

# DECIPHERING TITLE VII & EXECUTIVE ORDER 13672: TO WHAT EXTENT ARE RELIGIOUS ORGANIZATIONS FREE TO DISCRIMINATE IN THEIR HIRING PRACTICES?

## INTRODUCTION

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>1</sup> These simple but far-reaching words set the stage for the primary question this Note seeks to answer: Under Title VII and Executive Order (“EO”) 11246, as amended,<sup>2</sup> are religious organizations permitted to discriminate in employment decisions on the basis of sexual orientation? Until recently, the answer to this question was seemingly an easy “yes,” because Title VII, the primary federal law addressing employment discrimination, does not list sexual orientation as a protected class.<sup>3</sup> Also, EO 11246 established nondiscrimination rules specifically for federal contractors that did not prohibit discrimination based on sexual orientation.<sup>4</sup>

However, on July 21, 2014, President Barack H. Obama issued EO 13672, applicable to federal contractors and subcontractors, which added sexual orientation and gender identity (collectively “SOGI”) as protected classes to EO 11246.<sup>5</sup> Also, although sexual orientation is not listed as a protected class in Title VII, the enforcement policies of the Equal Employment Opportunity Commission (“EEOC”) have recently shifted to consider discrimination on the basis of sexual orientation to be equivalent to discrimination on the basis of sex,<sup>6</sup> which is covered by Title VII.<sup>7</sup>

In light of these developments, this Note explores whether longstanding exemptions from employment nondiscrimination laws will continue to permit religious organizations to consider sexual orientation

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> The scope of this Note is limited to examining federal nondiscrimination issues, and therefore will disregard the varied existence and application of state and local nondiscrimination laws. Furthermore, although the Religious Freedom Restoration Act, codified at 42 U.S.C. § 2000bb et seq., is relevant to the discussion, analysis of its relevancy to Title VII and EO 11246 is also beyond the scope of this Note.

<sup>3</sup> See 42 U.S.C. § 2000e-2(a)(1) (2012) (only prohibiting discrimination on the basis of “race, color, religion, sex, or national origin”).

<sup>4</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965) (only prohibiting discrimination on the basis of “race, creed, color, or national origin”).

<sup>5</sup> Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014). The final regulations for this order became effective April 8, 2015. See 79 Fed. Reg. 72,985 (Dec. 9, 2014).

<sup>6</sup> See *infra* Section II.D.

<sup>7</sup> 42 U.S.C. § 2000e-2(a)(1) (2012).

when making employment decisions. Part I reviews the enactment and amendment of Title VII and two executive orders that are important predecessors of EO 13672. Part II reviews the exemptions for religious organizations in Title VII and EO 11246, along with relevant case law and enforcement policies of the EEOC. Part III develops a framework for correctly interpreting Title VII's exemption for religious organizations. This Note concludes that religious organizations, including federal contractors, may continue to discriminate on the basis of sexual orientation in their hiring practices if they do so for religious reasons.

## I. HISTORICAL CONTEXT

### A. *Enactment of Title VII*

In July 1964, Congress sought to improve equal access to employment by enacting what is commonly known as Title VII of the Civil Rights Act.<sup>8</sup> Title VII generally applies to employers who have fifteen or more employees.<sup>9</sup> Most relevant to the discussion in this Note is Title VII's ban on discrimination in employment decisions because of a person's "race, color, religion, sex, or national origin."<sup>10</sup> Also important is Title VII's exemption for religious organizations, often referred to as the 702(a) exemption,<sup>11</sup> which states that "[t]his subchapter shall not apply . . . to a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities."<sup>12</sup>

Prior to a 1972 amendment of Title VII, which changed the words "religious activities" to "activities," the exemption for religious

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<sup>8</sup> 42 U.S.C. § 2000e.

<sup>9</sup> 42 U.S.C. § 2000e(b).

<sup>10</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>11</sup> Title VII also contains two additional exemptions for religious employers. The first is codified at 42 U.S.C. § 2000e-2(e)(1). It states that "it shall not be an unlawful employment practice . . . [to hire an employee] on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." The second exemption, commonly referred to as 703(e)(2), is codified at 42 U.S.C. § 2000e-2(e)(2). It states that

it shall not be an unlawful employment practice for a school, college, university, or other educational institution . . . to hire and employ employees of a particular religion if such . . . [institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such . . . [institution] is directed toward the propagation of a particular religion.

This second exemption slightly expands Title VII's religious exemption scheme that this Note discusses, but for the purposes of the discussion herein it is largely duplicative of 702(a) and will not be discussed further.

<sup>12</sup> 42 U.S.C. § 2000e-1(a).

organizations applied only with respect to employees who were engaged in activities that were religious in nature.<sup>13</sup> Thus, prior to the 1972 amendment, religious employers could not claim the 702(a) exemption for employment decisions affecting employees who performed tasks that were viewed as being secular in nature.

