressed by the ministerial exception.

A second type of conflict arises in cases involving nonministers. In these cases, the religious organization offers a *religious reason* for the employment action—such as the employee's violation of church teaching—and the employee claims that religious reason is *pretextual*. For example, imagine the Catholic school says it dismissed the secretary because she was divorced and remarried in violation of Catholic teaching; but the secretary claims this was a pretext for age discrimination.[33] In this case, a jury would be asked to determine the real reason for the firing: Was it the violation of Church teaching, or was it her age?[34]

This "pretext" case threatens church-state conflict in two ways. First, it risks entangling the court in religious questions. The Catholic school will likely offer testimony that divorce and remarriage in violation of Church teaching is a grave sin. The secretary may try to counter with evidence that many Catholics ignore this teaching, that the Pope has softened the Church's stance on this issue, or that the school has failed to discipline other employees for similar offenses. The jury will then be asked to decide a religious question: How serious was this religious offense? Was it serious enough that it was likely the motivation

32 *See, e.g.*, Petruska v. Gannon Univ., 462 F.3d 294 (3d Cir. 2006).

33 *See* Geary v. Visitation of Blessed Virgin Mary Par. Sch., 7 F.3d 324, 329 (3d Cir. 1993).

34 *See id.* at 329–30.

for the firing? Or was it minor enough that it was likely just a pretext for age discrimination?[35]

Second, such a case risks interfering in religious governance. If the secretary prevails, the school would be forced to employ someone who violated church teaching or else pay damages. It would lose the freedom to organize its school around shared religious principles.

For these reasons, several courts have rejected claims of pretext when a religious organization offers a religious reason for the employment action.[36] As these courts have explained, resolving pretext claims in many cases "would require an analysis of [religious] doctrine" to assess the "seriousness" of an employee's conduct,[37] and "it is not the province of the federal courts" to "differentiate between the severity of violating [various] tenets of [a religious] faith."[38]

Other courts have allowed pretext claims to go forward if, in the court's view, such claims can be resolved without addressing religious questions.[39] For example, perhaps the employee can provide direct evidence of discrimination, such as emails stating a discriminatory reason for the employment action. Or perhaps the employee has evidence that similarly situated employees engaged in the same conduct and were not terminated. In such a case, some courts have said it may be possible to "conduct a 'limited inquiry'" into "whether the proffered non-discriminatory reason for firing the plaintiff . . . was the actual reason or a pretext."[40]

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35 For a similar discussion, see GOODRICH, *supra* note 5, at 81–82.

36 *See, e.g.*, EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980); Curay-Cramer v. Ursuline Acad., 450 F.3d 130, 138–42 (3d Cir. 2006); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 626–27 (6th Cir. 2000); Leavy v. Congregation Beth Shalom, 490 F. Supp. 2d 1011, 1025 (N.D. Iowa 2007) (The pretext inquiry "presses the civil court to become excessively entangled in internal church affairs and is prohibited by the First Amendment.").

37 *Curay-Cramer*, 450 F.3d at 140 (quoting Curay-Cramer v. Ursuline Acad., 344 F. Supp. 2d 923, 934 (D. Del. 2004)).

38 *Hall*, 215 F.3d at 626 (quoting Hall v. Baptist Mem'l Health Care Corp., 27 F. Supp. 2d 1029, 1039 (W.D. Tenn. 1998), *aff'd*, 215 F.3d 618); *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 205–06 (2012) (Alito, J., concurring) (noting how adjudicating some pretext claims would require "a civil court—and perhaps a jury— . . . to make a judgment about church doctrine," *id.* at 205).

39 DeMarco v. Holy Cross High Sch., 4 F.3d 166, 171 (2d Cir. 1993); *see also* Boyd v. Harding Acad., 88 F.3d 410 (6th Cir. 1996); Geary v. Visitation of Blessed Virgin Mary Par. Sch., 7 F.3d 324, 330 (3d Cir. 1993); Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316 (11th Cir. 2012), *overruled in part by*, United States v. Durham, 795 F.3d 1329 (11th Cir. 2015).

40 *Curay-Cramer*, 450 F.3d at 139 (quoting *Geary*, 7 F.3d at 328).

These "pretext cases" are not as common as ministerial exception cases.[41] And the legal doctrine surrounding these cases is less well settled.[42] Nevertheless, both pretext cases and ministerial exception cases long predated *Bostock*. And these cases largely described the pre-*Bostock* universe of conflicts between employment discrimination laws and religious autonomy.

2. Different Conflicts After *Bostock*

Bostock, however, gives rise to a different type of conflict: cases where an employee admits she was dismissed for a *non-pretextual religious reason*, but challenges that religious reason itself as discriminatory and therefore *illegal*.

Imagine, for example, a Catholic school dismisses a secretary because she entered a same-sex marriage in violation of Catholic teaching. The secretary doesn't dispute that she entered a same-sex marriage; she doesn't dispute that this violated Church teaching; and she doesn't dispute that the violation of Church teaching was the real reason for her termination. Instead, she claims that enforcing the Church's teaching on marriage is itself sex discrimination under *Bostock* and therefore unlawful.

Note how this differs from a pretext case.[43] In a pretext case, the secretary says, "You fired me because of my age." The school says, "No, we didn't. We fired you because you violated Church teaching." The dispute is over the real reason for the firing.

In a *Bostock* case, the secretary says, "You fired me because I entered a same-sex marriage." The school says, "Yes, we did, because that's a serious violation of Church teaching." There is no dispute over the reason for the firing. The dispute is over whether the school can legally act on its religious beliefs.

This creates a different form of church-state conflict.[44] In a pretext case, the government effectively tells a religious organization, "You're free to act on your religious beliefs if that is truly the motivation for your action." In a *Bostock* case, by contrast, the government tells a religious organization, "Even if your religious beliefs are truly the motivation for your action, we don't care; acting on your religious beliefs is discriminatory and illegal."

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41 *Compare supra* notes 17–28 (ministerial exception), *with supra* notes 33–40 (pretext).

42 *See* Douglas Laycock, Hosanna-Tabor *and the Ministerial Exception*, 35 HARV. J.L. & PUB. POL'Y 839, 858–62 (2012).

43 This discussion is drawn from GOODRICH, *supra* note 5, at 83–84.

44 This discussion is drawn from GOODRICH, *supra* note 5, at 84.

This significantly raises the stakes of church-state conflict. Absent a viable religious freedom defense, this sort of "illegality claim" under *Bostock* makes it illegal for religious organizations to make employment decisions based on their beliefs about sexuality and marriage. This, in turn, makes it impossible to form religious communities based on those shared religious beliefs. And this strikes at the heart of religious freedom.[45]

3. Other "Illegality Claims"?

Is this sort of "illegality claim" under *Bostock* truly novel? Not necessarily. Consider some examples.

The most common example is a religious organization that discriminates based on religion—such as a Baptist school that refuses to hire a secretary because she is not Baptist, or a Jewish organization that prefers to hire only Jews. Such organizations could be sued under Title VII, which prohibits employment discrimination based on "religion."[46] They could defend—as in a *Bostock* case—by saying their hiring practices are required by their religious beliefs. And the employee could argue that, even if those religious beliefs aren't pretextual, they are still discriminatory and therefore illegal.

In this "illegality case," however, Title VII expressly protects religious organizations. It includes an exemption stating that Title VII "shall not apply" to a religious organization "with respect to the employment of individuals of a particular religion."[47] And it is settled law that this exemption, at minimum, protects religious organizations from claims of religious discrimination.[48]

Another common illegality example is religious organizations that limit the clergy to males. Again, such organizations could be sued under Title VII, which prohibits sex discrimination. They could defend by saying their hiring practices are required by their religious beliefs. And the employee could again argue that, even if those beliefs aren't pretextual, they are still discriminatory and illegal.

45 The Supreme Court has often said that religious freedom includes the right to form religious groups around shared religious principles. *E.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in judgment) (describing the "means by which a religious community defines itself"). This Article assumes that the Court is correct. For a normative argument for why the Court is correct, see, for example, Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm, in* LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS 194 (Austin Sarat ed., 2012).

46 42 U.S.C. § 2000e-2 (2018).

47 *Id.* § 2000e-1(a).

48 *See Amos*, 483 U.S. at 329.

But again, the religious organization would prevail, because clergy fall within the ministerial exception.[49]

These are the most common illegality cases. But it is easy to posit others—at least in theory. For example, a religious organization might say its religious beliefs require it to dismiss a worker who has an abortion; this could be challenged as illegal pregnancy discrimination.[50] Or a religious organization might say its religious beliefs require it to dismiss a worker for entering an interracial marriage; this could be challenged as illegal race discrimination.[51] Or a religious organization might say its religious beliefs require workers to retire when they reach the age of fifty-five or become physically disabled; this could be challenged as illegal age or disability discrimination.[52]

While such claims are easy to posit in theory, they are rare in practice. Reasons vary. Abortion tends to occur privately and can be concealed from one's employer; thus, such cases rarely arise.[53] To my knowledge, interracial marriage hasn't been litigated in a religious employment case for at least forty years—since the Supreme Court ruled that the IRS could strip the tax-exempt status of Bob Jones University over its prohibitions on interracial marriage and dating.[54] Some denominations have mandatory retirement ages for clergy, but those requirements are rarely challenged and would in any event be protected

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49 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 186 (2012).

50 Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008) (The Pregnancy Discrimination Act (PDA) prohibits employer from discriminating against female employee because she has exercised her right to have an abortion.); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2015-1, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES § I(A)(4)(c) & n.52 (2015) ("Title VII protects women from being fired for having an abortion or contemplating having an abortion.").

51 *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983).

52 *See, e.g.*, 1983 CODE c.538, § 3 (requiring Catholic priests to submit their resignation to their diocesan bishop at age seventy-five); *Numbers* 8:25 (requiring retirement for Levites at age fifty); *Leviticus* 21:17–21 (prohibiting disabled priests from presenting offerings).

53 In perhaps the closest example, a Catholic school teacher once informed her principal that she was seeking to become pregnant via in vitro fertilization. Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168, 1172 (N.D. Ind. 2014). She didn't know this violated Catholic teaching. *Id.* Nor did the principal. *See id.* But when the priest found out, and the teacher declined to stop the treatment, she was dismissed. *See id.* at 1172–73. Even then, the case was not litigated as an illegality claim; instead, the teacher claimed that the school applied its policies unevenly to men and women and that the stated objection to in vitro fertilization was a pretext for sex discrimination. *Id.* at 1173. Another relevant example is *Slattery v. Hochul*, 61 F.4th 278 (2d Cir. 2023). But that was a pre-enforcement challenge brought by an employer; no known employee had an abortion or sued over it. *Id.* at 283.

54 *Bob Jones*, 461 U.S. at 605. Even before *Bob Jones*, I have found no reported cases involving a religious organization that claimed its religious beliefs justified dismissing (or refusing to hire) an employee who entered an interracial marriage.

by the ministerial exception.[55] And I am not aware of any reported cases involving religious organizations that claim a religious justification for dismissing disabled workers.

In contrast, *Bostock* has made illegality claims much more common. In the five years since *Bostock*, there have been at least eighteen cases involving illegality claims against religious organizations that ask their employees to adhere to their religious beliefs on matters of sexual orientation or gender identity.[56] This is more than all the reported illegality claims based on abortion, race, age, or disability over the last sixty years combined.[57]

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55 *See, e.g.*, Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) (United Methodist Church required clergy to retire at age seventy. *Id.* at 99.).

56 Twelve of those cases have been brought by employees against religious employers. *See* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931 (7th Cir. 2022); Fitzgerald v. Roncalli High Sch., Inc., 73 F.4th 529 (7th Cir. 2023); Billard v. Charlotte Cath. High Sch., 101 F.4th 316 (4th Cir. 2024); McMahon v. World Vision Inc., 147 F.4th 959 (9th Cir. 2025); Ference v. Roman Cath. Diocese of Greensburg, No. 22-797, 2023 WL 3876584, at *1 (W.D. Pa. Jan. 18, 2023), *report and recommendation adopted in part, denied in part*, No. 22-cv-797, 2023 WL 3300499 (W.D. Pa. May 8, 2023); Zinski v. Liberty Univ., Inc., 777 F. Supp. 3d 601 (W.D. Va. 2025) (denying religious university's motion to dismiss, *id.* at 650); Doe v. Cath. Relief Servs., 529 F. Supp. 3d 440, 448 (D. Md. 2021); Califano v. Roman Cath. Diocese of Rockville Ctr., 751 F. Supp. 3d 42 (E.D.N.Y. 2024); Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (Wash. 2021); MoChridhe v. Acad. of Holy Angels, 29 N.W.3d 753 (Minn. Ct. App. 2025); Berken v. St. John Paul II Cath. Acad., No. 21-cv-248, 2022 WL 22881806, at *1 (W.D. Mich. June 3, 2022); Butler v. St. Stanislaus Kostka Cath. Acad., 609 F. Supp. 3d 184 (E.D.N.Y. 2022).

Six of those cases have been pre-enforcement challenges brought by religious employers against government officials charged with enforcing antidiscrimination laws. Four of those six have focused on claims of sex, sexual orientation, or gender identity discrimination. *See* Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914, 940 & n.60 (5th Cir. 2023) (affirming ruling in favor of religious plaintiffs seeking protection under Title VII's religious exemption and RFRA); Christian Healthcare Ctrs., Inc. v. Nessel, 117 F.4th 826, 857 (6th Cir. 2024) (finding standing for a challenge to application of the employment provisions of Michigan's Elliott-Larsen Civil Rights Act); Seattle Pac. Univ. v. Ferguson, 104 F.4th 50, 55 (9th Cir. 2024) (challenging application of the Washington Law Against Discrimination); Christian Emps. All. v. EEOC, No. 21-cv-195, 2022 WL 1573689, at *9 (D.N.D. May 16, 2022) (granting preliminary injunction against EEOC's application of Title VII). Two have addressed the more general question of whether religious groups can limit hiring to employees who agree with their religious beliefs. *See* Gen. Conf. of Seventh-Day Adventists v. Horton, 787 F. Supp. 3d 99, 107–08 (D. Md. 2025) (denying preliminary injunction against application of the Maryland Fair Employment Practices Act); Union Gospel Mission of Yakima Wash. v. Brown, 162 F.4th 1190 (9th Cir. 2026) (affirming preliminary injunction against application of the Washington Law Against Discrimination).

There are likely other cases I am not aware of, particularly as some cases settle before a reported decision.

57 *See* WESTLAW, "Title VII" & "religious" & ("race" OR "age" OR "disability" OR "abortion"), 14 results (Nov. 11, 2025) (on file with the Notre Dame Law Review) (filtered by "before June 15, 2020").

Thus, while illegality claims may not be "new"—at least in theory—*Bostock* has now made them far more common in practice.

C. Legal Protections Beyond the Ministerial Exception

Based on this discussion, it should be apparent why *Bostock* is now prompting courts to consider legal protections beyond the ministerial exception.

We have identified three types of employment cases that present church-state conflicts: (1) ministerial exception cases, (2) pretext cases, and (3) illegality cases. Ministerial exception cases are governed by the longstanding ministerial exception. Pretext cases are governed by the rule prohibiting entanglement in religious questions. But illegality cases raise a host of thorny questions expressly left open by *Bostock*.

And *Bostock* has made those cases commonplace. Tens of thousands of religious organizations require *all* their employees—ministers and nonministers alike—to refrain from sex outside traditional marriage and to live in accordance with their biological sex.[58] Religious organizations have done this for decades, and this has always been permitted under American law.[59] But under *Bostock*, all those organizations can now be sued for sex discrimination. Many already have been. And these suits are now forcing courts to address the question *Bostock* left open: What legal doctrines, if any, protect a religious organization's freedom to hire nonministers?

II. THREE STATUTORY PROTECTIONS BEYOND THE MINISTERIAL EXCEPTION

There are six main legal defenses potentially protecting a religious organization's freedom to hire nonministers. Three are statutory: (1) Title VII's religious exemption; (2) Title VII's bona fide occupational qualification (BFOQ) exception; and (3) RFRA. Three are constitutional: (4) church autonomy; (5) expressive association; and (6) the Free Exercise Clause. Since courts usually address statutory defenses before constitutional ones,[60] this Article will follow suit.

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58 *See* Brief for The Church of Jesus Christ of Latter-day Saints et al. as Amici Curiae Supporting Appellants & Reversal, Billard v. Charlotte Cath. High Sch., 101 F.4th 316 (4th Cir. 2024) (No. 22-1440); Brief of Nat'l Ass'n of Evangelicals et al. as Amici Curiae in Support of Employers at 1–3, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618).

59 *See* Obergefell v. Hodges, 576 U.S. 644, 659–63 (2015).

60 *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

A. *Title VII's Religious Exemption: A Textualist Solution*

Title VII prohibits "sex" discrimination in employment.[61] But as *Bostock* noted, Title VII also includes a religious exemption, stating that Title VII "shall not apply" to a religious organization "with respect to the employment of individuals of a particular religion."[62]

Some courts have interpreted this exemption narrowly to apply only when a plaintiff brings a *religious discrimination claim*. I call this the *claim-based approach* because it focuses on the type of *claim* brought by the employee. Others have interpreted the exemption more broadly to apply when a religious organization engages in specific, exempted conduct—namely, when it makes an employment decision based on *an individual's particular religious beliefs, observances, and practices* (even if the plaintiff sues for some other form of discrimination, such as sex discrimination). I call this the *conduct-based approach* because it focuses on the *conduct* engaged in by the employer. As explained below, the conduct-based approach is more faithful to Title VII's text, structure, and precedent.

1. The Basic Textual Argument

We'll start with the basic textual argument for the conduct-based approach. Title VII's religious exemption provides as follows:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or 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.[63]

Title VII also has a second religious exemption, specific to religious educational institutions, with similar language: "Notwithstanding any other provision of this subchapter," "it shall not be an unlawful employment practice" for religious educational institutions "to hire and employ employees of a particular religion."[64] Because both exemptions have functionally identical language—permitting the employment of individuals "of a particular religion"—most courts have

61 42 U.S.C. § 2000e-2(a) (2018).

62 *Id.* § 2000e-1(a); *see Bostock*, 140 S. Ct. at 1754.

63 42 U.S.C. § 2000e-1(a) (2018).

64 *Id.* § 2000e-2(e). In this quote, "educational institutions" stand in for "school, college, university, or other educational institution or institution of learning." *Id.*

treated them as interchangeable and have focused on the language of the first exemption.[65] This Article will do the same.

Consider how this exemption might apply to a typical *Bostock* claim—such as when a religious school dismisses a nonministerial secretary for entering a same-sex marriage. The textual argument for applying the exemption is straightforward.[66]

First, the exemption states that "[t]his subchapter shall not apply" to whatever falls within the exemption.[67] The "subchapter" referenced is Title 42, Chapter 21, Subchapter VI—which consists of all of Title VII.[68] This means that, at least at the outset, the exemption is not limited to one particular subset of Title VII claims. Instead, "the entire 'subchapter' of Title VII" does not apply when the exemption is triggered.[69]

Next, the text identifies what triggers the exemption: "the employment of individuals of a particular religion."[70] (Or, in terms of the parallel exemption in § 2000e-2, "to hire and employ employees of a particular religion."[71]) So the question becomes: What does it mean to employ "individuals of a particular religion," or "to hire and employ employees of a particular religion"?

65 *See* STEVEN H. ADEN, THE FEDERALIST SOCIETY, THE EMPLOYMENT NON-DISCRIMINATION ACT 3–4 (2010). The presence of two religious exemptions with functionally identical language is an artifact of how Title VII was originally drafted and later amended. As originally enacted, the first religious exemption was narrower than the second, because it covered only employees who performed work connected with the organization's "religious activities." Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255. Several members of Congress expressed concern that this exemption was not broad enough for religious schools, which should be protected when hiring all employees, not just those engaged in religious or educational activities. 110 CONG. REC. 2585–93 (1964). So they added the second exemption to provide additional protection for religious schools. *See id.* at 2593.

In 1972, however, Congress broadened the first exemption to cover all employees, not just those performing work connected with the organization's "religious activities." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103–04. So both exemptions now cover all employees at exempt religious organizations.

66 For a similar articulation of this argument, see the author's Appellants' Opening Brief at 21–32, Billard v. Charlotte Cath. High Sch., 101 F.4th 316 (4th Cir. 2024) (No. 22-1440).

67 42 U.S.C. § 2000e-1(a) (2018). The second exemption for religious schools includes similar language, stating that the exemption applies "[n]otwithstanding any other provision of this subchapter." *Id.* § 2000e-2(e).

68 *See* Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (Religious organizations are exempted from "the entire 'subchapter' of Title VII."); Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring) (The "subchapter" in § 2000e-1(a) "comprises all of Title VII.").

69 *See Kennedy*, 657 F.3d at 194.

70 42 U.S.C. § 2000e-1(a) (2018).

71 *Id.* § 2000e-2(e)(2).

Here, Title VII provides additional clarity by expressly defining "religion": "The term 'religion' includes all aspects of religious observance and practice, as well as belief . . . ."[72]

Thus, putting it all together, the exemption provides that all of Title VII "shall not apply" when a religious organization employs "individuals of a particular" "religious observance," "practice," or "belief."

This means, of course, that religious organizations are free to make employment decisions based on an individual's particular religious *belief*—such as belief in Christianity or the doctrine of the Trinity.[73] But it also means religious organizations are free to make employment decisions based on an individual's particular religious *observances and practices*—such as maintaining a kosher diet or refraining from sex outside of marriage. As several courts have said, the exemption "include[s] the decision to terminate an employee whose *conduct or religious beliefs* are inconsistent with those of its employer."[74] And this would include the decision to terminate an employee who enters a same-sex marriage inconsistent with a religious employer's religious beliefs and standards of conduct.[75]

This interpretation of the exemption's text is reinforced by the exemption's structure.[76] The structure is: "[law X] shall not apply to [religious employers] with respect to [conduct Y]."[77] The law that shall not apply is "[t]his subchapter"—i.e., all of Title VII, not just the prohibition on religious discrimination.[78] And the conduct exempted is the "employment of individuals of a particular" religious "belief," "observance," or "practice."[79] So when a religious employer engages in the relevant conduct—making employment decisions based on an individual's religious "belief," "observance," or "practice"—Title VII doesn't apply.

If Congress had wanted to limit the religious exemption to *religious discrimination claims*—as some courts have held[80]—it easily could

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72 *Id.* § 2000e(j).

73 *See* Spencer v. World Vision, Inc., 633 F.3d 723, 725 (9th Cir. 2011) (O'Scannlain, J., concurring) (Employee was dismissed for disagreeing with the doctrine of the Trinity.).

74 *Kennedy*, 657 F.3d at 192 (emphasis added) (quoting Hall v. Baptist Mem'l Heath Care Corp., 215 F.3d 618, 624 (6th Cir. 2000)).

75 *See* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring) ("Section 702(a) permits a religious employer to require the staff to abide by religious rules.").

76 The structural argument in the following three paragraphs draws from the author's Appellants' Opening Brief, *supra* note 66, at 25–28.

77 *See* 42 U.S.C. § 2000e-1(a) (2018).

78 *See id.*; *supra* note 68 and accompanying text.

79 42 U.S.C. § 2000e-1(a) (2018); *id.* § 2000e(j).

80 *See infra* note 104 and accompanying text.

have done so. It could have said, "This subchapter's prohibition on religious discrimination shall not apply . . ."; or, "This subchapter shall not apply with respect to claims of religious discrimination against . . ."; or, "It shall not be an unlawful employment practice for a religious organization to discriminate against any individual in employment because of such individual's religion." But it framed the exemption *not* in terms of the plaintiff's *claim* (religious discrimination), but in terms of the employer's *conduct* ("employment of individuals of a particular religion," or "to hire and employ employees of a particular religion").[81]

This structural point is underscored by the other half of § 2000e-1(a): the "alien" exemption. Section 2000e-1(a) consists of a single sentence with two exemptions—both introduced with the same language: "This subchapter shall not apply to *an employer with respect to the employment of aliens outside any State*, or to a religious [employer] with respect to the employment of individuals of a particular religion . . . ."[82] If the religious exemption were limited to only certain types of claims (i.e., religious discrimination), one would expect the alien exemption to have a similar limitation (to only claims of race or national origin discrimination). But courts have imposed no such limitation on the alien exemption. Rather, whenever an employer engages in the relevant conduct—"employment of aliens outside any State"—"[t]hat language has been understood to mean what it says: none of Title VII's substantive rules applies."[83] Thus, the two exemptions "must be read equally broadly."[84]

Finally, this understanding of the religious exemption is confirmed by the use of identical language in a parallel exemption in the Americans with Disabilities Act (ADA).[85] The ADA's religious exemption provides: "*This subchapter* shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to *individuals of a particular religion*."[86] If the

81 *Cf.* Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) ("[I]f Congress had wished to limit the religious organization exemption to [certain] decisions, it could clearly have done so," but "it painted with a broader brush.").

82 42 U.S.C. § 2000e-1(a) (2018) (emphasis added).

83 Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 947 (7th Cir. 2022) (Easterbrook, J., concurring) (emphasis omitted).

84 Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 591 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023).

85 *See* United States v. Simms, 914 F.3d 229, 234, 240 (4th Cir. 2019) (en banc) (interpreting a statutory clause in part by looking to "a materially identical clause in another statute"). These two paragraphs on the ADA exemption quote from the author's Appellants' Opening Brief, *supra* note 66, at 25–28.

86 42 U.S.C. § 12113(d)(1) (2018) (emphasis added).

narrow interpretation of Title VII's religious exemption were correct—that an exemption for employing "individuals of a particular religion" protects only against *religious discrimination claims*—then the ADA's religious exemption would be superfluous, because the ADA doesn't authorize religious discrimination claims; it authorizes only disability discrimination claims.[87]

So the only way to give the ADA's religious exemption any meaning at all is to construe it to protect a particular type of *conduct*—namely, making employment decisions based on an employee's religion—even when the employee brings a disability discrimination *claim*. So if this is what an exemption for employing "individuals of a particular religion" means under the ADA, the same must be true under the identical language of Title VII.[88]

2. Precedent

Several courts have adopted this interpretation of Title VII's religious exemption. Perhaps the most prominent pre-*Bostock* example is the Third Circuit's decision in *Curay-Cramer v. Ursuline Academy*.[89] There, a Catholic school dismissed a teacher after she signed a pro-choice advertisement contrary to Catholic teaching.[90] The teacher sued for sex discrimination, claiming that she had been treated worse than comparable male teachers and that the school's religious reason was pretextual.[91] But the Third Circuit held that her sex discrimination claim was barred by the religious exemption.[92] The Court reasoned that "Congress intended the explicit exemptions of Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices . . . ."[93] And because the school had "offer[ed] a religious justification" for its

87 *See id.* § 12112(a).

88 Nor are Title VII and the ADA the only federal statutes with such religious exemptions. The Pregnant Workers Fairness Act (PWFA), for example, expressly incorporates Title VII's religious exemption, 42 U.S.C. § 2000gg-5(b) (2023), but doesn't allow for religious-discrimination claims; the only available discrimination claims are for reasonable accommodations related to pregnancy, *id.* § 2000gg-1.

89 Curay-Cramer v. Ursuline Acad., 450 F.3d 130 (3d Cir. 2006). Because *Curay-Cramer* was litigated pre-*Bostock*, it is a pretext case rather than an illegality case. But it still addresses the question of whether Title VII's religious exemption can bar sex discrimination claims. *See id.* at 141.

90 *Id.* at 132.

91 *Id.* at 133.

92 *Id.* at 141.

93 *Id.* (quoting Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)).

decision, her claim was barred—even though she sued for sex discrimination.[94] Other pre-*Bostock* decisions agree.[95]

Perhaps the first illegality case to address this issue, and certainly the first post-*Bostock* court of appeals decision to do so, is *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*[96] There, a Catholic high school dismissed a guidance counselor who entered a same-sex union contrary to Catholic teaching.[97] The counselor didn't claim that this religious reason was pretextual; instead, she claimed it was illegal sex discrimination.[98] Although the Court ultimately held her claims were barred by the ministerial exception,[99] Judge Easterbrook wrote a concurring opinion, explaining that her illegality claim was also barred by "[a] straightforward reading" of Title VII's religious exemption.[100] The exemption, he explained, by its plain text, applies to "all of Title VII" and defines religion to include "all aspects of religious observance and practice, as well as belief."[101] Thus, it "permits a religious employer to require the staff to abide by religious rules."[102]

Since *Bostock*, at least one district court, another Seventh Circuit concurrence, and a Fourth Circuit concurrence have adopted the

94 *Id.* at 142, 141–42.

95 *See, e.g.*, EEOC v. Miss. Coll., 626 F.2d 477, 485–86 (5th Cir. 1980) (barring sex-discrimination investigation where college "applied its policy of preferring Baptists over non-Baptists"); Maguire v. Marquette Univ., 627 F. Supp. 1499, 1502–04 (E.D. Wis. 1986) (barring sex discrimination claim when Catholic university declined to hire professor for expressing pro-abortion views), *aff'd in part, vacated in part on other grounds*, 814 F.2d 1213 (7th Cir. 1987); Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (noting, in a religious discrimination case, that "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" (emphasis added) (quoting *Little*, 929 F.2d at 951)); Larsen v. Kirkham, 499 F. Supp. 960, 966 (D. Utah 1980) (Congress would not "purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task."), *aff'd*, No. 80-2152, 1982 WL 20024 (10th Cir. Dec. 20, 1982).

96 Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931 (7th Cir. 2022).

97 *See id.* at 938.

98 *Id.*

99 *Id.* at 942.

100 *Id.* at 946 (Easterbrook, J., concurring).

101 *Id.* (quoting 42 U.S.C. § 2000e(j) (2018)).

102 *Id.*

same view.[103] Several pre- and post-*Bostock* cases, however, have also adopted the narrower, claim-based approach, discussed below.[104]

Likewise, after *Bostock*, the Equal Employment Opportunity Commission (EEOC) promulgated guidance agreeing with the conduct-based interpretation of the religious exemption.[105] The EEOC noted that "the exemption allows 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."[106] Citing *Curay-Cramer*, the EEOC said the religious exemption "bars adjudication of the sex discrimination claim" in such a case because it "preserves the religious school's ability to maintain a community composed of individuals faithful to its doctrinal practices."[107]

Finally, *Bostock* itself provides support for this view. There, the Court noted that it remains "deeply concerned with preserving the promise of the free exercise of religion."[108] To that end, the Court highlighted several "doctrines protecting religious liberty" that it said may apply in "future cases" asserting sex discrimination—including Title VII's "express statutory exception for religious organizations."[109] However, it would make no sense to highlight the religious exemption

103 *See* Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 591 (N.D. Tex. 2021) (Under "[t]he plain text of [the religious] exemption," "a religious employer is not liable under Title VII when it refuses to employ an individual because of sexual orientation or gender expression, based on religious observance, practice, or belief."), *aff'd in part, vacated in part, rev'd in part sub nom.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023); Fitzgerald v. Roncalli High Sch., Inc., 73 F.4th 529, 534 (7th Cir. 2023) (Brennan, J., concurring); Billard v. Charlotte Cath. High Sch., 101 F.4th 316, 333 (4th Cir. 2024) (King, J., dissenting in part and concurring in judgment).

104 Some pre-*Bostock* cases held that the religious exemption is limited to claims of religious discrimination. *See, e.g.*, EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168 (N.D. Ind. 2014). Other pre-*Bostock* cases suggested the same in dicta. *See, e.g.*, Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, 238 F. Supp. 2d 174 (D.D.C. 2002); Boyd v. Harding Acad., 88 F.3d 410 (6th Cir. 1996). Since *Bostock*, at least four district courts have agreed. *See* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195 (S.D. Ind. 2020), *appeal dismissed*, No. 20-3265, 2021 WL 9181051 (7th Cir. 2021); Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431 (W.D.N.C. Sep. 3, 2021), *rev'd*, 101 F.4th 316 (4th Cir. 2024); McMahon v. World Vision, Inc., 704 F. Supp. 3d 1121 (W.D. Wash. 2023), *rev'd*, 147 F.4th 959 (9th Cir. 2025); Zinski v. Liberty Univ., Inc., 777 F. Supp. 3d 601, 631 (W.D. Va. 2025).

105 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2021-3, SECTION 12 RELIGIOUS DISCRIMINATION (2021).

106 *Id.* § I(C)(1).

107 *Id.*

108 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

109 *Id.* (citing 42 U.S.C. § 2000e-1(a) (2018)).

in a sex-discrimination case if that exemption were limited only to religious discrimination claims.[110]

3. Counterarguments

But not every court has adopted this conduct-based approach to the religious exemption. Several courts have adopted a narrower, *claim-based approach*—concluding that the exemption applies only when a plaintiff brings a *religious discrimination claim*. In support, they have offered arguments rooted primarily in Title VII's legislative history and policy.

a. Text

Somewhat surprisingly, no court has offered a textual analysis in support of the claim-based approach. Instead, most courts adopting that approach have simply assumed that because the exemption mentions "religion," but doesn't mention race, national origin, or sex, the exemption must be "limited specifically to claims of discrimination premised upon religious preferences."[111] None of these courts, however, has addressed how this claim-based approach fits with the exemption's application to the entire "subchapter" of Title VII, with the definition of religion (which includes "all aspects of religious observance and practice"), with the alien exemption in the same sentence (which is not limited to specific types of claims), or with the parallel exemption in the ADA.[112]

110 Other Justices have also characterized the religious exemption in this way. In *Our Lady*, for example, Justices Sotomayor and Ginsburg argued for a narrower interpretation of the ministerial exception based in part on the existence of Title VII's religious exemptions. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072, 2076, 2082 (2020) (Sotomayor, J., dissenting). In describing the exemptions, the Justices didn't say their applicability turned on whether the plaintiff had characterized his claims as religious discrimination. *See id.* at 2072. Indeed, no religious discrimination claim was at issue in *Our Lady*. *Id.* at 2058–59 (majority opinion). Instead, Justice Sotomayor wrote that the exemptions "protect a religious entity's ability to make employment decisions—hiring or firing—*for religious reasons*." *Id.* at 2072 (Sotomayor, J., dissenting) (emphasis added); *see also* Transcript of Oral Argument at 11–12, *Our Lady*, 140 S. Ct. 2049 (No. 19-267) (Breyer, J.) (similar). The majority didn't disagree with this understanding of the exemption's scope; it simply went further, holding that the First Amendment barred the claims at issue without regard to whether the schools had religious reasons for their actions. *See Our Lady*, 140 S. Ct. at 2068–69.

111 *See, e.g.*, Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168, 1175 (N.D. Ind. 2014).

112 *See, e.g.*, EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1366 (9th Cir. 1986) (no mention of these textual issues); *Herx*, 48 F. Supp. 3d at 1175–76 (same); Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *8–9 (W.D.N.C. Sep. 3, 2021) (same), *rev'd*, 101 F.4th 316 (4th Cir. 2024).

b. Legislative History

Instead of analyzing the text, courts adopting the claim-based approach have typically focused on legislative history. A leading example is the Ninth Circuit's decision in *EEOC v. Pacific Press Publishing Ass'n*.[113] There, a Seventh-day Adventist publisher was sued for sex discrimination for allegedly paying a female editorial secretary less than similarly situated males and then retaliating against her when she filed charges with the EEOC.[114] The publisher denied paying discriminatory wages[115] and argued that the claim was barred by Title VII's religious exemption.[116]

The Ninth Circuit rejected the defense based on "the legislative history of Title VII and its amendments."[117] As the court explained, the "original version" of Title VII, passed only by the House, "contained a broad exemption" excluding religious organizations from coverage under the Act "entirely."[118] But the Senate rejected this broad exemption and adopted "a more limited exemption," permitting religious employers "to employ individuals of a particular religion to perform work connected with its religious activities."[119] Likewise, when Congress broadened the religious exemption in 1972, the Senate again declined a "blanket exemption" for religious organizations.[120] Instead, it broadened the exemption "only slightly to allow religious employers to discriminate on the basis of religion with respect to all [activities]—not just religious activities."[121]

This "legislative history," the court said, "shows that although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, [or] national origin."[122] Other courts adopting the claim-based approach have likewise relied on this legislative history.[123]

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

114 *Id.* at 1275.

115 *See id.* at 1279.

116 *Id.* at 1276.

117 *Id.*

118 *Id.* That exemption provided: "This title shall not apply . . . to a religious corporation, association, or society." *Id.* (quoting H.R. REP. NO. 88-914 (1963), *reprinted in* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2010 (1968)).

119 *Id.*

120 *Id.* at 1277 (citing SUBCOMM. ON LAB., S. COMM. ON LAB. & PUB. WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 1229–30 (Comm. Print 1972)).

121 *Id.*

122 *Id.* at 1276.

123 *See, e.g.*, EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1365–66 (9th Cir. 1986); Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1202 (S.D.

There are two problems with this argument. First, it elevates legislative history above the plain text. But the Supreme Court "has repeatedly refused to alter [a statute's] plain terms on the strength only of arguments from legislative history."[124] And it has particularly refused to do so with Title VII, instead holding that courts must follow "the ordinary public meaning of Title VII's" text.[125]

Second, the legislative history argument is premised on a false dichotomy. Specifically, the argument assumes Congress had only two options for an exemption: (1) exempting religious organizations "entirely"; or (2) exempting religious organizations only from religious discrimination claims.[126] Since Congress clearly rejected a complete exemption (so the argument goes), it must have adopted an exemption only from religious discrimination claims—meaning the exemption is inapplicable to race, sex, and national origin discrimination claims.

But this argument overlooks a third option for an exemption: exempting religious organizations from *all* types of discrimination claims *if* the religious organization shows it was seeking to employ "individuals of a particular religion."[127] The mere fact that Congress rejected a *complete* exemption says nothing about whether Congress adopted a *claim-based exemption* or a *conduct-based exemption.* And as explained above, the most natural reading of the text is that it provides a conduct-based exemption—an exemption that applies to *all* of Title VII ("This subchapter shall not apply") *when* a religious organization engages in the relevant conduct ("employment of individuals of a particular religion").[128]

c. Policy

In addition to legislative history, several courts have invoked policy reasons for rejecting the conduct-based approach. One common argument is that a conduct-based approach would "swallow Title VII's

Ind. 2020), *appeal dismissed*, No. 20-3265, 2021 WL 9181051 (7th Cir. 2021); Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *9 (W.D.N.C. Sep. 3, 2021), *rev'd*, 101 F.4th 316 (4th Cir. 2024); Herx v. Diocese of Fort Wayne-South Bend Inc., 48 F. Supp. 3d 1168, 1174–76 (N.D. Ind. 2014) (relying on "the history of Congressional action relating to Title VII," *id.* at 1175).

124 Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019); *cf.* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment) ("The greatest defect of legislative history is its illegitimacy.").

125 Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020); *see also id.* at 1750 ("[L]egislative history can never defeat unambiguous statutory text . . . .").

126 *See Pac. Press*, 676 F.2d at 1276.

127 42 U.S.C. § 2000e-1(a) (2018).

128 *See supra* notes 67–74 and accompanying text.

rules," amounting to a "complete exemption" from claims based on "race, color, sex or national origin" discrimination.[129]

But this misunderstands the conduct-based approach. Under that approach, religious organizations remain subject to race, sex, and national origin discrimination claims *every* time they make an employment decision based on anything *other* than the employee's religious beliefs, observances, or practices. So, for example, if they dismiss an employee for poor performance—or tardiness, or downsizing, or budgetary reasons, or personality fit, or lack of technological savvy—they can be sued for race, sex, or national origin discrimination, and a jury can probe whether the nonreligious reasons for dismissal were pretextual.[130] In fact, even when a religious organization claims its decision was based on the employee's *religion*, the religious exemption still doesn't apply if the religious reason was pretextual.[131] So the only time the exemption applies is when the employment decision is based on the employee's religion *and* the religious reason was sincere and non-pretextual. That is far from a "complete exemption."