Since the 1970s, Congress has considered various bills that would, in effect, add sexual orientation and gender identity to the list of protected classes under Title VII.<sup>14</sup> A recent version of such a bill is the Equality Act, which was introduced in both the House of Representatives and the Senate in July 2015, but has not moved beyond committee consideration.<sup>15</sup> If this bill were passed in its current form, the 702(a) exemption discussed in this Note would remain in place.<sup>16</sup>

### B. Executive Orders 11246 and 13279

In 1965 President Lyndon B. Johnson issued EO 11246, which required all government contracts to include the following provision: “The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.”<sup>17</sup> Because this order contained no explicit exemption for religious organizations, federal contractors arguably<sup>18</sup> could not discriminate on the basis of religion as a result of their status as a federal contractor.

In 2002 President George W. Bush issued EO 13279, which amended EO 11246 by stating that its nondiscrimination provisions did not apply to religious organizations “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of [the organization’s] activities.”<sup>19</sup> This change made the order’s nondiscrimination provisions and the related exemption for religious federal contractors virtually identical to Title VII’s nondiscrimination provisions and exemption for religious organizations

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<sup>13</sup> 1-5 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 5.06(2)(a) (2016).

<sup>14</sup> Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act’s Exemption for Religious Organizations*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 4, 4 (2010).

<sup>15</sup> Equality Act, S. 1858, 114th Cong. § 7 (2015).

<sup>16</sup> *Id.*

<sup>17</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,319–20 (Sept. 28, 1965).

<sup>18</sup> Although EO 11246 lacked any specific textual protection for religious federal contractors, they still could have availed themselves of various constitutional protections, as discussed *infra* in Part III.

<sup>19</sup> Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,143 (Dec. 16, 2002).

in general.<sup>20</sup> Indeed, the Department of Labor (“DOL”) follows rulings interpreting Title VII’s religious exemption when enforcing EO 11246.<sup>21</sup>

## II. ANALYSIS OF THE EXEMPTION FOR RELIGIOUS ORGANIZATIONS PROVIDED BY 702(A) AND 204(C)

While Title VII litigation can be complex, the purpose of this part is to distill and simplify the main principles relevant to interpreting 702(a) and 204(c) so the points of tension can be revealed and addressed. The next four sections will (1) compare the 702(a) and 204(c) exemptions, (2) review the requirements to qualify as a religious organization, (3) provide a brief overview of relevant case law, and (4) examine the EEOC’s applicable enforcement policies.

### *A. Comparison of Title VII’s 702(a) Exemption for Religious Employers and Section 204(c)’s Exemption for Religious Federal Contractors*

To understand why Section 204(c) of EO 11246 must be interpreted in tandem with Title VII’s 702(a) exemption, comparison of their respective plain language is instructive. 702(a) reads as follows:

This subchapter [42 USCS §§ 2000e et seq.] shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.<sup>22</sup>

The apparent function of 702(a) is to exempt employment decisions of religious organizations from all provisions of Title VII, provided that those employment decisions are based on religious convictions of the employer, not on discriminatory reasons prohibited by Title VII.<sup>23</sup>

The 204(c) exemption is very similar in that it takes a broad, non-applicability approach by stating the following:

Section 202 of this Order shall not apply to a Government contractor or subcontractor that is 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

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<sup>20</sup> See *infra* Section II.A.

<sup>21</sup> *Office of Federal Contract Compliance Programs: Frequently Asked Questions Sexual Orientation and Gender Identity*, U.S. DEPT LAB., [http://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html) (last visited Mar. 12, 2017).

<sup>22</sup> 42 U.S.C. § 2000e-1(a) (2012).

<sup>23</sup> See 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, 375–76 (2015) (discussing the two exemptions in Title VII under which an employer may draw on its religious beliefs and practices for staffing decisions).

carrying on by such corporation, association, educational institution, or society of its activities.<sup>24</sup>

By explicitly stating that Section 202, which contains the nondiscrimination provisions at issue, does not apply, 204(c) appears to completely eliminate Section 202's nondiscrimination provisions when religious federal contractors make employment decisions "with respect to the employment of individuals of a particular religion."<sup>25</sup>

In sum, 702(a) and 204(c) contain virtually identical operative provisions, which appear to exempt religious organizations from generally applicable nondiscrimination rules when such organizations make religiously-motivated employment decisions. Therefore, the DOL's policy of interpreting 204(c) in accordance with relevant Title VII case law and the EEOC's related guidance<sup>26</sup> is appropriate and necessary for consistent application of law. As a result, interpretation and enforcement of these exemptions are inextricably linked and inherently transferrable.<sup>27</sup> Because the overwhelming weight of relevant case law deals expressly with Title VII's 702(a) exemption,<sup>28</sup> the discussion in this Note will focus on Title VII, its 702(a) exemption, and related constitutional principles.

#### *B. Requirements to Qualify as a Religious Organization*

A threshold requirement for an organization to be exempt under 702(a) or 204(c) is to meet the definition of a "religious corporation, association, educational institution, or society,"<sup>29</sup> which are collectively referred to in this Note as *religious organizations*. The test for determining whether an organization is religious is fact-specific and, in general, seeks to determine whether an organization's character and purpose(s) are primarily religious.<sup>30</sup>

The EEOC's Compliance Manual states that determination of whether an organization is "primarily religious" should be based on "[a]ll

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<sup>24</sup> Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,143 (Dec. 16, 2002).

<sup>25</sup> *Id.*

<sup>26</sup> *Frequently Asked Questions Sexual Orientation and Gender Identity*, *supra* note 21.

<sup>27</sup> Because 702(a) is part of a federal statute, while 204(c) is in an executive order, they carry different force of law implications and enforcement mechanisms; however, this distinction will be ignored for the purposes of this Note.

<sup>28</sup> Esbeck, *supra* note 23, at 371–72.

<sup>29</sup> Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,143 (Dec. 16, 2002).

<sup>30</sup> *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988).

significant religious and secular characteristics.”<sup>31</sup> While noting that no factor is dispositive, the EEOC states that

significant factors to consider that would indicate whether an entity is religious include:

- Do its articles of incorporation state a religious purpose?
- Are its day-to-day operations religious (e.g., are the services the entity performs, the product it produces, or the educational curriculum it provides directed toward propagation of the religion)?
- Is it not-for-profit?
- Is it affiliated with or supported by a church or other religious organization?<sup>32</sup>

The Third and Ninth Circuits have held that the following nine factors are generally relevant when applying the “primarily religious” test:

- (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity’s articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.<sup>33</sup>

While these factors are instructive, because the test remains fact-specific, the relevance and weight of each factor will vary among cases.<sup>34</sup>

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<sup>31</sup> EEOC Compl. Man. (BNA), Section 12: Religious Discrimination, 16–17 (July 22, 2008), <http://www.eeoc.gov/policy/docs/religion.pdf> (alteration in original) [hereinafter EEOC Compl. Man.].

<sup>32</sup> EEOC Compl. Man., *supra* note 31, 16–17.

The second factor illustrates the difficulty (and potential entanglement issues) of a secular court determining the relative religiosity of an organization, because it requires the court to determine which activities are religious in nature. *See infra* notes 98–100 and accompanying text.

The third factor considers whether the organization is a non-profit. *But see* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014) (stating that for-profit corporations can also “further religious objectives”).

<sup>33</sup> Spencer v. World Vision, Inc., 619 F.3d 1109, 1112–13 (9th Cir. 2010) (quoting LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n, 503 F.3d 217, 226 (3d Cir. 2007)).

<sup>34</sup> *LeBoon*, 503 F.3d at 226–27.

### C. Overview of Case Law Applying the 702(a) Exemption

While a comprehensive review of case law applying the 702(a) exemption is beyond the scope of this Note, it is necessary to lay the basic framework before advancing arguments for the correct application of Title VII, and correspondingly, EO 11246. This analysis will be limited to reviewing several principles from the Supreme Court and reviewing the rulings of a number of federal circuit courts dealing with two ambiguities arising from the 702(a) exemption. Arguments addressing a correct understanding and application of this case law will be taken up in Part III.

#### 1. Overview of the Supreme Court's 702(a) Jurisprudence

The Supreme Court's analysis of Title VII's 702(a) exemption is very limited, and therefore leaves significant gaps to fill. However, there are a few useful principles that can be gleaned from several of the Court's cases.

*NLRB v. Catholic Bishop of Chicago*, although not a Title VII case, states an important statutory interpretation principle which is relevant to interpreting 702(a).<sup>35</sup> The Court stated that in determining whether the employment law under review gave the National Labor Relations Board ("NLRB") enforcement jurisdiction, the Court must first decide whether allowing the NLRB to exercise jurisdiction would raise "serious constitutional questions."<sup>36</sup> If such questions are raised, the Court noted that the law could give the NLRB jurisdiction only if Congress clearly expressed an "affirmative intention" to do so.<sup>37</sup>

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, the Court unanimously held that Congress's 1972 amendment that expanded 702(a)'s application to employees performing *any activities* of a religious organization did not violate the Establishment Clause.<sup>38</sup> The Court reasoned that providing protection for only religious activities would significantly burden religious organizations by requiring them, "on pain of substantial liability, to predict which of [their] activities a secular court will consider religious,"<sup>39</sup> creating the possibility of a chilling effect on the way such organizations define and carry out their religious missions.<sup>40</sup>

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<sup>35</sup> 440 U.S. 490, 501 (1979).

<sup>36</sup> *Id.* at 491, 499–501.

<sup>37</sup> *Id.* at 501.

<sup>38</sup> 483 U.S. 327, 339–40 (1987).

<sup>39</sup> *Id.* at 336; *see also id.* at 343–44 (Brennan, J., concurring in the judgment) (noting that differentiating between secular and religious activities requires a case-by-case

In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Court unanimously affirmed the existence of a *ministerial exception*, which gives absolute discretion to “religious groups” when selecting employees to “preach their beliefs, teach their faith, and carry out their mission.”<sup>41</sup> The ministerial exception, which the Court held is compelled by the Religion Clauses of the First Amendment,<sup>42</sup> goes beyond the statutory exemption in 702(a) by giving *complete freedom* to religious organizations when selecting their “ministers,” effectively foreclosing any claims of discriminatory hiring or firing of ministerial employees.<sup>43</sup> Therefore, the ministerial exception overlaps and strengthens Title VII’s 702(a) exemption, but only to the extent of employees who hold ministerial-type positions.<sup>44</sup>

## 2. How Has 702(a)’s Phrase “*Of a Particular Religion*” Been Defined?

Religious organizations are exempt from Title VII “with respect to the employment of individuals *of a particular religion*,”<sup>45</sup> but exactly what this means is disputed. Does it mean that religious organizations may only discriminate against persons who do not share their specific faith or denomination? Or may religious organizations discriminate more expansively, based on specific aspects of religious belief and practice?