Alternatively, some courts have said a conduct-based approach is objectionable because it might protect odious practices—such as "a religious employer that genuinely believes the Bible forbids interracial marriage" and wants "to terminate an employee who married someone of a different race."[132]

But such conduct is already prohibited by multiple laws even stronger than Title VII. Section 1981, for example, prohibits race discrimination in employment.[133] But unlike Title VII, it applies to all employers (not just those with at least fifteen full-time employees),[134] has

129 Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1202–03 (S.D. Ind. 2020), *appeal dismissed*, No. 20-3265, 2021 WL 9181051 (7th Cir. 2021); *see also* Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *8 (W.D.N.C. Sep. 3, 2021) (quoting *Starkey*, 496 F. Supp. 3d at 1203).

130 Such cases are common. *See, e.g.*, Palmer v. Liberty Univ., Inc., 72 F.4th 52 (4th Cir. 2023) (lack of technological skills), *cert. denied*, 144 S. Ct. 1030 (2024); *see also infra* notes 435–39 and accompanying text.

131 *See supra* notes 39–40 and accompanying text; *see also* Garrick v. Moody Bible Inst., 95 F.4th 1104, 1116 (7th Cir. 2024) ("Even where a religious justification is given, if the plaintiff plausibly asserts that justification is pretextual, the First Amendment does not automatically bar judicial examination of that claim."). For limits on the pretext inquiry, *see supra* notes 36–38 and accompanying text.

132 *Starkey*, 496 F. Supp. 3d at 1203.

133 42 U.S.C. § 1981(a), (c) (2018) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . . The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.").

134 *Cf. id.* § 2000e(b) (Title VII's fifteen-employee limit).

no cap on damages,[135] and has *no religious exemption*.[136] Similarly, Title VI prohibits race discrimination in any activity receiving federal funds—authorizing the federal government (and private lawsuits) to strip race-discriminatory organizations of federal funding.[137] And the Supreme Court has already upheld the authority of the IRS to strip race-discriminatory religious organizations of their tax-exempt status.[138] Thus, any organization engaging in such conduct would be subject not only to uncapped damages under § 1981, but loss of federal funding under Title VI and loss of tax-exempt status—all without Title VII or its religious exemption even entering the equation. That may be one reason why I have been unable to locate a single reported case in the sixty-year history of Title VII that has ever involved a religious organization claiming a religious exemption for religious beliefs supporting racism.

On the other hand, strong policy considerations support the conduct-based approach. Tens of thousands of religious organizations have long asked their employees to share their religious beliefs and practices—including their belief in traditional marriage. This has long been permitted under American law. And the Supreme Court has said these organizations should continue to receive "proper protection as they seek to teach" and "advocate with utmost, sincere conviction" that "same-sex marriage should not be condoned."[139] But the narrow, claim-based approach would do just the opposite—subjecting all these organizations to liability and creating widespread church-state conflict.

135 *Id.* § 1981a(b)(3)–(4).

136 *See, e.g.*, Chambers v. N.C. Dep't of Just., 66 F.4th 139, 143–44 (4th Cir. 2023) (Section 1981 applies to employment and hostile work environment claims.); Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 277 (4th Cir. 2015) (en banc) ("The same test applies to a hostile work environment claim asserted under 42 U.S.C. § 1981" as applied to a Title VII racially hostile work environment claim.); Bob Jones Univ. v. United States, 639 F.2d 147, 151 (4th Cir. 1980) ("In *Runyon v. McCrary*, the Supreme Court held, in a non-religious setting, that the equal right to contract provision, 42 U.S.C. § 1981, prohibits racial discrimination in non-public school admission policies. Similar considerations apply in a religious setting." (citation omitted)), *aff'd*, 461 U.S. 574 (1983).

137 *See* 42 U.S.C. § 2000d (2018) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); Bob Jones Univ. v. Johnson, 529 F.2d 514 (4th Cir. 1975) (upholding the denial of Veterans Administration assistance to Bob Jones University and its students under Title VI), *aff'g*, 396 F. Supp. 597 (D.S.C. 1974).

138 Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983).

139 Obergefell v. Hodges, 576 U.S. 644, 679–80 (2015).

4. Conclusion

In sum, Title VII's religious exemption offers a strong textual basis for protecting the religious hiring of nonministers. That exemption provides that the entire "subchapter" of Title VII "shall not apply" to religious organizations when they seek to employ "individuals of a particular religion"—with "religion" defined broadly to include "all aspects of religious observance and practice."[140] This means religious employers have "permission to employ only persons whose *beliefs and conduct* are consistent with the employer's religious precepts."[141] The narrower, claim-based approach to Title VII's exemption fails to account for Title VII's text and is based instead on a misreading of legislative history and unfounded policy arguments.

B. Title VII's Bona Fide Occupational Qualification (BFOQ) Exemption: Relevant but Rarely Used

The second potential protection for the religious hiring of nonministers is Title VII's BFOQ exemption. That exemption allows an employer to hire and fire on the basis of sex when sex is "a bona fide occupational qualification reasonably necessary to the normal operation" of the employer's enterprise.[142] Under this provision, a religious group that is sued for sex discrimination under *Bostock*—such as a religious school that dismisses a librarian for entering a same-sex marriage—could argue that requiring employees to follow the group's religious teachings is "reasonably necessary" to carry out the group's religious mission. Very few cases have considered this question, likely because most litigation in similar cases has focused on other protections like the ministerial exception or Title VII's religious exemption. However, as explained below, the BFOQ exemption's text and available precedent suggest that this may supply another viable defense.

1. The Basic Argument

The BFOQ exemption provides: "it shall not be an unlawful employment practice" to "hire and employ employees . . . on the basis of . . . religion, sex, or national origin . . . where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[143]

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140 42 U.S.C. §§ 2000e-1(a), 2000e(j) (2018).

141 Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (emphasis added) (quoting Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991)).

142 42 U.S.C. § 2000e-2(e)(1) (2018).

143 *Id.*

This defense generally applies when two conditions are met. First, the employment requirement must be a "bona fide occupational qualification"—meaning it must "affect an employee's ability to do the job."[144] Such requirements typically must be "objective, verifiable," and "concern job-related skills and aptitudes."[145] Second, the qualification must be "reasonably necessary to the normal operation" of the particular enterprise—meaning it must "relate to" the organization's "essence" or "central mission."[146]

Although the Supreme Court has said that "[t]he BFOQ defense is written narrowly,"[147] lower courts and the EEOC have upheld BFOQ defenses to sex discrimination claims in a variety of contexts. Examples include cases where a sex-based qualification enables an employer: (1) to maintain the *safety* of employees or clients—such as a male prison that hires only male guards,[148] or a female prison that hires only female guards;[149] (2) to respect the *privacy* of clients or customers—such as when "nurses, nurses' aides, janitors, child care specialists at psychiatric hospitals, [or] prison guards" would "view the naked bodies of patients or inmates" in the course of their work;[150] (3) to accommodate the *psychological needs* of clients—such as when "only males [are] allowed on the staff of a dormitory for mentally retarded young men,"[151] or only female prison guards are allowed in a female prison where many prisoners had been abused by men;[152] or (4) to enhance "*authenticity or genuineness*," such as when casting "an actor or actress" in a particular role.[153]

Outside the context of health, safety, privacy, and authenticity, courts have also held that a sex-based requirement to serve as a "role model" of the employer's values can be a BFOQ where "the 'essence'

144 Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991).

145 *Id.*

146 *Id.* at 203 (first quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); and then quoting W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

147 *Id.* at 201.

148 *See, e.g.*, *Dothard*, 433 U.S. at 336–37; *see also* St. John's Home for Child. v. W. Va. Hum. Rts. Comm'n, 375 S.E.2d 769, 771 (W. Va. 1988) (upholding male-only BFOQ where "[s]upervising violent, aggressive, male adolescents involves protecting the weaker members of the patient community from the stronger ones").

149 *See, e.g.*, Everson v. Mich. Dep't of Corr., 391 F.3d 737, 753–54 (6th Cir. 2004).

150 *See* Jillian B. Berman, Note, *Defining the "Essence of the Business": An Analysis of Title VII's Privacy BFOQ after* Johnson Controls, 67 U. CHI. L. REV. 749, 750 (2000); *see also* Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1258–59 (2003) (collecting cases).

151 U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1982-2, CM-625 BONA FIDE OCCUPATIONAL QUALIFICATIONS § 625.7(a) (1982).

152 *See* Torres v. Wis. Dep't of Health & Soc. Servs., 859 F.2d 1523, 1530, 1532 (7th Cir. 1988).

153 29 C.F.R. § 1604.2(a)(2) (2024) (emphasis added).

of the employer's mission is to exemplify a moral or religious life."[154] For example, the Eighth Circuit held that a Girls Club could dismiss an unmarried, pregnant art instructor because the club's "purpose" included "model[ing]" "behavior" and teenage "pregnancy prevention."[155] Other courts have suggested that the BFOQ exemption may permit Catholic schools to require teachers or librarians to serve as role models of Catholic teaching on sexuality.[156]

Consider, then, the example of a Catholic school that asks all its employees to model the Catholic faith, and then dismisses a librarian who enters a same-sex marriage contrary to Catholic teaching. To fall within the BFOQ exemption, the school would need to show two things: (1) that modeling the Catholic faith is part of the librarian's "ability to do the job," and (2) that being able to model the faith is related to the school's "essence" or "central mission."[157]

As the EEOC has explained, a BFOQ defense presents fact-specific questions that must be addressed "on a case-by-case basis."[158] The school would likely offer evidence that its "central mission" involves teaching children the Catholic faith, and that this mission is advanced not just by the words spoken in the classroom but by the lived examples of faculty and staff. It would likely offer evidence of employee contracts, handbooks, or codes of conduct articulating the importance of

154 Benjamin O. Hoerner, *The Role-Modeling BFOQ: Court Confusion and Educational Promise*, 16 U. PA. J. BUS. L. 1211, 1234 & n.114 (2014) (collecting cases).

155 Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 698–99, 705 (8th Cir. 1987).

156 *See, e.g.*, Dolter v. Wahlert High Sch., 483 F. Supp. 266, 271 (N.D. Iowa 1980) (noting that a Catholic school "may be entitled to impose a code of moral conduct" on teachers "as a bfoq"); Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802, 809 (N.D. Cal. 1992) (Fact issues precluded summary judgment on whether a requirement "to act as a role model" was a BFOQ for a Catholic school librarian.).

Very few cases have addressed "the BFOQ exception based on religion." U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 151, § 625.3(a). This is likely because Title VII's religious exemption already provides overlapping and more explicit protection for "the hiring of persons of a particular religion." *Id.* However, it has occasionally been asserted by nonreligious employers, McCollum v. Cal. Dep't of Corr. & Rehab., 647 F.3d 870, 881 (9th Cir. 2011) (holding that religion was a BFOQ when a prison was hiring for a prison chaplaincy program), or alongside Title VII's religious exemption, EEOC v. Kamehameha Schs./Bishop Est., 990 F.2d 458, 463–65 (9th Cir. 1993) (rejecting "adherence to the Protestant faith," *id.* at 466, as a BFOQ for teachers where the school's "purpose and character is primarily secular, not primarily religious," *id.* at 464). For purposes of this Article, the BFOQ exemption based on *religion* would arguably be irrelevant to a claim of *sex* discrimination under *Bostock*. But the BFOQ exemption based on sex would be especially relevant in a court that adopted a narrow, claim-based approach to Title VII's religious exemption.

157 Int'l Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201, 203 (1991) (first quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); and then quoting W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 413 (1985)).

158 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 151, § 625.4(b)(2).

modeling the Catholic faith. And it would offer evidence of how a librarian is expected to interact with students, staff, and parents and why modeling the faith is important in those contexts.

Depending on this evidentiary showing, the school could have a strong defense under the Eighth Circuit's decision in *Chambers v. Omaha Girls Club, Inc.* There, the court held that "teenage pregnancy" was contrary to the "fundamental purpose" of the Girls Club, which was to provide young girls with "exposure to the greatest number of available positive options in life."[159] Accordingly, the court held that the Club could require its "arts and crafts instructor" to comply with a "role model rule" forbidding single pregnancy.[160] Likewise, a Catholic school could show that requiring its librarian to model the Catholic faith is "reasonably necessary" to its purpose of forming students in the Catholic faith.[161]

2. Counterarguments

There are several potential counterarguments against this account of the BFOQ exemption. First, the hypothetical librarian in our example could note that the Supreme Court has often cautioned that "[t]he BFOQ defense is written narrowly, and this Court has read it narrowly."[162] This counsels against unduly expanding the exemption. But it does not foreclose its application where the terms of the exemption are satisfied.

Second, the librarian could point out that very few cases have applied the BFOQ exemption to religious qualifications of religious employers.[163] And the lone court that has considered a religious group's BFOQ defense to a sex discrimination claim under *Bostock* has rejected it.[164] However, the dearth of precedent on the BFOQ exemption is likely due to the fact that similar conflicts have previously been resolved under religion-specific doctrines like the ministerial exception and Title VII's religious exemption.[165] And the lone post-*Bostock* ruling against the BFOQ defense has been reversed without addressing the BFOQ.[166]

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159 *Chambers*, 834 F.2d at 701–02.

160 *Id.* at 699, 704–05.

161 *See* 42 U.S.C. § 2000e-2(e)(1) (2018).

162 *Johnson Controls*, 499 U.S. at 201.

163 *See supra* note 156 and accompanying text.

164 McMahon v. World Vision, Inc., 704 F. Supp. 3d 1121, 1140–41 (W.D. Wash. 2023) ("World Vision has not shown that excluding those in a same-sex marriage is essential to the customer service representative position . . . ."), *rev'd*, 147 F.4th 959 (9th Cir. 2025).

165 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 151, § 625.3(a).

166 *See McMahon*, 147 F.4th at 966.

Third, the librarian could dispute both prongs of the BFOQ test on the merits. That is, she could argue that entering a same-sex marriage does not undermine her ability to do the job of a librarian—which consists primarily of managing the library collection, helping students with research, and promoting literacy, not modeling the Catholic faith. She could try to offer evidence that the school employs other individuals who disagree with the Catholic teaching on marriage. And she could argue that the school's "essence" or "central mission" is not teaching the Catholic faith but providing children with a good academic education.

As should be evident, however, these arguments risk entangling civil courts (or juries) in religious questions. Defining the "central mission" of a religious school and determining what religious qualifications are "reasonably necessary" to accomplish that mission, are, at bottom, religious questions. The Supreme Court has recognized that religious groups generally have the freedom both "to define" and to "carry out their religious missions."[167] This is because second-guessing a religious group's own definition of its mission and what religious qualifications are important for that mission "would require calling witnesses to testify about the importance and priority of the religious doctrine in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission."[168] "[T]he mere adjudication of such questions would pose grave problems . . . ."[169]

To avoid entanglement in religious questions, courts addressing a BFOQ defense of this sort would need to give religious groups at least some measure of deference in defining their religious mission and deciding what religious qualifications are "reasonably necessary" to that mission. Such deference is not unusual. For example, under the doctrine of expressive association, courts are bound to "give deference to an association's assertions regarding the nature of its expression," as well as to "give deference to an association's view of what would impair its expression."[170] In the same way, courts should accord deference to a religious group's assertions "regarding the nature of its [mission]"

167 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987).

168 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 206 (2012) (Alito, J., concurring).

169 *Id.* at 205; *see also* Union Gospel Mission of Yakima Wash. v. Brown, 162 F.4th 1190, 1204 (9th Cir. 2026) ("If a religious institution sincerely believes that its non-ministerial employees must adhere to and live according to its religious principles to accomplish its religious mission, the only way a court could adjudicate a dispute for a plaintiff would be to rule that the religious institution cannot seek that 'mission' or that the hiring policy isn't necessary to that 'mission'—inherently religious questions.").

170 Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

and "what would impair its [mission]." If anything, deference is even more appropriate in the context of religious groups than of other expressive groups due to the Constitution's prohibition on civil courts answering religious questions.[171]

Thus, applied with appropriate deference to avoid entanglement in religious questions, the BFOQ exemption may provide religious groups with a strong defense.

C. RFRA: A Lurking Circuit Split

The third potential protection for the religious hiring of nonministers is the Religious Freedom Restoration Act (RFRA). In fact, *Bostock* specifically highlighted the potential application of RFRA in such cases—noting that "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws."[172] Thus, "it might supersede Title VII's commands in appropriate cases."[173]

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless the government demonstrates that imposing that burden "is the least restrictive means of furthering" "a compelling governmental interest."[174] This means the application of RFRA typically proceeds in two steps. First, a religious individual or organization must show that the federal government has substantially burdened its religious exercise.[175] Second, the government must prove that imposing the burden satisfies strict scrutiny.[176]

Two circuits have held that RFRA can provide a valid defense to employment discrimination claims.[177] According to these circuits, when the government imposes liability on a religious organization for

171 Courts have long recognized this dynamic in the context of the ministerial exception, noting that a religious group's "definition and explanation of [employees'] roles is important." Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020). That is because "the Religion Clauses require deference to a 'religious institution's explanation of the role of [its] employees in the life of the religion in question.'" Markel v. Union of Orthodox Jewish Congregations of Am., 124 F.4th 796, 803 (9th Cir. 2024) (alteration in original) (quoting *Our Lady*, 140 S. Ct. at 2066), *cert. denied*, 145 S. Ct. 2822 (2025) (mem.).

172 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

173 *Id.*

174 *See* 42 U.S.C. § 2000bb-1(a)–(b) (2018).

175 *See, e.g.*, Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 428–29 (2006).

176 *See id.*

177 *See* Hankins v. Lyght, 441 F.3d 96, 102–04 (2d Cir. 2006) (employment discrimination); EEOC v. Cath. Univ. of Am., 83 F.3d 455, 467–69 (D.C. Cir. 1996) (Title VII); *see also In re* Young, 82 F.3d 1407, 1416–17 (8th Cir. 1996) (bankruptcy), *vacated sub nom.*, Christians v. Crystal Evangelical Free Church, 521 U.S. 1114 (1997), *reinstated sub nom., In re* Young, 141 F.3d 854 (8th Cir. 1998).

making a religiously based hiring decision, the government substantially burdens religious exercise.[178] And imposing that burden doesn't satisfy strict scrutiny because, while the government may have a compelling interest in eradicating employment discrimination generally, that general interest doesn't justify forcing religious organizations to hire individuals who reject their core religious beliefs and practices.[179]

Two other circuits have rejected RFRA as a defense to at least some employment discrimination claims.[180] These circuits, however, haven't typically taken issue with other circuits' conclusions on the existence of a substantial burden or the government's ability to satisfy strict scrutiny. Instead, they have noted that RFRA applies only when the burden on religious exercise is imposed by the federal "Government."[181] Thus, according to these circuits, while RFRA might provide a defense when the federal government is a *party* to the case—such as when the EEOC sues to enforce Title VII—RFRA does not apply when employment discrimination suits are brought by *private employees.*

This circuit split may soon need to be addressed by the Supreme Court. And its resolution depends on a close reading of RFRA's text, purpose, and precedent.

1. The Argument for Applying RFRA

The argument in favor of applying RFRA to employment discrimination suits starts with RFRA's text. First, RFRA provides that it "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993."[182] That obviously includes federal employment laws. Second, RFRA also says a defendant may "assert" RFRA as a "defense in a judicial proceeding."[183] That is how RFRA functions in an employment discrimination suit—as a "defense" in a judicial proceeding to enforce employment laws.

What about that fact that RFRA applies only when the "Government" substantially burdens religious exercise? RFRA defines "Government" broadly to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the

178 *See Cath. Univ.*, 83 F.3d at 467–68.

179 *See id.*

180 *See* Listecki v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 737 (7th Cir. 2015); Gen. Conf. Corp. of Seventh-day Adventists v. McGill, 617 F.3d 402, 411 (6th Cir. 2010); *see also Hankins*, 441 F.3d at 109 (Sotomayor, J., dissenting).

181 42 U.S.C. § 2000bb–1(a) (2018); *see Listecki*, 780 F.3d at 737; *McGill*, 617 F.3d at 411.

182 42 U.S.C. § 2000bb-3(a) (2018); *see also* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2383 (2020) (quoting 42 U.S.C. § 2000bb-3(a) (2018)).

183 42 U.S.C. § 2000bb-1(c) (2018).

United States."[184] So when a religious organization is sued for employment discrimination, the "Government" imposes the burden in at least two respects. A "branch" of the United States—Congress—creates the law that gives rise to the burden. And another "branch"—the federal judiciary—issues the judgment that penalizes the religious organization.

This is also how government burdens are understood in the First Amendment context. The First Amendment's text doesn't constrain private parties; it says only that "*Congress* shall make no law" prohibiting or abridging First Amendment rights.[185] (And the Fourteenth Amendment incorporates this constraint against state governments.) But the Supreme Court has long recognized that lawsuits brought by private parties can impose just such an unconstitutional burden. This is because the imposition of liability in "a civil lawsuit between private parties" is itself an exercise of "state power."[186] Thus, a private lawsuit for libel can unconstitutionally burden the freedom of speech.[187] More to the point, a private lawsuit for employment discrimination can unconstitutionally burden the free exercise of religion—as shown by the many cases applying the ministerial exception to lawsuits brought by private parties.[188]

This analysis likewise fits with RFRA's purpose. As the Supreme Court has explained: "Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment."[189] The First Amendment routinely bars private lawsuits brought under federal employment laws (and other statutes) even when the government isn't a party.[190] So, too, must RFRA. Otherwise, a statute meant to provide "greater protection for religious exercise" than the First Amendment would provide far less.

Based on this analysis, three circuits have applied RFRA to suits between private parties.[191]

184 *Id.* § 2000bb-2(1).

185 U.S. CONST. amend. I (emphasis added).

186 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

187 *See id.* at 264.

188 *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).

189 Holt v. Hobbs, 574 U.S. 352, 357 (2015).

190 *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012).

191 *See supra* note 177.

2. Counterarguments

Two circuits, however, have held that RFRA applies only when the government is a party.[192] These circuits rely mainly on two aspects of RFRA's text.

First, RFRA provides that a party may assert RFRA "as a claim or defense in a judicial proceeding and obtain *appropriate relief against a government*."[193] This, some courts have said, means that relief under RFRA is "limited" to relief obtained from the "government"; thus, "[i]f the government is not a party, no one can provide the appropriate relief."[194]

But the better reading of this provision is that it "broaden[s]" relief by abrogating state sovereign immunity.[195] When Congress enacted RFRA, it applied to state governments,[196] and "Supreme Court precedent allowed Congress to abrogate state sovereign immunity only if Congress made its intention to abrogate 'unmistakably clear in the language of the statute.'"[197] Thus, to authorize suits against state governments, it was not enough to say that RFRA could be asserted "as a claim or defense in a judicial proceeding"; Congress had to specify that RFRA could "provide relief against a government."[198] That Congress included this phrase to waive sovereign immunity is also borne out by RFRA's drafting history.[199]

The contrary interpretation of this provision—that it limits RFRA to proceedings against the government—also turns the phrase "against a government" into a misplaced modifier. That is, it rewrites the provision to mean that a party may assert RFRA "as a claim or defense [in

192 *See* Listecki v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 737 (7th Cir. 2015); Gen. Conf. Corp. of Seventh-day Adventists v. McGill, 617 F.3d 402, 411 (6th Cir. 2010); *see also* Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) (Sotomayor, J., dissenting).

193 42 U.S.C. § 2000bb-1(c) (2018) (emphasis added).

194 *Listecki*, 780 F.3d at 737.

195 *See Hankins*, 441 F.3d at 103; *see generally* Appellants' Opening Brief, *supra* note 66, at 57–58.

196 The Supreme Court later struck down such application in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

197 Brief of Christian Legal Society as Amicus Curiae in Support of Defendants-Appellees at 15, Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931 (7th Cir. 2022) (No. 21-2524) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

198 *Id.*

199 Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 350–52 (2013).

a judicial proceeding] against a government and obtain appropriate relief ~~against a government~~."[200] But that is not what RFRA says.[201]

Second, RFRA provides that "Government may substantially burden a person's exercise of religion only if *it demonstrates*" that imposing the burden satisfies strict scrutiny.[202] RFRA then defines "demonstrates" as "meets the burdens of going forward with the evidence and of persuasion."[203] According to some courts, "[i]t is self-evident that the government cannot meet its burden if it is not party to the suit."[204] And "[a] private party cannot step into the shoes of the 'government'" and meet this burden "because the statute explicitly says that the 'government' must make this showing."[205]

But private parties make this showing in First Amendment cases as a matter of course, even though the First Amendment restrains only the government.[206] And RFRA defines "government" to include any "branch" or "agency" of government, any "official," or any "other person acting under color of law."[207] When a private party sues a religious organization under Title VII, she does so "only after the EEOC, by declining to bring its own enforcement action and issuing a right-to-sue letter, has authorized [her] to do so."[208] Given this statutory scheme—where the government clothes a private party with enforcement authority—it follows that the private party can bear the burden otherwise placed on the government.[209]

Limiting RFRA to suits between private parties would also produce odd results. Because the same employment actions are subject to suit by either a private party or by the EEOC, courts would have to "render

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200 *See* Brief of Christian Legal Society as Amicus Curiae in Support of Defendants-Appellees, *supra* note 197, at 14.

201 It is also incongruous to speak of "relief" against a government when RFRA is asserted as a "defense"—"since a litigant cannot obtain relief when merely asserting a defense," but "can only defeat liability." Chaganti, *supra* note 199, at 349–50. This further confirms that "appropriate relief against a government" doesn't narrow the category of parties against whom RFRA can be asserted but instead confers "an additional right upon which a litigant may rely"—the right to obtain relief from an otherwise immune government. *Id.* at 348.

202 *See* 42 U.S.C. § 2000bb-1(b) (2018) (emphasis added).

203 *Id.* § 2000bb-2(3).

204 *See, e.g.*, Listecki v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 736 (7th Cir. 2015).

205 *Id.*

206 *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 658–59 (2000) (private scoutmaster defending application of New Jersey law); Yeshiva Univ. v. YU Pride All., 143 S. Ct. 1, 2–3 (2022) (Alito, J., dissenting) (private club defending application of municipal law).

207 42 U.S.C. § 2000bb-2(1) (2018).

208 Appellants' Opening Brief, *supra* note 66, at 57.

209 *See id.*; *see also* Hankins v. Lyght, 411 F.3d 96, 103 (2d Cir. 2006). *But see* Gen. Conf. Corp. of Seventh-day Adventists v. McGill, 617 F.3d 402, 411 (6th Cir. 2010).

a different decision" on the same facts "depending on whether [the claim is brought] by the EEOC or an aggrieved private party."[210] The EEOC could also "evade RFRA simply by delegating its enforcement power to private parties whenever a religious defendant might be involved."[211]

Finally, the Supreme Court's decision in *Bostock* further supports RFRA's application to suits between private parties. *Bostock* involved three consolidated Title VII cases, two of which were brought by private parties.[212] In that context, the Court emphasized that it is "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution" and that RFRA "might supersede Title VII's commands in appropriate cases."[213] It gave no indication that the "appropriate cases" are only those in which the government is a party.[214]

III. THREE CONSTITUTIONAL PROTECTIONS BEYOND THE MINISTERIAL EXCEPTION

In addition to statutory protections like Title VII's exemptions and RFRA, religious organizations can also rely on the Constitution. Three protections are most relevant here: church autonomy, expressive association, and the Free Exercise Clause. We consider each in turn.

A. *Church Autonomy: Religious Employment Qualifications*

The Supreme Court has long recognized the "principle of church autonomy," which protects religious groups' "independence in matters of faith and doctrine and in closely linked matters of internal government."[215] Church autonomy is grounded in both Religion Clauses—the Free Exercise Clause, which "protects a religious group's right to shape its own faith and mission,"[216] and the Establishment Clause, which bars "any attempt by government to dictate or even to influence" religious faith, doctrine, or governance.[217]

The most familiar "component" of church autonomy is the ministerial exception, which bars civil interference in a religious group's

210 *Hankins*, 441 F.3d at 103.
211 Appellants' Opening Brief, *supra* note 66, at 58.
212 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1737–38 (2020).
213 *Id.* at 1754.
214 *See id.*
215 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020).
216 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012).
217 *Our Lady*, 140 S. Ct. at 2060.

decisions about who can perform religious functions.[218] But "the guarantee of church autonomy" is not "narrowly confined" to the ministerial exception.[219] Rather, "the general principle of church autonomy" provides additional protections beyond the ministerial exception.[220] The question is: what additional protections? And in particular, what additional protections for the hiring of nonministers?

1. The Breadth of Church Autonomy

The Supreme Court often describes church autonomy as protecting matters of "faith," "doctrine," and "church government."[221] The protection for "faith" and "doctrine" generally means civil courts cannot decide religious questions or make legal determinations based on a religious group's beliefs or practices. Thus, for example, civil courts cannot decide church property disputes based on which faction of the church "depart[ed] substantially from prior [church] doctrine."[222] Nor can a court or jury resolve a defamation case by deciding whether an individual is rightly considered to be a Catholic nun.[223] "Religious questions are to be answered by religious bodies."[224]

The protection for "church government" means that religious institutions generally have freedom to order their own internal affairs to carry out their own religious mission.[225] This includes decisions about who can lead a religious organization, teach its doctrine, and perform its religious functions, all of which are protected under the ministerial exception. But it also includes other "internal management decisions that are essential to the institution's central mission,"[226] such as decisions about "church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[227]

218 *See id.* at 2060–61.

219 Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1096 (2022) (Alito, J., respecting denial of certiorari).

220 *See Our Lady*, 140 S. Ct. at 2061.

221 *Id.* at 2060 (quoting *Hosanna-Tabor*, 565 U.S. at 186 (quoting Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94, 116 (1952))).

222 Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 450 (1969).

223 McCarthy v. Fuller, 714 F.3d 971, 976 (7th Cir. 2013).

224 *Id.*

225 *Our Lady*, 140 S. Ct. at 2060.

226 *Id.*

227 Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 709, 713–14 (1976) (emphasis omitted) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872)); *see also* Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 MARQ. L. REV. 705, 710–12 &

For example, civil courts cannot question "whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations."[228] Instead, "a civil court must accept the ecclesiastical decisions of church tribunals as it finds them."[229] Likewise, disaffected members cannot sue their church for fraud based on a religious disagreement about how tithing funds were used.[230] And in many cases, civil courts are restricted from probing the internal communications among church leaders and members—as reflected in cases barring discovery into church communications,[231] rejecting liability for church communications,[232] or recognizing the longstanding clergy-penitent privilege.[233]

Similarly, since at least 1872, the Supreme Court has held that civil courts "have no power to revise or question ordinary acts of church discipline, or of excision from membership."[234] This means religious groups get to determine the qualifications for church membership and "the conformity of the members of the church to the standard of morals required of them."[235] It also means church autonomy can bar defamation or other tort claims by former church members who challenge church discipline or statements made during church discipline.[236] In short, the government cannot interfere in a church's decision about who is qualified to be a member.

nn.23–28 (2025) (identifying five "subject-matter domains" of church autonomy and collecting cases).

228 *Milivojevich*, 426 U.S. at 713.

229 *Id.*

230 Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints, 127 F.4th 784, 793 (9th Cir. 2025) (en banc) (Bress, J., concurring in judgment).

231 *See, e.g.*, Whole Woman's Health v. Smith, 896 F.3d 362, 374–76 (5th Cir. 2018).

232 *See, e.g.*, *In re* Diocese of Lubbock, 624 S.W.3d 506, 509 (Tex. 2021); Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 293 (Ind. 2003); Payne-Elliott v. Roman Cath. Archdiocese of Indianapolis, Inc., 193 N.E.3d 1009, 1014 (Ind. 2022).

233 *See, e.g.*, People v. Phillips (N.Y. Ct. Gen. Sess. 1813), *reprinted in Privileged Communications to Clergymen*, 1 CATH. LAW. 199 (1955) (holding that the New York Constitution of 1777 protected the priest-penitent privilege); Scott v. Hammock, 133 F.R.D. 610, 619 (D. Utah 1990); Caekaert v. Watchtower Bible & Tract Soc'y of N.Y., Inc., No. cv 20-52, 2023 WL 3587291, at *1 (D. Mont. May 22, 2023).

234 Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139 (1872).

235 Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich, 426 U.S. 696, 714 (1976) (emphasis omitted) (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 733 (1872)).

236 *See, e.g.*, O'Connor v. Diocese of Honolulu, 885 P.2d 361, 362 (Haw. 1994) (rejecting tort claims stemming from excommunication); Lael Weinberger, *The Limits of Church Autonomy*, 98 NOTRE DAME L. REV. 1253, 1261 n.31 (2023) (collecting cases).

2. Supreme Court Precedent on Religious Employment Qualifications

What is true of ordinary members is even more true of those who are employed to represent a church and carry out its mission. Consider two Supreme Court cases protecting the freedom of religious groups to hire and fire nonministers based on alignment with their religious mission: *NLRB v. Catholic Bishop of Chicago* and *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos.*

In *Catholic Bishop*, the National Labor Relations Board (NLRB) ordered several Catholic high schools to recognize a union and bargain collectively with their "lay teachers."[237] The schools challenged the Board's order as a violation of the First Amendment, and the Seventh Circuit agreed, holding that the Board's order "conflicts with the Religion Clauses," because it "inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern"—such as by dismissing a teacher for teaching "sexual theories . . . contrary to the teachings of the Catholic Church" or for "adopting a lifestyle . . . contrary to Catholic moral teachings."[238]

The Supreme Court affirmed, citing "abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses."[239] The Court emphasized that "[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school" due to "the critical and unique role of the teacher in fulfilling the mission of a church-operated school."[240] Particularly when a school's "challenged [employment] actions were mandated by their religious creeds," both the NLRB's "conclusions" and its "very process of inquiry" "may impinge on rights guaranteed by the Religion Clauses."[241] Thus, the Court declined to interpret the National Labor Relations Act (NLRA) to give the Board jurisdiction over the hiring of lay teachers in religious schools.[242]

Amos, too, confirms that the Religion Clauses protect the hiring of nonministers. There, a church-run gymnasium fired a maintenance

237 NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 494 (1979).

238 Cath. Bishop of Chi. v. NLRB, 559 F.2d 1112, 1123–25 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

239 *Cath. Bishop*, 440 U.S. at 507.

240 *Id.* at 501, 504.

241 *Id.* at 502.

242 *Id.* at 507. Four dissenters criticized the majority for relying on the canon of constitutional avoidance, rather than addressing the constitutional questions directly. *Id.* at 508–11 (Brennan, J., dissenting). But because the majority didn't address the constitutional questions directly, the dissent didn't address them either. *Id.* at 518.

worker because he was not a member of the church.[243] The worker sued for religious discrimination, and when the church defended based on Title VII's religious exemption, the worker claimed that the exemption violated the Establishment Clause.[244]

The Supreme Court rejected the worker's argument unanimously, concluding that the exemption was "in no way questionable" under the Establishment Clause.[245] Rather, the Court said, the exemption "alleviate[s] significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[246] And far from entangling church and state, the exemption "effectuates a more complete separation of the two" by avoiding "governmental 'interfer[ence] with the decision-making process in religions.'"[247] Justice Brennan concurred, emphasizing that the exemption furthers "the autonomy of religious organizations" by allowing them to "[d]etermin[e] that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them."[248] "Concern for the autonomy of religious organizations" requires respect for their "authority to engage in this process of self-definition."[249]

Catholic Bishop and *Amos* are noteworthy because neither involved employees who would easily qualify as ministers. *Catholic Bishop* involved what the NLRB called "lay teachers"—nonordained teachers of secular subjects, like "physical education," and expressly excluding "religious faculty" and administrators.[250] *Amos* involved a "building engineer" whose "duties were to maintain the Gym's physical facilities and equipment and the grounds outside," performing "the same tasks performed by employees of any public gymnasium or health spa."[251] Yet both decisions recognized that government interference in the employment of nonministers can violate church autonomy.[252]

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243 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 330 (1987).

244 *Id.* at 331.

245 *Id.* at 335.

246 *Id.*

247 *Id.* at 339, 336 (quoting Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, 594 F. Supp. 791, 812 (D. Utah 1984), *rev'd*, 483 U.S. 327 (1987)).

248 *Id.* at 342 (Brennan, J., concurring in judgment).

249 *Id.* at 345, 342.

250 NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 493 n.5 (1979) (quoting Cath. Bishop of Chi., 220 NLRB 359, 360 (1975)). *But see* Reply Brief for Petitioners at 8–13, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267) (explaining why "'lay teachers' is an incoherent legal category," *id.* at 11).

251 Brief for Appellees, *Amos*, 483 U.S. 327 (No. 86-179), 1987 WL 864785, at *3.

252 *See Cath. Bishop*, 440 U.S. at 502 (explaining that NLRB's conclusions "may impinge on rights guaranteed by the Religion Clauses"); *Amos*, 483 U.S. at 335 (noting that Title VII

Why? Both decisions emphasized that even nonministers play an important role in a religious organization's "mission." *Catholic Bishop* emphasized "the critical and unique role of the teacher in fulfilling the mission of a church-operated school."[253] And the Court in *Amos* noted that work in the gymnasium was "expressive of the Church's religious values."[254]

More importantly, both decisions recognized that church autonomy includes the freedom to select employees who are *fully aligned with the organization's religious mission.* In *Catholic Bishop*, the Court warned against government interference in employment decisions that are "mandated by [the schools'] religious creeds"—such as dismissal of lay teachers who contradict Catholic doctrine or violate Catholic moral teachings.[255] And in *Amos*, Justice Brennan said church autonomy includes the freedom to determine what "activities are in furtherance of an organization's religious mission, and that *only those committed to that mission should conduct them*"—even when the activity is gym maintenance by a nonminister.[256]

In short, just as religious groups have the freedom to decide who is religiously qualified to become a member, so also they have the freedom to decide who is religiously qualified to help carry out their mission as an employee. To strip them of the freedom to determine the religious qualifications for membership or employment is to violate church autonomy.[257]

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can cause "significant governmental interference with the ability of religious organizations to define and carry out their religious missions").

253 *Cath. Bishop*, 440 U.S. at 501.

254 *Amos*, 483 U.S. at 336 n.14.

255 *Cath. Bishop*, 440 U.S. at 502.

256 *See Amos*, 483 U.S. at 342–43 (Brennan, J., concurring in judgment) (emphasis added).

257 Justice Alito, joined by Justice Thomas, recently made the same point in *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094 (2022). There, a religious ministry declined to hire a staff attorney who was in a same-sex relationship contrary to the ministry's religious beliefs, and the prospective staff attorney sued for discrimination. *Id.* at 1095 (Alito, J., respecting denial of certiorari). Although the Court denied certiorari, Justice Alito, joined by Justice Thomas, wrote separately to emphasize that "the guarantee of church autonomy" is not "narrowly confined" to the ministerial exception. *Id.* at 1096. Rather, "[t]o force religious organizations to hire . . . personnel who do not share their religious views" would also "infringe on their rights to freely exercise religion" and "undermine" their "autonomy." *Id.* He ultimately concurred in the denial of certiorari due to the "interlocutory nature" of the appeal but indicated that the issue "may warrant our review in the future." *Id.* at 1096–97.

3. Lower Court Precedent on Religious Employment Qualifications

Although the issue hasn't been litigated frequently, lower courts have expanded on this principle in several cases.