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analysis and that such an analysis “would both produce excessive government entanglement with religion and create the danger of chilling religious activity”).

<sup>40</sup> *Id.* at 336 (majority opinion).

<sup>41</sup> 132 S. Ct. 694, 710 (2012).

<sup>42</sup> *Id.* at 706.

<sup>43</sup> *See id.* at 709 (concluding that the government would violate the Religion Clauses for simply “requiring the Church to accept a minister it did not want” without explicitly placing any limiting factors on the Church’s discretion).

<sup>44</sup> Detailed analysis of who qualifies as a minister under *Hosanna-Tabor* is beyond the scope of this Note. For a discussion of this issue, see generally *Hosanna-Tabor*, 132 S. Ct. 694, 707–08 (2012) (concluding, after fact-specific analysis, that the ministerial exception applied); *Conlon v. Interservice Christian Fellowship/USA*, 777 F.3d 829, 834 (6th Cir. 2015) (restating the factors considered by the Court in *Hosanna-Tabor* in determining whether the ministerial exception applied); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 173–76 (5th Cir. 2012) (same); Carl H. Esbeck, *A Religious Organization’s Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, 13 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 168, 171 (2012) (concluding that a religious title, without substance, would not itself be sufficient for the ministerial exception, but it is a proper factor in determining if a person is a minister); Katherine Hinkle, Note, *What’s in a Name? The Definition of “Minister” in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 34 BERKELEY J. EMP. & LAB. L. 283, 286–88 (2013) (discussing that the Court’s decision in *Hosanna-Tabor* has left lower courts with little guidance in determining who is a minister for the ministerial exception to apply).

<sup>45</sup> 42 U.S.C. § 2000e-1(a) (2012) (emphasis added).



Title VII defines religion as including “all aspects of religious observance and practice, as well as belief.”<sup>46</sup> Many courts, including the Third, Sixth, and Eleventh Circuits have incorporated this expansive definition into their Title VII jurisprudence when applying the 702(a) exemption.<sup>47</sup> Therefore, these courts expansively construe the exemption to mean that a religious employer may discriminate on the basis of a person’s identification with (or rejection of) of a specific religious group, and based on specific conduct or beliefs (e.g. actions or beliefs that violate a religious code of conduct or doctrine).<sup>48</sup>

However, in *EEOC v. Pacific Press Publishing Association*, the Ninth Circuit construed the phrase “of a particular religion” to only permit a religious organization to prefer members of a particular denomination or religious group, presumably the denomination or group with which the organization identifies.<sup>49</sup> This opinion, which was issued prior to many of the most relevant circuit court cases dealing with 702(a), is a narrow reading of the exemption and fails to incorporate Title VII’s definition of religion.

### 3. May Religious Organizations Discriminate on the Basis of Any Protected Classes Listed in Title VII or EO 11246?

Title VII “exempts religious organizations from Title VII’s prohibition against discrimination in employment on the basis of religion,”<sup>50</sup> but what about discrimination against the other protected classes? The obvious and less contentious answer is that religious

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<sup>46</sup> 42 U.S.C. § 2000e(j) (2012).

<sup>47</sup> See, e.g., *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (“The decision to employ individuals ‘of a particular religion’ . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.”); *Killinger v. Samford Univ.*, 113 F.3d 196, 199–200 (11th Cir. 1997) (“We are also aware of no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the [702(a)] exemption.”); *Little v. Wuerl*, 929 F.2d 944, 950–51 (3d Cir. 1991) (expressly adopting Title VII’s definition of religion to interpret 702(a)).

<sup>48</sup> See, e.g., *Hall*, 215 F.3d at 623, 626–27 (holding that termination of an employee because she was ordained at a church that endorsed homosexuality, which conflicted with the employer’s religious convictions, was permissible); *Killinger*, 113 F.3d at 199–200 (holding that an employment decision based on differences in religious beliefs between an employee and organizational leadership is entitled to the 702(a) exemption, even if the employee subscribed to the employer’s general statement of faith); *Little*, 929 F.2d at 950–51 (holding that an employment decision based on an employee remarrying in violation of the Catholic Church’s rules is permissible under the 702(a) exemption).

<sup>49</sup> 676 F.2d 1272, 1276 (9th Cir. 1982) (holding that “Title VII provides only a limited exemption enabling Press to discriminate in favor of co-religionists”).

<sup>50</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 329 (1987).

organizations, because they are not altogether exempt from Title VII, cannot discriminate on the basis of race, color, sex, or national origin without a religious reason for doing so.<sup>51</sup> The more nuanced and contentious question, however, is what happens when hiring decisions that are religiously motivated also incidentally discriminate against another protected class?