An early example is *Bryce v. Episcopal Church in the Diocese of Colorado*.[258] There, a church dismissed a youth minister for entering a same-sex union contrary to church teaching.[259] The employee sued, alleging that church officials' statements opposing her same-sex union constituted sexual harassment in violation of Title VII.[260] Although the district court dismissed her claims based in part on the ministerial exception, the Tenth Circuit declined to consider whether she was a minister.[261] Instead, it held that even if she wasn't a minister, the "broader church autonomy doctrine" "extends beyond the specific ministerial exception" to protect "a personnel decision based on religious doctrine."[262] Because the plaintiff challenged "a personnel decision based on religious doctrine," her suit was barred.[263]

A more recent example is *Union Gospel Mission of Yakima Washington v. Brown*.[264] There, a Christian homeless ministry required all its employees to share its Christian beliefs and practices, including abstaining from sex outside traditional marriage.[265] This requirement ran afoul of Washington's Law Against Discrimination, which prohibits employment discrimination based on sexual orientation and doesn't exempt a religious organization's hiring of nonministers.[266] Thus, the homeless ministry challenged Washington's law as a violation of the church autonomy doctrine.[267]

The Ninth Circuit ruled unanimously in favor of the homeless ministry. Citing *Our Lady*, *Amos*, and *Bryce*, the court emphasized that "the church autonomy doctrine is broader than the ministerial exception"; it "more generally prohibits" government intrusion into "internal management decisions that are essential to the institution's central

258 Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002).

259 *Id.* at 651–52.

260 *Id.* at 653. She did not challenge the termination directly, presumably because that would have been futile prior to *Bostock*.

261 *Id.* at 658 n.2.

262 *Id.* at 656–58, 658 n.2, 660.

263 *Id.* at 660.

264 Union Gospel Mission of Yakima Wash. v. Brown, 162 F.4th 1190 (9th Cir. 2026). After this article was finalized, the Ninth Circuit granted rehearing en banc in *Yakima*; oral argument is scheduled for Fall 2026. *See* Union Gospel Mission of Yakima Wash. v. Brown, 181 F.4th 1331 (9th Cir. 2026) (mem); Notice of Oral Argument, Union Gospel Mission of Yakima, Wash. v. Brown, No. 24-7246 (9th Cir. Aug. 17, 2026).

265 *See id.* at 1198.

266 *See id.* at 1197–98.

267 *See id.* at 1199.

mission."[268] These "internal management decisions," the court explained, "may include a religious organization's policy of hiring co-religionists for non-ministerial roles."[269] This is because, as Justice Brennan explained in *Amos*, "selecting what 'activities are in furtherance of an organization's religious mission' and requiring that 'only those committed to [its] mission should conduct them' is one way 'a religious community defines itself.'"[270] Otherwise, the state could force a religious organization "to hire employees who openly flout and disagree with their religious principles"; "[t]his, the First Amendment doesn't tolerate."[271] Instead, it permits a religious organization "'to condition employment,' even non-ministerial employment, 'on subscription to particular religious tenets.'"[272]

Other courts have likewise applied church autonomy to bar challenges to the hiring of nonministers based on adherence to religious mission.[273]

The principle that emerges from these cases is the same as that in *Catholic Bishop* and *Amos*: Church autonomy protects a religious group's freedom to decide what activities are part of its religious mission and who is religiously qualified to carry out that mission as an employee—including as a nonminister. If an employment discrimination lawsuit would prevent a religious organization from ensuring

268 *Id.* at 1203 (quoting Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020)).

269 *Id.*

270 *Id.* at 1204 (alteration in original) (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in judgment)).

271 *Id.* at 1197.

272 *Id.* at 1204 (quoting *Amos*, 483 U.S. at 342 (Brennan, J., concurring in judgment)).

273 *See, e.g.*, Butler v. St. Stanislaus Kostka Cath. Acad., 609 F. Supp. 3d 184, 198 (E.D.N.Y. 2022) (applying the "broader" "church autonomy principle" to bar Title VII sexual orientation discrimination claim "[e]ven if [plaintiff] did not qualify as a ministerial employee"); Garrick v. Moody Bible Inst., 412 F. Supp. 3d 859, 871–73 (N.D. Ill. 2019) (citing *Bryce* and applying the "overarching principle of religious autonomy," *id.* at 871, to dismiss a challenge to a doctrinally rooted employment decision, regardless of whether plaintiff was a minister); Aparicio v. Christian Union, Inc., No. 18-cv-0592, 2019 WL 1437618, at *7, *10 (S.D.N.Y. Mar. 29, 2019) (Free Exercise Clause barred nonminister's Title VII sex discrimination claim.); Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 796 N.E.2d 286, 293–94, 296 (Ind. 2003) (applying "church autonomy" as described by "[t]he *Bryce* court," *id.* at 293, to bar tortious interference claim against diocese, *id.* at 294, though plaintiff lacked "ministerial-type duties," *id.* at 296 (Sullivan, J., concurring in part and dissenting in part)); *see also* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 623, 626 (6th Cir. 2000) (recognizing "the constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions," *id.* at 623, and noting that "the First Amendment does not permit federal courts to dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices," *id.* at 626).

adherence to its religious qualifications for employment, it is barred by church autonomy.[274]

4. Counterarguments

There are two main counterarguments to this component of church autonomy. First, some courts have said that applying church autonomy to religious employment qualifications for nonministers "would render the ministerial exception superfluous."[275] According to these courts, if church autonomy extends to nonministers, "then there would be no need to have a ministerial exception."[276]

But this objection misunderstands the relationship between the ministerial exception and the protection for religious employment qualifications.[277] Although the ministerial exception applies to only a narrow set of employees (ministers), it protects a broad range of employment decisions—including decisions not "made for a religious reason."[278] The religious qualification protection, as applied in *Catholic Bishop*, *Amos*, *Bryce*, and *Yakima*, is different: It applies to a broader

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274 Courts have not yet given a name to this component of church autonomy. One litigant has used the term "coreligionist exemption," Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163, 1174 (D. Colo. 2023), *appeal filed*, No. 25-1187 (10th Cir. May 8, 2025), presumably to parallel the "ministerial exception." *Cf.* Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1094 (2022) (Alito, J., respecting denial of certiorari) (discussing "whether freedom for religious employers to hire their co-religionists is constitutionally required").

However, that term may be too narrow. "Coreligionist" typically refers to "a person of the same religion." *Coreligionist*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (4th ed. 2002). But some religious groups, including many Jewish and Catholic schools, hire employees of different faiths while still requiring those employees to be aligned with the group's mission and refrain from conduct that undermines that mission. *See* Brief for Amici Curiae Stephen Wise Temple & Milwaukee Jewish Day Sch. in Support of Petitioners at 7–8, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (Nos. 19-267) (noting that "non-Jews may teach Jewish doctrine" at Jewish schools, *id.* at 8). Thus, the group still imposes religious or mission-based qualifications for employment, even if it doesn't limit hiring to "coreligionists." A better term, then, may be the "religious qualification protection" or "mission-based hiring exception." *Cf. Union Gospel Mission of Yakima Wash.*, 162 F.4th at 1197, 1203 (characterizing church autonomy as protecting "non-ministerial hiring decisions based on religious beliefs," *id.* at 1197, "[h]iring based on religious criteria," *id.*, hiring that is "essential to the institution's central mission," *id.* at 1203 (quoting *Our Lady*, 140 S. Ct. at 2060), and "hiring co-religionists," *id.*).

275 Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1206 (S.D. Ind. 2020), *appeal dismissed*, No. 20-3265, 2021 WL 9181051 (7th Cir. 2021).

276 Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *12 (W.D.N.C. Sep. 3, 2021), *rev'd*, 101 F.4th 316 (4th Cir. 2024).

277 The argument in this paragraph is drawn from Appellants' Opening Brief, *supra* note 66, at 45.

278 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194, 194–95 (2012).

group of employees (including nonministers), but a much narrower set of employment decisions—only those based on religious qualifications for employment.[279] Thus, while the doctrines in some cases may overlap—like when a minister is dismissed for lacking the religious qualifications for employment—the two protections still have different scopes and perform different functions. A simple Venn Diagram helps illustrate:

Figure 1. Illustrating the Overlap Between the Ministerial Exception and the Religious Qualification Exception.

The more serious objection is that it is impossible to discern principled, workable limits on the constitutional protection for mission-based hiring. Does it apply to all religious organizations, even those that may be operated as for-profit businesses? Does it apply to all employees, even those who appear to have no religious responsibilities? Does it apply to all religiously motivated employment decisions, even

279 *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in judgment) (noting that religious groups can hire "only those committed to th[eir] mission"); NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 502 (1979) (protecting religious schools' employment decisions "mandated by their religious creeds"); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 660 (10th Cir. 2002) (protecting employment decision "based on religious doctrine").

those widely considered invidious (such as a ban on interracial marriage)?

These are the sorts of questions that would ordinarily be worked out on a case-by-case basis through years of litigation. But as noted above, courts have rarely had to confront these questions, because (1) employment discrimination laws have rarely posed a direct conflict with the religious mission of religious organizations, and (2) when such conflict exists, the ministerial exception has typically been sufficient to address it.

But consider a simple thought experiment. Suppose Congress repealed Title VII's religious exemption—thus making it illegal for religious groups to hire employees based on "religion." Under this regime, it would be illegal for a Baptist church to prefer Baptists when hiring the church secretary. And it would be illegal for a Catholic school to require all teachers to be Catholic. Would such a regime violate church autonomy?

Of course it would. As described by the Supreme Court, church autonomy protects matters of "church government"—which includes "internal management decisions that are essential to the institution's central mission."[280] This includes defining the mission, deciding what activities advance the mission, and deciding that "only members of its community" or "only those committed to that mission" can "perform those activities."[281] This, Justice Brennan explained, is part of how "a religious community defines itself."[282] Thus, just as a Mormon gymnasium can decide that the building engineer advances its mission and must be a Mormon (*Amos*),[283] a Baptist church can decide that the church secretary advances its mission and must be a Baptist, and a Catholic school can decide that a math teacher advances its mission and must be a Catholic.

This doesn't tell us exactly where the outer bounds of the mission-based hiring protection lie. But it offers a solid starting point. And the caselaw addressing the ministerial exception and Title VII's religious exemption offers several other limiting principles.

First, like the ministerial exception—and the broader church autonomy doctrine of which it is a part—the religious qualification protection extends only to *religious organizations*. There is ample caselaw,

280 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060 (2020).

281 *Amos*, 483 U.S. at 342–43 (Brennan, J., concurring in judgment).

282 *Id.* at 342.

283 *Id.* at 327.

under the ministerial exception,[284] Title VII's religious exemption,[285] and federal and state tax law,[286] drawing lines between religious and nonreligious organizations. This caselaw tells us, among other things, that for-profit businesses are unlikely to count as religious.[287]

Second, the religious qualification protection extends to all of a religious organization's employees, regardless of their job duties. That was a key premise of *Amos*. As originally enacted, Title VII's religious exemption applied only to employees engaged in "religious activities."[288] But Congress expanded the exemption in 1972 to protect "all activities,"[289] and *Amos* expressly affirmed this expansion—reasoning that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."[290] Otherwise, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission."[291] In other words, religious organizations get to decide which employees are contributing to their religious mission.

Third, the religious qualification protection extends to employment decisions based on an employee's religious qualifications or adherence to the organization's religious mission. Like Title VII's religious exemption, this can include decisions based on "all aspects" of an employee's "religious observance and practice, as well as belief."[292] Thus, for example, religious organizations can require their employees

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284 *E.g.*, Shaliehsabou v. Hebrew Home of Greater Wash., Inc., 363 F.3d 299, 309–10 (4th Cir. 2004); Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 425–26 (2d Cir. 2018).

285 *E.g.*, Spencer v. World Vision, Inc., 633 F.3d 723, 726–33 (9th Cir. 2011); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226–31 (3d Cir. 2007).

286 *E.g.*, Cath. Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 145 S. Ct. 1583, 1591–92 (2025).

287 *Compare Amos*, 483 U.S. at 344–45 (Brennan, J., concurring in judgment) (positing a line between "nonprofit" and "for-profit" activities), *and id.* at 348 (O'Connor, J., concurring in judgment) ("[T]he amended § 702 raises different questions as it is applied to nonprofit and for-profit organizations."), *and Spencer*, 633 F.3d at 724 (noting that a religious organization "does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts"), *with* Markel v. Union of Orthodox Jewish Congregations of Am., 124 F.4th 796, 804 (9th Cir. 2024) ("[T]he presence of revenue do es not make [an organization] non-religious."), *cert. denied*, 145 S. Ct. 2822 (2025) (mem.), *and* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) ("The plain terms of [the Religious Freedom Restoration Act of 1993] make it perfectly clear that Congress did not discriminate in this way against [persons] who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.").

288 *Amos*, 483 U.S. at 332 n.9.

289 *Id.* at 333 n.9.

290 *Id.* at 336.

291 *Id.*

292 42 U.S.C. § 2000e(j) (2018).

to be members in good standing of a particular church,[293] believe in particular religious doctrines,[294] or adhere to particular religious standards of conduct.[295] In other words, religious organizations decide who is *religiously qualified* to carry out their mission.[296]

If the scope of the church autonomy protection for religious qualifications is starting to sound a lot like the scope of Title VII's religious exemption, that should not be surprising. Members of Congress take an oath to uphold the Constitution, and they are presumed to legislate "in the light of constitutional limitations."[297] The legislative debate surrounding Title VII's religious exemption was focused on the First Amendment, with some members arguing that an even broader exemption was constitutionally required.[298] In light of *Amos*, *Catholic Bishop*, and the Supreme Court's more recent church autonomy precedent, there is a strong argument that Title VII's religious exemption is constitutionally required. And it is required not by the ministerial exception but by the broader church autonomy doctrine and its protection for religious qualifications for employment.

What would that mean for post-*Bostock* sex discrimination claims brought by nonministers? As explained above, such claims are likely barred by Title VII's religious exemption. If that exemption is repealed—or if the claims are brought under state law that contains a

293 *See Amos*, 483 U.S. at 330 (An employee was discharged "because he failed to qualify for a temple recommend, that is, a certificate that he is a member of the Church and eligible to attend its temples.").

294 *See* Spencer v. World Vision, Inc., 633 F.3d 723, 725 (9th Cir. 2011) (O'Scannlain, J., concurring) ("Employees denied the deity of Jesus Christ and disavowed the doctrine of the Trinity.").

295 *See* Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 651–52 (10th Cir. 2002).

296 This doesn't mean anything goes. For example, some courts have rejected religious organizations' claims of a First Amendment right to compensate women less than men. EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1274 (9th Cir. 1982); EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1364 (9th Cir. 1986). In these cases, the religious organization wasn't claiming an employee was religiously unqualified to serve or rejected its religious mission. Similarly, constitutional protection does not extend to insincere religious claims or religious assertions that are pretextual, although there are constitutional limitations on how courts can conduct inquiries into sincerity and pretext. *See supra* notes 36–39.

297 Rust v. Sullivan, 500 U.S. 173, 191 (1991).

298 *See* Amos v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, 594 F. Supp. 791, 811, 810–12 (D. Utah 1984) ("I respectfully submit that we do not erect a wall of separation between church and state when we permit the agents of the state to tell a religious corporation . . . whom it is to employ for any purpose, whom it is to promote for any purpose, or whom it may discharge for any reason." (quoting 118 CONG. REC. 1979 (1972) (statement of Sen. Sam Ervin))), *rev'd*, 483 U.S. 327 (1987).

narrower exemption—those claims would likewise be barred by church autonomy.

B. Expressive Association: An A Fortiori Case

In addition to church autonomy, religious organizations can assert a constitutional defense based on the right of expressive association. The right of expressive association is rooted in the Free Speech Clause. The basic idea is that the freedom of speech necessarily includes the right to form associations to engage in protected expression. The right of expressive association, then, protects both the right "to associate with others" and the right "not to associate" for expressive purposes.[299] For religious groups, that means the freedom to gather with others to express a religious message—and the right to exclude individuals who reject their core religious teachings and would undermine their message.

1. The Basic Argument

The leading case on expressive association is *Boy Scouts of America v. Dale*.[300] There, a former scoutmaster sued the Boy Scouts, claiming his dismissal for being a "gay rights activist" constituted sexual orientation discrimination.[301] But the Supreme Court held the First Amendment foreclosed this claim, explaining that freedom to associate "presupposes a freedom not to associate," and that requiring the Boy Scouts to retain the plaintiff would impermissibly "force the [Boy Scouts] to send a message, both to the youth members and the world, that [it] accepts homosexual conduct as a legitimate form of behavior."[302]

Dale requires a court to address two questions when presented with an expressive association defense: (1) whether the group "engage[s] in some form of expression," and (2) "whether the forced inclusion" of the individual "would significantly affect the [group's] ability to advocate public or private viewpoints."[303] On both questions, the court must "give deference to [the] association's assertions regarding

299 Roberts v. U.S. Jaycees, 468 U.S. 609, 622–23 (1984).

300 Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000). The summary of *Dale* in this paragraph is drawn from Appellants' Opening Brief, *supra* note 66, at 46–47.

301 *Dale*, 530 U.S. at 643–45.

302 *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623); *id.* at 653; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574–75 (1995) (finding that forcing parade organizers to include an LGBT group would violate freedom of association).

303 *Dale*, 530 U.S. at 648, 650.

the nature of its expression" and its "view of what would impair [that] expression."[304] And if the answer to both questions is yes, "the First Amendment prohibits" the forced association, unless strict scrutiny is satisfied.[305]

Dale provides a strong framework for protecting religious groups. Consider the example of a religious school that dismisses a teacher for entering a same-sex marriage.[306] Under *Dale*'s first prong, a religious school easily qualifies as an organization that "engage[s] in some form of expression." Indeed, "[r]eligious groups are the archetype of associations formed for expressive purposes,"[307] because "the *raison d'être* of parochial schools is the propagation of a religious faith."[308]

Second, forcing a religious school to employ a teacher who rejects its view of marriage would "significantly affect the [school's] ability" to instill its view in its students.[309] As the Second Circuit explained, "'It would be difficult,' to say the least, for an organization 'to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct.'"[310] Thus, under *Dale*, a teacher's employment discrimination claim would be barred unless it satisfied strict scrutiny (which we address in the following Section).[311]

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304 *Id.* at 653.

305 *Id.* at 648, 659. The doctrine of expressive association also draws support from the separate constitutional freedom of assembly. *See, e.g.*, Brief of Amicus Curiae Professor John D. Inazu in Support of Petitioners, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267).

306 Billard v. Charlotte Cath. High Sch., 101 F.4th 316, 320 (4th Cir. 2024).

307 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (2012).

308 NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 503 (1979) (quoting Lemon v. Kurtzman, 403 U.S. 602, 628 (1971) (Douglas, J., concurring), *abrogated by*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022)).

309 *See Dale*, 530 U.S. at 648, 650.

310 Slattery v. Hochul, 61 F.4th 278, 290 (2d Cir. 2023) (quoting Christian Legal Soc'y v. Walker, 453 F.3d 853, 863 (7th Cir. 2006)).

311 *Id.* at 288–89; *see also, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574–75 (1995) (finding that forcing parade organizers to include an LGBT group would violate freedom of association); *Walker*, 453 F.3d at 863 (applying expressive association to protect a religious student group that excluded members "who engage in or approve of homosexual conduct"); Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 615 (N.D. Tex. 2021) (applying expressive association to protect a Christian business that would not hire individuals who engage in "homosexual conduct or gender non-conforming behavior"(citation omitted)), *aff'd in part, vacated in part, rev'd in part sub nom.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023); Apilado v. N. Am. Gay Amateur Athletic All., 792 F. Supp. 2d 1151, 1162 (W.D. Wash. 2011) (finding that a gay

2. Counterarguments

There are three main counterarguments to this expressive association defense.