For example, what should happen if a religious organization believes that, based on its religious doctrines, only men should hold certain positions of leadership, and therefore only hires/promotes men past a certain level in its hierarchy? Or more relevant to the issue in this Note, what should happen if a federal contractor objects, on the basis of a religious belief or practice, to hiring persons with certain sexual orientations?<sup>52</sup> While existing case law does not provide definitive answers to these questions, it does provide some guidance.

There are two main procedural approaches that courts have taken in cases involving 702(a) that may affect the answer to the question at hand. In cases involving direct evidence of some type of discrimination, some courts have held that when an employer presents “convincing evidence” that a challenged employment decision was based on a religious reason, 702(a) “deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.”<sup>53</sup> This approach seemingly allows a genuine religious reason for an employment decision to trump allegations of, and halt inquiry into, whether a religious organization may have incidentally discriminated against another protected class such as race or sex.

On the other hand, when deciding a case involving 702(a) the Sixth Circuit used a test the Supreme Court developed in *McDonnell Douglas Corp. v. Green*, which was a Title VII case, but did not involve the 702(a) exemption.<sup>54</sup> This test only applies when there is no direct evidence of discrimination and requires the plaintiff to establish a “prima facie case of discrimination” by showing that

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<sup>51</sup> See *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (“While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin . . .”).

<sup>52</sup> As noted in the introduction and elsewhere in this Note, under current EEOC guidance and case law, such an issue could also directly affect a religious organization subject to Title VII who is not a federal contractor. See *infra* Section II.D.

<sup>53</sup> *Rayburn*, 772 F.2d at 1166 (quoting *EEOC v. Mississippi Coll.*, 626 F.2d 477, 485 (5th Cir. 1980)); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986) (same).

<sup>54</sup> 411 U.S. 792, 802 (1973).

(1) [plaintiff] is a member of a protected group; (2) [plaintiff] was subject to an adverse employment action; (3) [plaintiff] was qualified for the position; and (4) [plaintiff] was replaced by someone outside the protected class or was treated less favorably than a similarly-situated employee outside the protected class. If the plaintiff makes a prima facie case, a presumption of discrimination arises. In order to overcome this presumption, the defendant must articulate a legitimate nondiscriminatory reason for the plaintiff's termination. If the defendant can do so, the burden shifts back to the plaintiff to prove that the articulated reason was merely a pretext for the real reason, unlawful discrimination.<sup>55</sup>

If a court applies the *McDonnell Douglas* test in a 702(a) case, the implication is that the plaintiff could challenge a religious organization's claim that it based an employment decision on a religious conviction.

Although the precise implications are murky, if a plaintiff is able to prove to the satisfaction of the fact finder that the religious organization's religious preference (although based on a genuine religious conviction) discriminated against a protected class (e.g. sex, sexual orientation, or gender identity), the court *might* deem the religious preference to be pretextual (invalid) and find the religious organization liable for discrimination. The *McDonnell Douglas* approach, however, appears to conflict with the circuits that have disallowed further investigation by the EEOC after a religious organization shows that an employment decision was based on religion, and the Supreme Court has looked with disfavor on arguments that courts should review the veracity of religious claims.<sup>56</sup>

Alternatively, it is possible that these two approaches can peacefully coexist. The *McDonnell Douglas* test only requires an employer to "articulate a legitimate nondiscriminatory reason for the plaintiff's termination."<sup>57</sup> This low burden, which does not rise even to a preponderance standard, "is satisfied if [the employer] simply 'explains what he has done' or 'produces evidence of legitimate nondiscriminatory

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<sup>55</sup> Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625–26 (6th Cir. 2000) (citations omitted).

<sup>56</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 715 (2012) (Alito & Kagan, JJ., concurring) (stating that allowing a "pretext inquiry" would undermine "religious autonomy" and "whatever the truth of the matter might be, the mere adjudication of such questions would pose grave problems for religious autonomy"); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1987) (Brennan, J., concurring in the judgment) (stating that the "prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.").

<sup>57</sup> *Hall*, 215 F.3d at 626.

reasons” for the hiring decision.<sup>58</sup> Therefore, if a religious employer exceeds this low burden by presenting *convincing evidence* of a religious reason for its actions, even a court applying the *McDonnell Douglas* test could choose to end the inquiry there, rather than risking excessive entanglement by allowing further inquiry into whether the religious reason is pretextual.<sup>59</sup>

But beyond procedural issues, at its most basic level, the crucial question is this: Which should preempt the other in the event of a clash—the 702(a) and 204(c) exemptions for religiously-based employment decisions, or protection for certain classes of individuals enumerated in Title VII and EO 11246?<sup>60</sup>