First, some courts and litigants have focused on *Dale*'s second prong, arguing that requiring religious groups to hire dissenters does not significantly inhibit their expression. For example, one court has suggested that expressive association is triggered only if propagating a particular viewpoint is the "very mission" of the organization.[312]

But the Supreme Court rejected this argument in *Dale*. There, opposing homosexuality wasn't the "very mission" of the Boy Scouts. In fact, the Boy Scouts' "central tenets" arguably did not "say[] the slightest thing about homosexuality."[313] Yet the Court held that "associations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment."[314] Instead, courts must "give deference to [the] association's assertions regarding the nature of its expression" and its "view of what would impair [that] expression."[315]

Second, several federal district courts have held that the freedom of expressive association doesn't apply to employment disputes.[316] The leading case cited for this argument is *Hishon v. King & Spalding*, in which the Supreme Court rejected a law firm's argument that it had an expressive association right to exclude women from partnership.[317] According to these courts, *Hishon* stands for the proposition that

softball league could not maintain "a gay identity" if it could not exclude heterosexual men).

312 McMahon v. World Vision, Inc., 704 F. Supp. 3d 1121, 1145 (W.D. Wash. 2023) (quoting *Slattery*, 61 F.4th at 288) (distinguishing *Slattery*), *rev'd*, 147 F.4th 959 (9th Cir. 2025); *see also* CompassCare v. Hochul, 125 F.4th 49, 61 (2d Cir. 2025) (imposing a "very mission" requirement in the employment context).

313 *Dale*, 530 U.S. at 665–68 (Stevens, J., dissenting).

314 *Id.* at 655 (majority opinion).

315 *Id.* at 653.

316 *See* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 496 F. Supp. 3d 1195, 1209 (S.D. Ind. 2020), *appeal dismissed*, No. 20-3265, 2021 WL 9181051 (7th Cir. 2021); *McMahon*, 704 F. Supp. 3d at 1144 ("[E]mployment discrimination action does not implicate . . . expressive associational rights."). A panel of the Second Circuit rejected the argument that expressive association doesn't apply to employment disputes, but held that the doctrine applies more narrowly in the employment context—requiring an employer to "show that [forced employment] threatens its very mission not only in a vague and generalized sense, but in the context of a specific employment decision." *CompassCare*, 125 F.4th at 61.

317 Hishon v. King & Spalding, 467 U.S. 69, 78 (1984).

"[f]reedom of association does not apply in the employment context."[318]

But this argument fails as a matter of both precedent and principle. As for precedent, this argument misreads *Hishon. Hishon* doesn't say employment claims are categorically exempt from expressive association. Rather, *Hishon* addressed the expressive association defense on the merits, rejecting it on the ground that the defendant there (a large law firm) "has not shown how its ability" to express "ideas and beliefs" would be "inhibited" by considering a woman for partnership.[319] That falls far short of holding that employment discrimination claims are per se exempt from expressive association. Not surprisingly, then, multiple courts have applied expressive association to employment claims.[320]

Nor would a carve-out for employment make sense as a matter of First Amendment principle. The Supreme Court routinely applies First Amendment defenses to employment relationships and other commercial disputes. To take just a few examples: The ministerial exception bars private employment discrimination claims;[321] church autonomy limits collective bargaining over the terms of employment in Catholic schools;[322] the Free Exercise Clause bars the application of public accommodations laws to a for-profit baker;[323] and the Free Speech Clause protects the sale of commercial web design services,[324] the sale of violent video games to minors,[325] and the placement of "paid, 'commercial' advertisement[s]" in newspapers.[326] The Court

318 *See* Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *23 (W.D.N.C. Sep. 3, 2021), *rev'd*, 101 F.4th 316 (4th Cir. 2024).

319 *Hishon*, 467 U.S. at 78 (quoting NAACP v. Button, 371 U.S. 415, 431 (1963)).

320 *See* Slattery v. Hochul, 61 F.4th 278, 288 (2d Cir. 2023); Our Lady's Inn v. City of St. Louis, 349 F. Supp. 3d 805, 809, 820–22 (E.D. Mo. 2018); Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571, 615 (N.D. Tex. 2021), *aff'd in part, vacated in part, rev'd in part sub nom.*, Braidwood Mgmt., Inc. v. EEOC, 70 F.4th 914 (5th Cir. 2023); Boy Scouts of Am. v. Wyman, 335 F.3d 80, 89, 91 (2d Cir. 2003) (Scouts may "under any reading of *Dale*" exclude "gay activists" from employment positions involving "leadership."); Moore v. Hadestown Broadway LLC, 722 F. Supp. 3d 229, 260 (S.D.N.Y. 2024); Darren Patterson Christian Acad. v. Roy, 699 F. Supp. 3d 1163, 1184–85 (D. Colo. 2023), *appeal filed*, No. 25-1187 (10th Cir. May 8, 2025).

321 Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055–58 (2020); *see also id.* at 2072 (Sotomayor, J., dissenting).

322 *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 507 (1979).

323 *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018).

324 *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2313 (2023).

325 *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 805 (2011).

326 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

has repeatedly said that First Amendment "rights are not lost merely because compensation is received."[327] Thus, there is no basis for carving out the First Amendment right of expressive association from the employment context.

Third, some courts have held that forcing religious groups to employ dissenters can satisfy strict scrutiny—which requires a showing that forced association advances "compelling state interests . . . that cannot be achieved" through "less restrictive" means.[328] According to these courts, employment discrimination laws advance a compelling interest in eradicating sexual orientation discrimination, and there is no less restrictive means of accomplishing this interest short of requiring religious groups to comply.[329]

But this strict scrutiny argument faces several hurdles. First, it runs headlong into the strict scrutiny analysis in *Dale* and *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*.[330] In both cases, the Supreme Court considered whether the government's interest in eradicating sexual orientation discrimination was sufficiently compelling and narrowly tailored to override First Amendment objections to antidiscrimination laws.[331] And in both cases, the Court rejected the strict scrutiny defense.[332] The Court held that however "compelling" the government's "interest in eliminating discrimination" based on "sexual orientation," that interest "d[id] not justify such a severe intrusion on . . . freedom of expressive association"[333]—namely, requiring the Boy Scouts to retain a gay scoutmaster (*Dale*), or requiring parade organizers to include an LGBT group in the parade (*Hurley*).[334]

The strict scrutiny argument is also undermined by *Obergefell*, which recognized a right to same-sex marriage,[335] and *Bostock*, which construed Title VII to extend to claims of sexual orientation

327 *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988).

328 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

329 *See, e.g.*, Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *23 (W.D.N.C. Sep. 3, 2021) ("Title VII is narrowly tailored to serve the government's compelling interest in protecting employees from discrimination based on sex."), *rev'd*, 101 F.4th 316 (4th Cir. 2024).

330 *Dale*, 530 U.S. at 650, 657, 659; *see also* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 578–79 (1995).

331 *See Dale*, 530 U.S. at 647; *Hurley*, 515 U.S. at 563–66.

332 *Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 578.

333 *Dale*, 530 U.S. at 650, 657, 659; *see also Hurley*, 515 U.S. at 578–79.

334 *See Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 561.

335 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

discrimination.[336] While both cases recognized the government has an interest in combatting sexual orientation discrimination generally,[337] both also recognized that this interest does not extend to forcing religious groups to abandon their religious practices.[338] Instead, *Bostock* emphasized that the government should be "deeply concerned with preserving the promise of the free exercise of religion,"[339] and *Obergefell* said the government must provide "proper protection" to religious groups "as they seek to teach" that "same-sex marriage should not be condoned."[340]

In other words, to satisfy strict scrutiny, it is not enough to assert a "broadly formulated" interest in "ensuring equal treatment" based on sexual orientation; "the First Amendment demands a more precise analysis."[341] The government must instead show that it has a compelling interest in "denying [a religious] exception" to "particular religious claimants."[342] And the Supreme Court has *never* found this analysis satisfied when a religious claimant has sought an exemption from a sexual orientation discrimination law. Rather, the Supreme Court has considered five cases in which the government's interest in combatting sexual orientation discrimination has conflicted with religious practices—and it has ruled in favor of the religious practices every time.[343]

Nor is it likely that Title VII's ban on sex discrimination could satisfy this analysis, given Title VII's many exemptions. As the Supreme Court has explained, "a law cannot be regarded as protecting an interest 'of the highest order'" when it includes exemptions leaving "appreciable damage to [the] supposedly vital interest unprohibited."[344] Title VII, however, has broad exemptions that exclude millions of employers from all coverage.

336 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

337 *See Obergefell*, 576 U.S. at 679; *Bostock*, 140 S. Ct. at 1747.

338 *See Obergefell*, 576 U.S. at 679–80; *Bostock*, 140 S. Ct. at 1754.

339 *See Bostock*, 140 S. Ct. at 1754.

340 *See Obergefell*, 576 U.S. at 679.

341 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 431 (2006)).

342 *Id.* (quoting *O Centro*, 546 U.S. at 431).

343 *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557 (1995); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018); *Fulton*, 141 S. Ct. 1868; 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

344 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (quoting Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

Most significantly, Title VII exempts every employer in the country with fewer than fifteen employees.[345] This provision alone exempts approximately eighty percent of all employers nationwide, who employ nearly twenty million individuals.[346] The government cannot have a compelling interest in forcing religious groups to hire religious dissenters when it would allow millions of secular businesses to fire the same employees for any reason with impunity.

Beyond that, Title VII categorically exempts all employment decisions by a "bona fide private membership club."[347] But there is no compelling reason to allow private clubs to set "meaningful conditions of limited membership," such as "eligibility requirements,"[348] but not allow religious groups to do the same. Title VII also includes the discretionary BFOQ exemption, which applies when discrimination based on sex is "reasonably necessary to the normal operation of [a] particular business or enterprise."[349] For example, the EEOC has said that hiring "an actor or actress" based on sex is permissible when it enhances "authenticity or genuineness."[350] But there is no compelling interest in making this sort of exemption for theaters while denying a comparable exemption rooted in an organization's most fundamental religious beliefs.

Given Title VII's many exemptions, the strict scrutiny analysis is controlled by *Fulton v. City of Philadelphia*.[351] There, the government argued that its refusal to contract with a Catholic foster care ministry was justified by a compelling interest in "ensuring equal treatment of prospective foster parents" based on sexual orientation.[352] But the Court unanimously rejected the strict scrutiny argument because the government retained discretion to make exceptions.[353] As the Court explained, "[t]he creation of a system of exceptions . . . undermines

345 *See* 42 U.S.C. § 2000e(b) (2018).

346 *See Facts & Data on Small Business and Entrepreneurship*, SMALL BUS. & ENTREPRENEURSHIP COUNCIL, https://sbecouncil.org/about-us/facts-and-data/ [https://perma.cc/7RPC-CHKF] (last visited Sep. 26, 2025); Richard Carlson, *The Small Firm Exemption and the Single Employer Doctrine in Employment Discrimination Law*, 80 ST. JOHN'S L. REV. 1197, 1198–99 & n.14 (2006).

347 42 U.S.C. § 2000e(b)(2) (2018).

348 EEOC v. Chi. Club, 86 F.3d 1423, 1433 (7th Cir. 1996); *accord* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2000-2, SECTION 2 THRESHOLD ISSUES § III(B)(4)(a)(ii)(c) (2000).

349 42 U.S.C. § 2000e-2(e)(1) (2018).

350 29 C.F.R. § 1604.2(a)(2) (2024).

351 Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

352 *Id.* at 1881.

353 *See id.* at 1882.

the [government's] contention that its non-discrimination policies can brook no departures."[354] And the government "offers no compelling reason why it has a particular interest in denying an exception to [Catholic Social Services] while making them available to others."[355] The same is true of Title VII.[356]

In short, the right of expressive association provides a strong defense to religious organizations that seek to dismiss employees who contradict their core religious practices.

C. *Free Exercise Clause: Clarified by* Tandon *and* Fulton

The third and final constitutional protection for religious hiring is the First Amendment's Free Exercise Clause, which provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[357] The Supreme Court construed this language narrowly in *Employment Division v. Smith* to impose strict scrutiny only when a law burdening religious exercise is not "neutral" or "generally applicable."[358] In the wake of *Smith*, some lower courts held that Title VII is neutral and generally applicable and therefore not subject to strict scrutiny under the Free Exercise Clause.[359] However, the Supreme Court has issued two rulings clarifying the meaning of "neutral" and "generally applicable"—*Tandon v. Newsom*[360] and *Fulton v. City of Philadelphia*.[361] *Tandon* and *Fulton* have significantly strengthened the argument that Title VII is not neutral and generally applicable.[362]

354 *Id.*

355 *Id.*

356 *See* Slattery v. Hochul, 61 F.4th 278, 290–91 (2d. Cir. 2023) (citing Christian Legal Soc'y v. Walker, 453 F.3d 853, 863 (7th Cir. 2006)).

357 U.S. CONST. amend. I.

358 Emp. Div. v. Smith, 494 U.S. 872, 879–82 (1990). Some Justices have called for *Smith* to be overruled. *See Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring). However, this Article addresses the free exercise analysis on the assumption that *Smith* remains the governing law.

359 *See, e.g.*, Doe v. Cath. Relief Servs., 618 F. Supp. 3d 244, 254–56 (D. Md. 2022), *aff'd*, 2023 WL 5266354, No. CCB-20-1815 (D. Md. 2023), *certifying questions to* 300 A.3d 116 (Md.).

360 Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam).

361 *Fulton*, 141 S. Ct. 1868.

362 *See, e.g.*, Union Gospel Mission of Yakima, Wash. v. Ferguson, No. 23-cv-3027, 2024 WL 4660918, at *3–4 (E.D. Wash. Nov. 1, 2024) (concluding that Washington's employment discrimination law is not neutral or generally applicable under *Tandon* and *Fulton*).

1. The Basic Argument

In *Tandon*, the Court considered California's restrictions on gatherings during COVID.[363] California adopted "a blanket restriction on at-home gatherings of all kinds, religious and secular alike," limiting those gatherings to "three households."[364] But it allowed more than three households to gather in other settings, such as "hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants."[365] The question was whether the blanket restriction on at-home gatherings was "generally applicable" for purposes of the Free Exercise Clause.[366] California argued it was, because the restriction applied equally to both religious and secular at-home gatherings.[367] The religious plaintiffs argued it wasn't, because *other* secular gatherings—in salons, stores, theaters, and restaurants—were treated more favorably that at-home religious gatherings.[368]

The Supreme Court agreed with the religious plaintiffs. "[G]overnment regulations are not neutral and generally applicable," the Court said, "whenever they treat *any* comparable secular activity more favorably than religious exercise."[369] And "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue"—in that case, the "interest in reducing the spread of COVID."[370] Thus, because gatherings in salons, retail stores, theaters, and restaurants posed "similar risks" of spreading COVID, they could not be treated more favorably than in-home religious gatherings without triggering strict scrutiny.[371]

363 *See Tandon*, 141 S. Ct. at 1297.

364 *Id.* at 1298 (Kagan, J., dissenting).

365 *Id.* at 1297 (majority opinion).

366 *See id.* at 1296.

367 Opposition to Emergency Application for Writ of Injunction at 14–15, *Tandon*, 141 S. Ct. 1294 (No. 20A151).

368 Emergency Application for Writ of Injunction or in the Alternative for Certiorari Before Judgment or Summary Reversal at 5, *Tandon*, 141 S. Ct. 1294 (No. 20A151).

369 *Tandon*, 141 S. Ct. at 1296.

370 *Id.* at 1296–97.

371 *Id.*; *cf.* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) ("People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues . . . .").

In *Fulton*, the Court considered a nondiscrimination provision in Philadelphia's contracts with private foster care agencies.[372] That provision required foster care agencies to provide services to prospective foster parents regardless of their sexual orientation "unless an exception is granted by the [city's] Commissioner . . . in his/her sole discretion."[373] Based on this provision, Philadelphia refused to contract with a Catholic foster care ministry that wouldn't certify same-sex couples as foster parents.[374] The ministry then challenged the nondiscrimination provision under the Free Exercise Clause.[375]

The Supreme Court ruled unanimously in favor of the Catholic ministry, concluding that the nondiscrimination provision was not generally applicable.[376] Although the provision applied to all foster care agencies, it included "a formal mechanism for granting exceptions" at the Commissioner's "sole discretion."[377] This exemption mechanism, the Court said, "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude," which "renders [the] policy not generally applicable."[378]

Together, then, *Tandon* and *Fulton* stand for two "bedrock requirements of the Free Exercise Clause": (1) "the government may not 'treat . . . comparable secular activity more favorably than religious exercise'" (*Tandon*); and (2) "a purportedly neutral 'generally applicable' policy may not have 'a mechanism for individualized exemptions'" (*Fulton*).[379] If a law fails either requirement, it is subject to strict scrutiny.[380]

Title VII arguably fails both requirements. First, Title VII has numerous exemptions that treat comparable secular activity more favorably than religious exercise. For example, Title VII exempts all employment decisions by a "bona fide private membership club."[381] It also exempts all employers with fewer than fifteen employees.[382] This

372 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874 (2021).

373 *Id.* at 1878 (quoting Supplemental Appendix to City Respondents' Brief on the Merits at SA 16–17, *Fulton*, 141 S. Ct. 1868 (No. 19-123)).

374 *Id.* at 1874.

375 *Id.* at 1876.

376 *See id.* at 1878.

377 *Id.* at 1879.

378 *Id.* (alteration in original) (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

379 Fellowship of Christian Athletes v. S.J. Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 686 (9th Cir. 2023) (en banc) (alteration in original) (first quoting *Fulton*, 141 S. Ct. at 1877; and then quoting Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam)).

380 *Id.*

381 *See* 42 U.S.C. § 2000e(b) (2018).

382 *See id.*

means that approximately eighty percent of all employers, who employ nearly twenty million employees, are categorically exempt from Title VII.[383]

To analyze these exemptions under *Tandon*, the first step is to identify "the asserted government interest that justifies the regulation at issue."[384] For Title VII, that is the government's interest in eliminating sex discrimination in employment. Next, *Tandon* asks whether the government permits "*any*" secular activity that poses a "risk" to its interest that is similar to the risk posed by prohibited religious conduct.[385] The answer is yes. When a private club refuses to hire women, or a fourteen-employee business permits sexual harassment of its female employees, that undermines the government's interest in eliminating sex discrimination just as much as when a church asks its employees to adhere to its religious beliefs. Indeed, the broad, fifteen-employee exemption poses a far greater risk to the government's interest because it allows the vast majority of secular businesses to engage in any form of sex discrimination with impunity—removing all federal protections from nearly twenty million workers.

Title VII is also subject to strict scrutiny under *Fulton* because it has a "mechanism for individualized exemptions"—namely, the BFOQ exemption. As noted above, the BFOQ exemption applies when discrimination based on sex is "reasonably necessary" to the "normal operation of [a] particular business or enterprise."[386] This exemption, on its face, "'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude" and which are not[387]—that is, which reasons are "reasonably necessary" to the "normal operation" of the enterprise and which are not. Under this exemption, for example, the EEOC can say that hiring "an actor or actress" based on sex is "necessary" to enhance "authenticity or genuineness," and therefore permissible;[388] but hiring a church secretary based on adherence to the church's teaching on marriage is not. When the government has in place this sort of "system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship'"

383 *See Facts & Data on Small Business and Entrepreneurship*, *supra* note 346; Carlson, *supra* note 346.

384 *Tandon*, 141 S. Ct. at 1296.

385 *Id.*

386 42 U.S.C. § 2000e-2(e)(1) (2018).

387 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1879 (2021) (alteration in original) (citing Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

388 29 C.F.R. § 1604.2(a)(2) (2024).

without satisfying strict scrutiny.[389] And as noted above, given Title VII's many exemptions, it is unlikely to satisfy strict scrutiny.[390]

2. Counterarguments

There are several common counterarguments to this application of *Tandon* and *Fulton*.

First, the EEOC has argued that Title VII remains generally applicable under *Tandon*, despite its fifteen-employee exemption, because "Title VII does not permit *any covered employer*, secular or otherwise," to dismiss employees due to their same-sex marriages.[391] In other words, all employers with fifteen or more employees are "covered" by the nondiscrimination rule—"secular and religious employers alike"; and all employers with under fifteen employees "fall outside" the rule's "coverage"—"secular and religious employers alike."[392] Thus, the rule is generally applicable because it treats all "covered" employers alike.

But this argument is circular. "Every law" is "a generally applicable prohibition of whatever it prohibits."[393] So if the analysis considers only what a law "covers," and ignores what it exempts, *Tandon* would be toothless. Instead, *Tandon* requires courts to look *across* a law's categories—considering *both* what the law covers *and* what it exempts—and ask if "*any* comparable secular activity" in *either* category (covered or exempt) is treated "more favorably than religious exercise."[394]

Thus, in *Tandon* itself, it was insufficient for California to say that the three-households rule covered all in-home gatherings, "religious and secular alike," and that gatherings in other settings (like stores, theaters, and restaurants) fell outside the rule's coverage.[395] The Court looked *across* the categories of covered and exempted conduct; and because secular gatherings in theaters and restaurants presented risks similar to in-home religious gatherings but were exempt, the law was not generally applicable.[396]

389 *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion)).

390 *See supra* Section III.B.2.

391 Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellee and in Favor of Affirmance at 25–26, McMahon v. World Vision Inc., 147 F.4th 959 (9th Cir. 2025) (No. 24-3259) (emphasis added).

392 *Id.* at 26.

393 Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 16 (2016).

394 *See* Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021) (per curiam).

395 *See id.* at 1298 (Kagan, J., dissenting).

396 *See id.* at 1296–97.

The same is true of Title VII: Looking across the categories of covered and exempted conduct, tens of thousands of small businesses, employing millions of Americans, are permitted to fire gay employees for any reason or no reason at all, without limitation.[397] This poses the same or greater risk to the government's interest as when a religious employer asks its employees to uphold its religious beliefs. Thus, Title VII is not generally applicable.

Second, EEOC has argued that Title VII remains generally applicable under *Fulton*, despite the availability of the individualized BFOQ exemption, because "[n]o government actor has discretion in administering the BFOQ defense"; rather, the applicability of the defense depends on whether the employer "make[s] the required evidentiary showing in court."[398] In other words, according to the EEOC, *Fulton* applies only when government officials have some amount of "discretion" to grant exemptions—not when the availability of an exemption depends on an "evidentiary showing."[399]

But *Fulton* drew no distinction between exemptions based on "discretion" versus "evidentiary showings." Instead, it held that "[a] law is not generally applicable" if it has "a mechanism for individualized exemptions" that "'*invite[s]' the government to consider the particular reasons for a person's conduct.*"[400] In other words, what matters is not whether exemptions are based on governmental discretion or on an evidentiary showing, but on governmental consideration of "the particular reasons for a person's conduct." And that is precisely how the BFOQ exemption operates. It requires the EEOC or court to consider the reasons *why* a religious organization wants to discriminate to determine whether those reasons show that the discrimination is "necessary" to the "normal operation of [a] particular business or enterprise."[401] If the reasons prove the discrimination is "necessary"—e.g., the employee is hired to teach the Catholic view of marriage and needs to be a role model of that teaching to do the job effectively—an exemption may be granted. If the reasons don't prove necessity—e.g., the employee is hired to teach mathematics and needn't (in the government's view) model Catholic teaching on marriage—an exemption will be denied. In short, the government gets "to decide which reasons for not

397 *See supra* notes 345–47 and accompanying text.

398 Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellee and in Favor of Affirmance, *supra* note 391, at 24–25.

399 *See id.*

400 Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) (emphasis added) (quoting Emp. Div. v. Smith, 494 U.S. 872, 884 (1990)).

401 42 U.S.C. § 2000e-2(e)(1) (2018).

complying with the policy are worthy of solicitude."[402] That has long been understood to trigger strict scrutiny.[403]

Third, some governments have argued (and some courts have held) that the availability of individualized exemptions doesn't matter unless exemptions have actually been granted for secular conduct in practice.[404] And since BFOQ exemptions are rarely granted in practice, they don't undermine the general applicability of Title VII. But *Fulton* forecloses this argument, too. There, the city argued that "the availability of exceptions under [its policy] is irrelevant because the [city] has never granted one."[405] But the Supreme Court held that this "misapprehends the issue"; rather, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, *regardless whether any exceptions have been given.*"[406] Given that exemptions *have* been given under the BFOQ provision, however sparingly, Title VII is an a fortiori case.

In short, the Free Exercise Clause provides another strong defense to religious organizations that dismiss employees who contradict their religious practices.

IV. WHICH PROTECTIONS ARE THE BEST FIT?

Given these six potential defenses, how should courts handle post-*Bostock* claims involving the religious hiring of nonministers? Should one defense be preferred over the others? If so, which defense and why? What considerations should govern such a decision?

This Section sketches out an answer to these questions. To do so, I start by examining and critiquing how early courts have addressed post-*Bostock* claims—namely, by stretching the ministerial exception to cover the claims and to thus avoid addressing alternative defenses. I then present a theory of how courts *should* approach such claims—

402 *Fulton*, 141 S. Ct. at 1879.

403 *See, e.g.*, *Smith*, 494 U.S. at 884 (explaining that the "good cause" exception to the unemployment law in *Sherbert* was not generally applicable because it "invite[d] consideration of the particular circumstances behind an applicant's unemployment"); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) (exception for "necessary" animal killing triggered strict scrutiny); *see also* Fellowship of Christian Athletes v. S.J. Unified Sch. Dist. Bd. of Educ., 82 F.4th 664, 687 (9th Cir. 2023) (en banc) (rejecting the argument that *Fulton* was "only concerned with 'unfettered' discretion"); Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (requiring strict scrutiny where government makes "case-by-case inquiries" that "'invite[] considerations of the particular circumstances' involved in the particular case" (quoting *Smith*, 494 U.S. at 884)).

404 *See, e.g.*, *Fulton*, 141 S. Ct. at 1879.

405 *Id.*

406 *Id.* (emphasis added).

namely, by following the ordinary meaning of Title VII's religious exemption when the exemption is available, and, when it is not available, recognizing constitutional church autonomy protections for mission-based hiring.

A. *What Courts Are Doing*

Since *Bostock*, federal circuit courts have resolved four sex discrimination claims by employees who were arguably not ministers. All four cases reached the same result: The courts extended the ministerial exception to cover the employee and avoid addressing alternative defenses.[407] But in three of the cases, one judge concurred, arguing that the claims were also barred by Title VII's religious exemption.[408]

The Fourth Circuit's decision in *Billard v. Charlotte Catholic High School* is instructive. There, the plaintiff was a substitute English and drama teacher at a Catholic high school, and he was dismissed for entering a same-sex marriage.[409] According to the district court, he had minimal religious responsibilities. He "did not teach religion in his classes and was not tasked with preparing students for participation in Catholic worship services."[410] He taught "purely secular subjects," where he "d[id] not have to reference Catholic principles."[411] Although he "would sometimes begin class with a prayer," "the prayers were not required," and "sometimes there would be no prayer at all."[412] He "did not have to undergo any religious training," had no special title, and "was not required to be a Catholic or even a Christian to hold his post."[413] Accordingly, the district court held that he was not a minister.[414] (On top of that, the school also stipulated that it would not assert the ministerial exception as a defense.[415])

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407 *See* Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 942 (7th Cir. 2022); Fitzgerald v. Roncalli High Sch., Inc., 73 F.4th 529, 534 (7th Cir. 2023); Billard v. Charlotte Cath. High Sch., 101 F.4th 316, 325 (4th Cir. 2024); McMahon v. World Vision Inc., 147 F.4th 959 (9th Cir. 2025).

408 *See Starkey*, 41 F.4th at 945 (Easterbrook, J., concurring); *Fitzgerald*, 73 F.4th at 534 (Brennan, J., concurring); *Billard*, 101 F.4th at 333 (King, J., dissenting in part and concurring in judgment).

409 *Billard*, 101 F.4th at 321–22.

410 Billard v. Charlotte Cath. High Sch., No. 17-cv-00011, 2021 WL 4037431, at *14 (W.D.N.C. Sep. 3, 2021), *rev'd*, 101 F.4th 316 (4th Cir. 2024).

411 *Id.*

412 *Id.*

413 *Id.*

414 *Id.*

415 *Id.*

On appeal, the parties' briefing focused on four alternative defenses beyond the ministerial exception: Title VII's religious exemption, RFRA, church autonomy, and expressive association.[416] At oral argument, however, Judges Harris and Niemeyer immediately turned the conversation to the ministerial exception, asking, "[w]hy isn't this a ministerial exception case?"[417] They seemed to agree, as Judge Harris put it, that the school's position was "quite sympathetic" and that "the Supreme Court is going to think that you can't make a Catholic school retain this teacher."[418] But they questioned the potential breadth of a ruling based on Title VII's religious exemption.[419]

Likewise, the teacher's attorney—an experienced litigator with the ACLU—when pressed, conceded, "if we have to lose, I'd rather lose on the ministerial exception than on a different issue."[420] He asserted that "a broader church autonomy holding has collateral consequences that will be very hard to anticipate," and "I would very much not want to lose on Title VII. That would be something I would want to lose the least on."[421]

After argument, the Fourth Circuit ruled in favor of the school.[422] A two-judge majority, consisting of Judges Harris and Niemeyer, relied on the ministerial exception; Judge King concurred in the judgment only, relying instead on Title VII's religious exemption.[423]

Writing for the majority, Judge Harris acknowledged that the school had "stipulated not to press the ministerial exception" and therefore "waived the argument."[424] Nevertheless, citing the ministerial exception's "structural basis" in the "separation of powers," and its "important role in limiting courts to their proper sphere," she reasoned that "forgiving a waiver and staying in our proper lane" was better than "enforcing a waiver and thus exceeding our authority."[425]

416 *See* Brief of Plaintiff-Appellee Lonnie Billard, Billard v. Charlotte Cath. High Sch., 101 F.4th 316 (4th Cir. 2024) (No. 22-1440); Appellants' Reply Brief, *Billard*, 101 F.4th 316 (No. 22-1440).

417 Oral Argument at 1:21, *Billard*, 101 F.4th 316 (No. 22-1440), https://www.ca4.uscourts.gov/OAarchive/mp3/22-1440-20230920.mp3 [https://perma.cc/CMN5-9V9X].

418 *Id.* at 42:12.

419 *See, e.g.*, *id.* at 13:40, 42:05.

420 *See id.* at 40:37.

421 *Id.* at 37:35, 40:53.

422 *See Billard*, 101 F.4th at 320.

423 *Id.*; *id.* at 333 (King, J., dissenting in part and concurring in judgment).

424 *See id.* at 325 (majority opinion).

425 *See id.* at 325–26.

Likewise, Judge Harris acknowledged that courts ordinarily "resolve statutory defenses" (like Title VII's religious exemption) "before constitutional ones" (like the ministerial exception).[426] But citing "the breadth and novelty of [the] statutory defenses," she concluded that this was "'one of those rare occasions' where we may reverse our usual order of operations because 'the constitutional issue is [more] straightforward' than the statutory issues presented."[427]

Turning to the merits of the ministerial exception, Judge Harris held that the teacher was a minister because: (1) the school asked all employees "to 'model and integrate the teachings of Jesus in all areas of conduct'"; (2) the teacher "was expected to—and did—begin each class with prayer"; (3) "[e]ven as a teacher of English and drama, [the teacher's] duties included conforming his instruction to Christian thought"; and (4) "we deal here with a teacher," and "teachers are different."[428] In other words, according to the majority, the ministerial exception extends to any teacher that is expected to model the faith, incorporate religion into secular subjects, and begin classes with prayer. This effectively extends the ministerial exception to *all* teachers at many religious schools and "may be," as one commentator noted, "the single broadest application of the ministerial exception to date."[429]

Judge King wrote separately, explaining that the majority had "strayed from settled principles of the constitutional avoidance doctrine" by addressing the ministerial exception, and that he "would decide this appeal solely" under a "straightforward reading" of Title VII's religious exemption.[430]

What should we make of *Billard*? I agree with the *Billard* majority that the ministerial exception is structural, unwaivable, and covers the plaintiff in the case. But that doesn't explain why the majority relied on the ministerial exception instead of other defenses like Title VII's religious exemption. The case certainly didn't lend itself to a ruling

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426 *See id.* at 325.

427 *Id.* at 327–28 (quoting Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 352 (4th Cir. 2018) (Harris, J., concurring), *vacated*, 138 S. Ct. 2710 (2018)).

428 *Id.* at 331–32 (quoting Joint Appendix at JA0407, *Billard*, 101 F.4th 316 (No. 22-1440)).

429 Ed Whelan, *ACLU Suffers Big Fourth Circuit Loss in Clash Between Gay Rights and Religious Liberty*, NAT'L REV. (May 8, 2024, at 18:52 ET), https://www.nationalreview.com/bench-memos/aclu-suffers-big-fourth-circuit-loss-in-clash-between-gay-rights-and-religious-liberty/ [https://perma.cc/AHB6-9WUP].

430 *Billard*, 101 F.4th at 333, 335 (King, J., dissenting in part and concurring in judgment) (quoting Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring)).

based on the ministerial exception—with the school expressly waiving the defense, failing to develop the factual record on the teacher's duties, and declining to brief the defense in the trial court or on appeal. Yet the Fourth Circuit not only relieved the school of its waiver but also issued what may be the broadest ministerial exception ruling ever. Why?

Judge Harris's opinion gave two reasons for preferring the ministerial exception over Title VII's religious exemption: (1) Title VII's "novelty," and (2) Title VII's "relative breadth."[431] Consider each in turn.

Regarding novelty, Judge Harris said, "No federal appellate court in the country has embraced the school's argument that Title VII permits religiously motivated sex discrimination by religious organizations."[432] But this is mistaken. As discussed above, both the Third and Fifth Circuits have held that Title VII's religious exemption barred sex discrimination claims against religious organizations.[433] So have several lower courts.[434] All of these cases were briefed and relied upon in *Billard*; yet Judge Harris's opinion simply omits them.[435]

As for breadth, Judge Harris worried that a plain text reading of Title VII's religious exemption "would apply equally to all employees of qualifying religious institutions"—not just ministers—and "would deprive those employees not only of Title VII's protections against religious discrimination, but also Title VII's protections against sex discrimination and, at least presumptively, those against race and national-origin discrimination, as well."[436]

But this overstates the breadth of the religious exemption by ignoring its limits. While the exemption isn't limited to ministers or to religious discrimination, it *is* limited to one specific type of employment action: actions based on the employee's religious beliefs or practices.[437] All other employment actions fall outside the exemption. Thus, terminations based on an employee's performance, personality,

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431 *Id.* at 325 (majority opinion).

432 *Id.* at 328.

433 *See supra* at notes 89–95 and accompanying text (addressing *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130 (3d Cir. 2006), and *EEOC v. Mississippi College*, 626 F.2d 477, 485–86 (5th Cir. 1980) (barring sex discrimination investigation where college "applied its policy of preferring Baptists over non-Baptists," *id.* at 486)).

434 *See supra* notes 95, 103–04 and accompanying text.

435 *See Billard*, 101 F.4th 316; *see, e.g.*, Appellants' Opening Brief, *supra* note 66, at 28–32.

436 *See Billard*, 101 F.4th at 327–28.

437 *See* discussion *supra* Section II.A.1.

tardiness, or technological savvy are not protected. Nor are employment actions based on an employer's secular concerns, like budget shortfalls, restructuring, or changes in management.[438] And even when an employer *claims* its action was based on the employee's religion, the exemption still doesn't apply if the asserted religious reason was insincere or pretextual.[439] Nor does the exemption insulate religious groups from claims of race discrimination, as such discrimination is already prohibited by multiple laws that are stronger than Title VII and offer no religious exemption.[440]

Judge Harris's claim about the "relative breadth" of Title VII's religious exemption also overlooks the relative strength of the ministerial exception. As the Supreme Court has explained, the ministerial exception isn't limited to employment decisions "made for a religious reason."[441] Rather, if an employee is a minister, she can't sue to get her job back no matter the employer's reasons.[442] Moreover, the ministerial exception protects religious organizations not just from employment discrimination claims but also wage-and-hour claims, some sexual harassment claims, and a variety of tort and contract claims.[443] Thus, if an employee is a minister, the religious employer receives protection against a much broader array of claims—and receives that protection even when the challenged employment action is admittedly secular, potentially pretextual, or actually invidious.

Thus, when comparing the "relative breadth" of Title VII's religious exemption and the ministerial exception, one must consider not just the relative number of *employees* covered by each defense, but also the relative number of employment *decisions* protected by each defense. In the mine-run of cases, and in my experience counseling religious organizations, most hiring decisions are justified in mundane terms that can be characterized as "nonreligious"—e.g., an English teacher has "difficulty in administering a new reading and writing program";[444] an art teacher "fail[s] to develop technology or digital art

438 *See supra* note 130 and accompanying text.

439 *See supra* note 131 on pretext inquiries and their limits.

440 *See supra* notes 133–38 and accompanying text.

441 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194, 194–95 (2012).

442 *See id.*

443 Brief for Respondents at 37–38, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267).

444 *See Our Lady*, 140 S. Ct. at 2058.

skills";[445] a Hebrew teacher has a personality clash with a parent;[446] a school cuts a position due to "financial difficulties";[447] an apprentice doesn't want to be assigned "menial" tasks on the "maintenance crew";[448] or a kosher food supervisor has a dispute over a "promotion and a raise."[449]

By contrast, direct conflicts over religious beliefs and practices are comparatively rare—likely because most people who want to work at a religious organization tend to be sympathetic to the organization's beliefs and mission and because many religious organizations screen for mission alignment on the front end of the hiring process.

Assume, then, for the sake of argument, that nine in ten cases involve mundane reasons for a firing, and one in ten cases involves a religious conflict. If the one religious conflict is covered by Title VII's religious exemption (rather than by the ministerial exception), then employees like the substitute teacher in *Billard* still have potentially viable claims in the other nine cases. But if the substitute teacher in *Billard* is deemed to be a minister, then that teacher (and every employee like him) loses *all ten cases*—no matter how mundane the justification for the employment action.

Thus, resolving a case like *Billard* under the ministerial exception involves a trade-off. A decision based on the ministerial exception applies to fewer employees, but protects a broader range of employment decisions from a broader range of claims; while a decision based on Title VII's religious exemption applies to more employees, but protects fewer employment decisions against a narrower range of claims.

Whether a ministerial exception ruling is "narrower," then, depends not just on the relative number of employees who fall on either side of the "minister" line, but also on the relative number of employment decisions made for religious or mundane reasons. And relying on the ministerial exception instead of Title VII's religious exemption will provide relatively more protection to religious groups when they dismiss employees for mundane reasons, and relatively less protection when they dismiss employees as religiously unqualified for the job.

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445 *See* Palmer v. Liberty Univ., Inc., 72 F.4th 52, 66 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 1030 (2024).

446 *See* Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 657 (7th Cir. 2018) (per curiam).

447 *See* Lishu Yin v. Columbia Int'l Univ., 335 F. Supp. 3d 803, 808 (D.S.C. 2018).

448 *See* Behrend v. S.F. Zen Ctr., Inc., 108 F.4th 765, 767 (9th Cir. 2024).

449 *See* Markel v. Union of Orthodox Jewish Congregations of Am., 124 F.4th 796, 802 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 2822 (2025) (mem.).

This points to a deeper issue with the *Billard* opinion: the misalignment between the legal doctrine employed (the ministerial exception) and the primary legal interest to be protected (the freedom of religious groups to maintain religious qualifications for employees). The "point of the ministerial exception," as the Supreme Court has explained, is not to protect employment decisions "made for a religious reason"; it is to protect the church's "authority to select and control who will minister to the faithful."[450] Yet the reason the school's position in *Billard* was "quite sympathetic," as Judge Harris put it,[451] is not merely because the substitute drama teacher played a significant role in ministering to the faithful; it is also because the drama teacher publicly rejected a core tenet of the Catholic faith, which the school viewed as religiously disqualifying.[452]

Thus, the ruling in *Billard* illustrates the old proverb: When all you have is a hammer, every problem looks like a nail. Likewise, when all the court considers is the ministerial exception, every problem looks like a ministerial exception case. While *Billard*'s ministerial exception ruling was correct, and reached a result that ultimately protected the school's religious autonomy, it was kind of like using a hammer to pound in a screw. Other legal tools are specifically designed to protect religious groups' interest in maintaining religious qualifications for employment. Courts should not hesitate to use them—as the following Section explains.