#### *D. Enforcement Policies of the EEOC and Department of Labor*

Because the law is not fully settled with respect to the exact scope and operation of 702(a), it is important for religious organizations to understand not just the law, but also the enforcement policies of the EEOC so organizations are aware of whether hiring decisions on the basis of sexual orientation might result in enforcement actions. Because the DOL has stated its intention to follow the EEOC’s guidance with respect to Section 204(c) of EO 11246,<sup>61</sup> it is likewise important for federal contractors to understand the enforcement policies of the EEOC, even though enforcement of EO 11246 is the responsibility of the DOL’s Office of Federal Contract Compliance Programs (“OFCCP”).<sup>62</sup>

##### 1. The EEOC’s Expanding Definition of Sex Discrimination

The EEOC’s 2013–2016 Strategic Enforcement Plan lists “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply,” as one of the EEOC’s enforcement priorities.<sup>63</sup> Since the Supreme Court decided *Price Waterhouse v. Hopkins* in 1989,<sup>64</sup> courts have relied on *Price Waterhouse*

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<sup>58</sup> *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (quoting *Bd. of Trs. v. Sweeney*, 439 U.S. 24, 25 n.2 (1978)).

<sup>59</sup> *See supra* note 56 and accompanying text.

<sup>60</sup> *See infra* Section III.B. for the answer to this question.

<sup>61</sup> *Frequently Asked Questions Sexual Orientation and Gender Identity*, *supra* note 21.

<sup>62</sup> 41 C.F.R. § 60-30.1 (2015).

<sup>63</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, 9–10 (2012), <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf>. Also, its 2017–2021 Strategic Enforcement Plan indicates that an ongoing priority is “[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN FY 2017–2021, 7–8 (2016), <https://www.eeoc.gov/eeoc/plan/upload/sep-2017.pdf>.

<sup>64</sup> 490 U.S. 228, 258 (1989).

to extend coverage of Title VII's prohibition of sex discrimination to include sex stereotyping,<sup>65</sup> but have mostly continued to hold that Title VII does not prohibit discrimination on the basis of sexual orientation.<sup>66</sup>

Nonetheless, the EEOC stated in a July 2015 administrative appeal involving a federal employee that discrimination on the basis of sexual orientation “is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>67</sup> The EEOC also stated that

sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.<sup>68</sup>

This reasoning ignores the distinction that courts have made since *Price Waterhouse* between claims of sex stereotyping and claims of sexual orientation discrimination.<sup>69</sup> While the EEOC may have been particularly motivated to stretch the definition of sex discrimination to protect a federal employee in this case, the EEOC’s analysis suggests

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<sup>65</sup> *E.g.*, *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (holding that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior”); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) (noting that “Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles”).

<sup>66</sup> *E.g.*, *Evans v. Ga Reg’l Hosp.*, No. 15-15234, 2017 WL 943925, at \*6 (11th Cir. Mar. 10, 2017) (noting that nine other circuit courts have held that Title VII contains no cause of action for sexual orientation discrimination and holding the same); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 289 (3d Cir. 2009) (noting that “Title VII does not prohibit discrimination based on sexual orientation,” but “a homosexual individual is [not] barred from bringing a *sex discrimination* claim under Title VII”); *Simonton v. Runyon*, 232 F.3d 33, 35, 37 (2d Cir. 2000) (“The law is well-settled in this circuit and in all others to have reached the question that [plaintiff] has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation. . . . We find [plaintiff’s sexual stereotyping] argument more substantial than [his] previous two arguments, but not sufficiently pled in this case.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259–60 (1st Cir. 1999) (holding that “we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation” and dismissing plaintiff’s sex stereotyping theory because it was not properly preserved for appeal). *But see* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, No. 15-1720, 2017 WL 1230393, at \*1 (7th Cir. Apr. 4, 2017) (en banc) (departing from its prior precedent and the tradition of other circuits and holding that “discrimination on the basis of sexual orientation is a form of sex discrimination”).

<sup>67</sup> *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 7 (July 15, 2015).

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *See supra* notes 63–66 and accompanying text.

that it likely is equally willing to apply the same reasoning to religious organizations.

The EEOC does not have official enforcement authority with respect to private sector employers; rather, it must seek a voluntary settlement or bring suit against a non-government employer it believes, after an initial investigation, is engaging in unlawful discrimination.<sup>70</sup> Also, lower courts interpreting Title VII generally only give the relatively weak *Skidmore* deference<sup>71</sup> (if they give any deference at all) to EEOC guidelines,<sup>72</sup> while the Supreme Court retains very broad discretion by declining to settle on a specific deference standard for EEOC guidelines.<sup>73</sup> Therefore, the EEOC's administrative rulings and guidelines do not carry any precedential value. The fact that the EEOC is taking this enforcement approach, however, suggests that all religious organizations (not just federal contractors) may now face enforcement actions (i.e. lawsuits by the EEOC) if their hiring practices appear to discriminate against persons based on sexual orientation. Furthermore, lower courts that have recently addressed the issue seem increasingly willing to adopt the EEOC's reasoning and extend sex discrimination to include sexual orientation.<sup>74</sup>

## 2. Does the EEOC and OFCCP Prioritize Nondiscrimination Provisions or Religious Exemptions When They Clash?

The OFCCP published a list of frequently asked questions following issuance of the EO 13672 Final Rule.<sup>75</sup> One Q&A was as follows: Q: "How does EO 11246's exemption for religious organizations operate in light of the addition of the new protected categories?" A: "In general, this exemption allows religious organizations to prefer to employ only members of a particular faith, but it does not allow religious

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<sup>70</sup> 42 U.S.C. § 2000e-5(b), (f) (2012).