B. *What Courts Should Do*

Which legal defenses are most suitably designed to protect a religious group's right to maintain religious qualifications for employees? We consider statutory defenses first, then constitutional.

1. Statutory Defenses

The most obvious candidate for a closely tailored defense is Title VII's religious exemption. As explained above, the exemption specifically protects "the employment of individuals of a particular religion"—with "religion" defined broadly to include "all aspects of religious observance and practice, as well as belief."[453] In other words,

450 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194–95 (2012).

451 Oral Argument, *supra* note 417, at 42:12.

452 *See* Appellants' Opening Brief, *supra* note 66, at 20.

453 42 U.S.C. § 2000e-1 (2018); *id.* § 2000e(j).

religious groups can require employees to conform to the group's religious beliefs, observances, and practices. This provides a tight fit between the legal doctrine employed (the exemption) and the legal interest to be protected (maintaining religious qualifications for employees). It allows courts to resolve these kinds of cases on statutory, rather than constitutional grounds.[454] And as several judges have noted, the application of the religious exemption in these cases is, as a matter of statutory interpretation, "straightforward."[455]

What about the other statutory defenses—the BFOQ exemption and RFRA? The BFOQ exemption protects employment decisions based on "religion" or "sex" where religion or sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[456] Thus, if requiring employees to adhere to particular religious beliefs, observances, or practices is deemed "reasonably necessary" to the "normal operation" of the religious organization, Title VII does not apply.

On first blush, the BFOQ exemption seems like a good fit. But it differs from the religious exemption in three important respects. First, by requiring courts to determine which religious qualifications are "reasonably necessary" to the "normal operation" of a religious organization, it asks courts to answer potentially entangling religious questions. To decide the question of necessity could "require calling witnesses to testify about the importance and priority of the religious [qualification] in question, with a civil factfinder sitting in ultimate judgment of what the accused church really believes, and how important that belief is to the church's overall mission."[457] This "would pose grave problems for religious autonomy."[458]

Second, unlike the religious exemption, the BFOQ exemption is not limited to religious groups; rather, the BFOQ defense may be asserted by *any* "business or enterprise." Thus, if the BFOQ defense is

454 *See* Billard v. Charlotte Cath. High Sch., 101 F.4th 316, 335 (4th Cir. 2024) (King, J., dissenting in part and concurring in judgment).

455 *See id.* (quoting Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring)).

456 42 U.S.C § 2000e-2(e)(1) (2018).

457 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 206 (2012) (Alito, J., concurring); *see also, e.g.*, New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . . ."); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.").

458 *Hosanna-Tabor*, 565 U.S. at 205–06 (Alito, J., concurring).

applied more liberally for religious groups, it risks an expansion for nonreligious enterprises, too.

Third, the BFOQ exemption is not limited to religious qualifications for employment; rather, *any* "bona fide occupational qualification" can count. Thus, again, if the BFOQ defense is applied rigorously for religious qualifications, it may expand to other qualifications, too.

What about RFRA? Unlike Title VII's religious exemption, RFRA is not tailored to religious qualifications for employment. Instead, RFRA is a catch-all statute; it applies to *all* substantial burdens on religious exercise imposed by *all* federal laws, statutory or otherwise.[459] Moreover, unlike Title VII's religious exemption, which protects religious employment decisions categorically, RFRA creates a balancing test, asking whether the burden on religious exercise is outweighed by a compelling governmental interest that cannot be advanced by any less restrictive alternative.[460] Such a test is well suited to a catch-all statute applying to unanticipated conflicts that might arise across a host of federal laws. But it is less well suited in cases where a religious organization seeks to maintain religious qualifications for employment. In such cases, "the interest of religious groups in choosing who will . . . carry out their mission" is at its apex;[461] the government's interest in controlling what religious standards are applied within religious groups is at its nadir. Thus, as in ministerial exception cases, a categorical rule is more appropriate. As *Hosanna-Tabor* put it: "[T]he First Amendment has struck the balance for us."[462]

Further, circuits are currently split over whether RFRA applies to lawsuits between private parties.[463] Thus, as a practical matter, relying on Title VII's religious exemption allows courts to avoid wading into a split.

2. Constitutional Defenses

What about the constitutional defenses? Given that Title VII's religious exemption provides a straightforward statutory basis for resolving these conflicts, one might wonder if courts would ever need to

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459 *See* 42 U.S.C. § 2000bb-3(a) (2018).

460 *See id.* § 2000bb-1(b).

461 *Hosanna-Tabor*, 565 U.S. at 196.

462 *Id.*; *see also* Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 NW. U. L. REV. 1183, 1189 (2014) (*Hosanna-Tabor* can be thought of as balancing "categorically rather than case-by-case" and "[d]ifferent balances between the governmental interest and the religious interest [can be] struck by drawing the line . . . in different places.").

463 *See supra* notes 191–92.

reach the constitutional defenses at all. In some cases, however, federal statutory defenses may be unavailable. A prime example is certain employment discrimination suits brought under state law.

Most states, like the federal government after *Bostock*, now have laws prohibiting employment discrimination based on sexual orientation and/or gender identity.[464] Virtually all of these state laws also have religious exemptions,[465] some of which mirror Title VII's religious exemption,[466] and some of which sweep even more broadly.[467] But some state courts have begun interpreting their religious exemptions narrowly or even effectively eliminating them entirely.

Washington, for example, has a broad provision that exempts from its employment laws "any religious or sectarian organization not organized for private profit."[468] The Washington Supreme Court, however, held that this exemption "may" violate the state constitution "as applied" if applied to an employee who is not a "minister."[469] Similarly, Maryland has a broad provision that exempts religious organizations from its employment laws "with respect to the employment of individuals of a particular religion, sexual orientation, [or] gender identity . . . to perform work connected with the activities of the religious

464 *See Equality Maps: Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws [https://perma.cc/KZC4-6BUE] (last visited Oct. 9, 2025). Some states prohibit discrimination based on sexual orientation or gender identity expressly; others have interpreted their prohibition on "sex" discrimination, like *Bostock*, to include discrimination based on sexual orientation or gender identity. *Id.*

465 *See* Petition for a Writ of Certiorari app. at 202a–51a, Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094 (2022) (No. 21-144) (fifty-state survey).

466 *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1462 (2025) ("individuals of a particular religion"); COLO. REV. STAT. § 24-34-402(6) (2025) (same); FLA. STAT. ANN. § 760.10(10) (West 2025) (same); IDAHO CODE § 67-5910(1) (2025) (same); NEB. REV. STAT. ANN. § 48-1103(1) (LexisNexis 2025) (same).

467 *See, e.g.*, ALASKA STAT. § 18.80.300(5) (2025) (defining "employer" to exclude a nonprofit "religious association or corporation"); ARK. CODE ANN. § 16-123-103(a) (2025) ("The provisions of this subchapter relating to employment shall not be applicable with respect to employment by a . . . religious entity.").

Still others specifically exempt religious organizations from claims of sexual orientation or gender identity discrimination. *See, e.g.*, DEL. CODE ANN. tit. 19, § 710(7) (2025) (excluding religious groups from the term "employer" "with respect to discriminatory practices based upon sexual orientation or gender identity"); VT. STAT. ANN. tit. 21, § 495(e) (2025) ("The provisions of this section prohibiting discrimination on the basis of sexual orientation and gender identity shall not be construed to prohibit or prevent any religious . . . organization . . . from taking any action with respect to matters of employment that is calculated by the organization to promote the religious principles for which it is established or maintained.").

468 WASH. REV. CODE ANN. § 49.60.040(11) (West 2025).

469 *See* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1069–70 (Wash. 2021).

entity."[470] The Maryland Supreme Court, however, gave this exemption "its narrowest reasonable reading," limiting it to "claims brought by employees who perform duties that directly further the core mission (or missions) of the religious entity."[471] Thus, in both states, courts have dramatically cut back state exemptions that would otherwise bar claims by nonministers. And when nonministers brief claims in those states, courts may be forced to address federal constitutional defenses.[472]

Which constitutional defense is most closely tailored to a religious group's interest in maintaining religious qualifications for employees? Consider each constitutional defense in turn, starting with the Free Exercise Clause.

The Free Exercise Clause shares several key similarities with RFRA—which is not surprising, given that RFRA is designed to enforce the Free Exercise Clause. Like RFRA, the Free Exercise Clause is a catch-all provision; it applies to *all* prohibitions on religious exercise imposed by *all* federal laws (and all state and local laws via the Fourteenth Amendment).[473] Like RFRA, the Free Exercise Clause also prohibits "burdens" on religious exercise.[474] And like RFRA, the Free Exercise Clause often requires balancing governmental interests.[475]

But the Free Exercise Clause, as currently interpreted, typically requires courts to address an additional question not posed by any other defense: the question of whether the government's action is "neutral" and "generally applicable."[476] This is often the first, last, and

470 MD. CODE ANN., STATE GOV'T § 20-604(2) (LexisNexis 2025).

471 Doe v. Cath. Relief Servs., 300 A.3d 116, 132 (Md. 2023).

472 *See* Union Gospel Mission of Yakima Wash. v. Brown, 162 F.4th 1190 (9th Cir. 2026) (addressing a federal constitutional defense to Washington's law).

473 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

474 *See id.* at 306–07; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993); 42 U.S.C. § 2000bb-2(b) (2018).

475 *Lukumi*, 508 U.S. at 546. Questions about governmental interest and the "burden" on religious exercise are common features of the free exercise exemption claims under cases like *Smith* and *Lukumi*. Other free exercise claims fall outside the rule in *Smith* and require a different analysis. *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012) ("[T]he First Amendment has struck the balance for us."). And *Smith* itself has been criticized as contrary to the Constitution's text, structure, and original public meaning. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., joined by Kavanaugh, J., concurring); *id.* at 1889–912 (Alito, J., joined by Thomas & Gorsuch, JJ., concurring in judgment).

476 *See* Emp. Div. v. Smith, 494 U.S. 872, 881 (1990). *But see* Mahmoud v. Taylor, 145 S. Ct. 2332, 2361 (2025) (noting that when the government "'substantially interfer[es] with the religious development' of . . . parents' children," "we need not ask whether the law at

most important question in a free exercise defense. And the analysis of this question often focuses not on the religious interests at stake but on *how the government has drafted its law.* In a Title VII case, for example, the analysis focuses on Title VII's nonreligious exemptions—like the fifteen-employee exemption, the private club exemption, and the BFOQ exemption—and asks whether these exemptions undermine the government's interests in the same way a comparable religious exemption would.[477]

But the chief concern in cases like *Billard* (where a religious institution is trying to maintain religious qualifications for employees) is not that the relevant employment discrimination law exempts nonreligious employers from the same ban that burdens religious employers. Indeed, even if the government eliminated all exemptions from its employment discrimination laws entirely, the core concern would remain: Religious groups would be prohibited from maintaining religious qualifications for employment, which intrudes on a core aspect of internal church governance. Thus, the Free Exercise Clause, while it still might provide a viable defense, doesn't focus on the core concern of internal church governance.

The freedom of expressive association, in some respects, provides a closer fit. The key inquiry there, as set forth in *Dale*, is whether a group "engage[s] in some form of expression," and "whether the forced inclusion" of an individual "would significantly affect the [group's] ability to advocate public or private viewpoints."[478] This inquiry is at least roughly analogous to the salient religious interest—i.e., just as an expressive group can't be forced to include someone who would undermine its expressive message, so also a religious group can't be forced to include someone who would undermine its religious mission. And in many cases, this inquiry will be a very close fit, because one reason religious groups maintain religious qualifications for employment is because they don't want employees to undermine their religious message.[479]

But not every religious qualification for employment is tied to conveying a message. The maintenance worker in *Amos,* for example,

issue is neutral or generally applicable before proceeding to strict scrutiny" (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).

477 *See supra* Section III.C.

478 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 650 (2000).

479 Christian Legal Soc'y v. Walker, 453 F.3d 853, 863 (7th Cir. 2006) ("It would be difficult for [a religious group] to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct.").

wasn't tasked with conveying the Mormon church's message; he was tasked with keeping up the grounds and physical facilities of the gym.[480] And he didn't do anything that publicly undermined the church's message.[481] Yet as Justice Brennan recognized, requiring him to tithe and maintain his church membership was part of the church's "autonomy in ordering [its] internal affairs"—"a means by which [the] religious community defines itself."[482]

The expressive association defense also sweeps more broadly than the free exercise or church autonomy defenses because it is not limited to religious groups. In that sense, it mirrors the statutory BFOQ exemption. Yet unlike the BFOQ exemption—and like RFRA and the Free Exercise Clause—it requires balancing governmental interests via strict scrutiny.

The closest fit among the constitutional defenses is the church autonomy doctrine and its protection for religious employment qualifications. That protection asks, first, whether the employer is religious,[483] and, second, whether the employment decision was based on an employee's religious qualifications or adherence to the organization's religious mission.[484] If so, the claim is barred by church autonomy.[485]

The religious hiring protection, then, closely parallels Title VII's religious exemption. Both focus on a religious group's interest in maintaining religious qualifications for its employees. Both are limited to religious groups (unlike the BFOQ exception and the right of expressive association). And neither require case-by-case balancing of governmental interests (unlike RFRA and the Free Exercise Clause).

480 *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 330 (1987).

481 *See id.* at 332.

482 *Id.* at 341–42 (Brennan, J., concurring in judgment).

483 *Cf. id.* at 336 (majority opinion) ("[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious."); *id.* at 342 (Brennan, J., concurring in judgment) ("Determining that certain activities are in furtherance of an organization's religious mission . . . is . . . a means by which a religious community defines itself.").

484 The inquiry here has parallels to the two-part inquiry in an expressive association defense. And just as a court must "give deference to an association's assertions regarding the nature of its expression" and its "view of what would impair [that] expression," Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000), a court must give deference to a religious group's assertions regarding the nature of its mission and what would impair that mission. Indeed, such deference is even more appropriate in the church autonomy context than in the free speech context, given the constitutional constraint on the power of courts to answer religious questions.

485 *See supra* Section III.A.

Instead, as with the ministerial exception, the Constitution strikes the balance in favor of church autonomy.

The following chart summarizes the key inquiries under the ministerial exception and the six key defenses beyond the ministerial exception:

	Religious Employer	Religious Job Functions	Religious Hiring Decision	Burden on Religion (or Expression)	Neutrality of Government Action	Government Interest
Ministerial Exception	√	√				
Title VII Exemption	√		√			
BFOQ		√	√			
RFRA	√			√		√
Free Exercise	√			√	√	√
Expressive Association				√		√
Church Autonomy	√		√			

Figure 2. Summary of Key Inquiries and Other Defenses.

As shown, only Title VII's religious exemption and the church autonomy defenses are both limited to religious employers and focused on the religious basis of the employment decision.

The main criticism of the church autonomy protection for religious hiring qualifications, as noted above, is that it is difficult to define precise, principled limits.[486] But as noted above, the limits of the defense are similar to those of Title VII's religious exemption. First, the church autonomy defense applies only to religious organizations—which makes it narrower than the BFOQ exemption and expressive association.[487] Second, it applies only to employment decisions based on an employee's religious qualifications—not to more common decisions based on personality fit, secular performance, budgetary shortfalls, or restructuring.[488] This makes the defense narrower in key

486 *See supra* notes 279–82 and accompanying text.

487 *See supra* notes 284–87 and accompanying text; *see also* Union Gospel Mission of Yakima Wash. v. Brown, 162 F.4th 1190, 1205 (9th Cir. 2026) ("limited to religious ministries").

488 *See supra* notes 292–96 and accompanying text; *see also Union Gospel Mission of Yakima Wash.*, 162 F.4th at 1204–05 (only when "the employment decision was 'rooted in religious belief' that was 'sincerely held,'" *id.* at 1205 (quoting Malik v. Brown, 16 F.3d 330, 333 (9th Cir. 1994))).

respects than the ministerial exception. And third, it applies only when the asserted reason for the employment decision is both sincere and non-pretextual—a limit that is common across many religious defenses.[489] These limits follow from the nature of the constitutional interest at stake—the freedom of a religious body to maintain religious qualifications for those who carry out its religious mission. And they are no less principled or administrable than the limits of the ministerial exception.

In fact, both defenses provide complementary protections for church autonomy. The ministerial exception protects religiously significant employment *positions*, without considering the nature of the employment decision. The religious qualification defense protects religiously significant employment *decisions*, without considering the nature of the position.[490] Both the decision about who may occupy religiously significant positions, and the decision about what religious qualifications employees must possess, are key aspects of internal church governance protected by the First Amendment.

CONCLUSION

The Supreme Court's decision in *Bostock* has generated a rash of novel, high-stakes religious freedom conflicts that courts are only now beginning to address. Absent a viable religious freedom defense, *Bostock* makes it illegal for religious groups to require nonministers to abide by their religious teachings on sexuality and marriage. This poses a severe threat to religious autonomy.

Thus far, courts have resolved these post-*Bostock* conflicts by invoking the most familiar and oft-litigated religious freedom defense: the ministerial exception. They have construed the ministerial exception broadly to protect religious autonomy, which has allowed them to avoid addressing alternative defenses.

These decisions are not incorrect. But it is only a matter of time before courts will be forced to address alternative defenses in cases involving non-ministers. And other legal defenses are arguably even better suited than the ministerial exception for protecting religious

489 *See supra* note 130–31 and accompanying text.

490 *See Union Gospel Mission of Yakima Wash.*, 162 F.4th at 1205 ("While the ministerial exception immunizes religious organizations from *all* employment-discrimination laws in the case of ministers," "[t]he church autonomy doctrine protects a religious organization from an employment-discrimination suit only to the extent the hiring of co-religionist non-ministerial employees is based on sincerely held religious beliefs.").

groups' interest in maintaining religious qualifications for their employees.

This Article has explored six potentially viable legal defenses in cases involving nonministers: (1) Title VII's religious exemption, (2) Title VII's BFOQ exemption, (3) RFRA, (4) church autonomy, (5) expressive association, and (6) the Free Exercise Clause. Among these six, Title VII's religious exemption provides the most straightforward and natural defense. That exemption expressly protects the ability of religious organizations to make employment decisions based on an employee's religious beliefs, observances, or practices. And it allows courts to resolve cases on statutory rather than constitutional grounds.

In some cases, however—particularly under state employment-discrimination laws with newly narrowed religious exemptions—federal statutory defenses like Title VII's religious exemption are unavailable. In such cases, courts will be forced to address constitutional defenses like church autonomy, expressive association, and the Free Exercise Clause.

Among the constitutional defenses, church autonomy—and its distinct protection for religious employment qualifications—appears to provide the best fit. Like Title VII's religious exemption, it is limited to religious organizations; it applies only to employment decisions based on an employee's religious qualifications; and it generally applies only when the asserted reason for the employment decision is both sincere and non-pretextual. Thus, the defense has workable limits that are closely tailored to the core legal interest at stake: the freedom of religious groups to maintain religious standards for their employees.

Considerations of which legal doctrines provide the best "fit," however, should not obscure the broader lesson to be drawn from this Article. The lesson is not that one or more of these legal doctrines—be it Title VII's religious exemption, church autonomy, the ministerial exception, or something else—is the "silver bullet" that solves all of the church autonomy challenges posed by *Bostock*. The lesson is that religious organizations have five, six, or even seven silver bullets in these cases—strong, overlapping, and mutually reinforcing legal defenses, all of which point to the same important conclusion: Religious groups have the freedom to maintain religious qualifications for their employees.