<sup>71</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944).

<sup>72</sup> Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1945 (2006).

<sup>73</sup> *Id.* at 1949.

<sup>74</sup> See, e.g., *Boutillier v. Hartford Pub. Sch.*, No. 3:13-cv-01303-WWE, 2016 WL 6818348, at \*9–11 (D. Conn. Nov. 17, 2016) (denying an employer's motion to dismiss and reasoning that Title VII protects individuals from discrimination on the basis of sexual orientation); *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-225, 2016 WL 6569233, at \*6 (W.D. Pa. Nov. 4, 2016) (stating that the line between discrimination on the basis of sex and discrimination on the basis of sexual orientation is a "distinction without a difference"); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 1334, 1346–47 (N.D. Fla. 2016) (adopting the rationale of *Baldwin v. Foxx* and holding that discrimination on the basis of sexual orientation is necessarily sex discrimination).

<sup>75</sup> *Frequently Asked Questions Sexual Orientation and Gender Identity*, *supra* note 21.

organizations to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.”<sup>76</sup> While this answer does not fully address the issue of what happens when a nondiscrimination provision conflicts with an employer’s religious convictions, the structure of the answer could be construed to create an absolute bar to discrimination against any of the protected classes, notwithstanding a religious hiring motive that would otherwise be exempt under 204(c).

The EEOC Compliance Manual’s interpretation of Title VII, which the DOL purports to follow,<sup>77</sup> is clearer. It states that the 702(a) exemption

only allows religious organizations to prefer to employ individuals who share their religion. The exception does not allow religious organizations otherwise to discriminate in employment on protected bases other than religion, such as race, color national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races. Similarly, a religious organization is not permitted to deny fringe benefits to married women but not to married men by asserting a religiously based view that only men can be the head of a household.<sup>78</sup>

This section of the manual does not explicitly discuss sexual orientation, but a fair inference from the quoted examples is that a religious organization with a conviction that homosexual activity is sinful would not be permitted to claim the 204(c) or 702(a) exemption in order to avoid hiring a homosexual individual.

In summary, the EEOC’s position appears to be that Title VII and EO 11246 both prohibit discrimination on the basis of SOGI, and that all covered employers are *absolutely barred* from discriminating based on any of the protected classes (except religion<sup>79</sup>), notwithstanding any religious convictions and the exemptions provided to religious organizations. In other words, the EEOC appears to be prioritizing nondiscrimination laws over the free exercise of religion.

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (explaining that the DOL’s Office of Federal Contract Compliance Programs follows the EEOC’s interpretation of Title VII); *EEOC Subregulatory Guidance*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/guidance/> (last visited Mar. 7, 2017) (explaining that the EEOC follows its Compliance Manual in regard to substantive matters of law).

<sup>78</sup> EEOC Compl. Man., *supra* note 31, at 18.

<sup>79</sup> *Id.* (noting that the 702(a) exception “allows religious organizations to prefer to employ individuals who share their religion”).

### III. ARGUMENTS FOR A BROAD INTERPRETATION OF TITLE VII'S EXEMPTION FOR RELIGIOUS ORGANIZATIONS

Having finished a brief overview of applicable case law and several of the EEOC's relevant enforcement policies, this Note takes up the task of building an interpretive framework for Title VII's 702(a) exemption, and correspondingly, 204(c)'s exemption for federal contractors. This section first reviews Congress's legislative intent behind 702(a) and then transitions to reviewing several Supreme Court cases that affect interpretation of 702(a).

#### *A. Congress's Legislative Intent When Enacting 702(a)*

The legislative history surrounding the 702(a) exemption is somewhat sparse; however, a specific act of Congress in the history of 702(a) suggests that Congress intended to provide robust free exercise protection for religious organizations. Specifically, by removing the word "religious" from the 702(a) exemption in 1972,<sup>80</sup> Congress intended to more fully protect the free exercise of religion by expanding 702(a) to cover *all activities* and therefore *all employees* of religious organizations.

In *Little v. Wuerl*, while analyzing the scope of the 702(a) exemption, the Third Circuit made some helpful observations regarding congressional intent.<sup>81</sup> It noted that "[a]lthough the legislative history never directly addresses the question of whether being 'of a particular religion' applies to conduct as well as formal affiliation, it suggests that the sponsors of the broadened exception were solicitous of religious organizations' desire to create communities faithful to their religious principles."<sup>82</sup> To support this conclusion, the court observed the following exchange during congressional discussion of an amendment that was proposed, but not passed, to *completely exempt* religious organizations from Title VII:

[Question]: Does the Senator's amendment limit itself to the opportunity of a religious organization to have the right to hire people of its own faith? Is that the limitation of the amendment?

Senator Ervin: I would allow the religious corporation to do what it pleased. That is what my amendment would allow it to do. It would allow it liberty. It would take it out from under the control of the EEOC entirely.<sup>83</sup>

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<sup>80</sup> 1-5 LARSON, *supra* note 13.

<sup>81</sup> 929 F.2d 944, 950-51 (3d Cir. 1991).

<sup>82</sup> *Id.* at 950.

<sup>83</sup> *Id.* (quoting 118 CONG. REC. 1982 (1972)).



In a separate discussion, after introducing the version of the amendment that was ultimately approved and codified in 1972, Senator Ervin stated that the revised (and ultimately adopted)

amendment would exempt religious [organizations] from the application of this act insofar as the right to employ people of any religion they see fit is concerned. . . . In other words, this amendment is to take the political hands of Caesar off of the institutions of God, where they have no place to be.<sup>84</sup>

Although the 1972 amendment that was ultimately passed did not provide the *complete immunity* for religious organizations contemplated by the first amendment proposed by Senator Ervin, his perspective, as co-sponsor of the amendment that was ultimately passed, is helpful to illustrate the importance Congress placed on religious freedom when enacting and amending Title VII.

The court in *Little* concluded its analysis by stating that it was “persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization’s ‘religious activities.’”<sup>85</sup>

On a related note, courts have held that the 702(a) exemption is not waived if a religious organization chooses not to exercise it immediately or with respect to certain employees.<sup>86</sup> Also, the exemption is not waived even if a religious organization has previously stated that it will not discriminate on the basis of religion.<sup>87</sup>

In summary, as stated by the Supreme Court, “Congress’ purpose was to minimize governmental ‘interfer[ence] with the decision-making process in religions.’”<sup>88</sup> Therefore, to maintain consistency with congressional intent, it is necessary to interpret 702(a) as preempting any provisions of Title VII that would interfere with religiously-based decisions of religious organizations. Furthermore, 702(a)’s plain statement “[t]his subchapter shall not apply” emphasizes that all actions

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<sup>84</sup> 118 CONG. REC. 4503 (1972).

<sup>85</sup> *Little*, 929 F.2d at 951.

<sup>86</sup> See, e.g., *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000) (holding that “the statutory exemptions from religious discrimination claims under Title VII cannot be waived by either party”) (citing *Little*, 929 F.2d at 951).

<sup>87</sup> See, e.g., *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 229–30 (3d Cir. 2007) (noting that “religious organizations may declare their intention not to discriminate . . . without losing the protection of Section 702”).

<sup>88</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (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)).

“with respect to the employment of individuals of a particular religion” should be exempt from Title VII’s nondiscrimination provisions.<sup>89</sup>

*B. Three Guideposts from the Supreme Court*

While the Supreme Court has not specifically addressed interpretation of 702(a), there are three Supreme Court cases that lend themselves readily to constructing an interpretive framework. Application of this framework shows that Title VII’s jurisdiction over religious organizations must be narrowly construed and 702(a) must be broadly interpreted and applied in order to carry out the robust protection for religious freedom that permeates Title VII.

1. Jurisdiction of Title VII Over Religious Organizations Must Be Narrowly Construed

A principle of statutory construction reviewed in *Catholic Bishop*, which dates back to the early 1800s,<sup>90</sup> states that “an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.”<sup>91</sup> As outlined in *Catholic Bishop*, this principle requires courts that apply Title VII to religious organizations to take two steps: (1) Consider whether the EEOC’s exercise of jurisdiction “would give rise to serious constitutional questions,” and (2) if so, “identify ‘the affirmative intention of the Congress clearly expressed’ before concluding that the Act grants jurisdiction.”<sup>92</sup> The first step appears simple in some contexts, in that it is well accepted that Title VII’s prohibition against religious discrimination “where the position involved has any religious significance is uniformly recognized as constitutionally suspect, if not forbidden.”<sup>93</sup> In such cases, *Catholic Bishop* would certainly require “the affirmative intention of the Congress clearly expressed” to grant the EEOC jurisdiction in any given case.<sup>94</sup>

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<sup>89</sup> 42 U.S.C. § 2000e-1(a) (2012).

<sup>90</sup> See *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804) (holding that “an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains”).

<sup>91</sup> *Catholic Bishop*, 440 U.S. at 500.

<sup>92</sup> *Id.* at 501 (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 22 (1963)).

<sup>93</sup> *Little v. Wuerl*, 929 F.2d 944, 948 (3d Cir. 1991); see also, e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365 (9th Cir. 1986) (holding that “application of Title VII to [hiring practices at a Christian school] would definitely give rise to serious constitutional questions”); *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (holding that “application of Title VII to [employment of pastors] would definitely ‘give rise to serious constitutional questions’”).

<sup>94</sup> *Catholic Bishop*, 440 U.S. at 501 (quoting *McCulloch*, 372 U.S. at 21–22).

Slightly more difficult is the result of *Catholic Bishop's* first step when Title VII purports to apply to an employee of a religious organization who has only secular duties.<sup>95</sup> Does such a situation still require “the affirmative intention of the Congress clearly expressed?”<sup>96</sup> For at least two reasons, the answer must again be yes. First, Congress specifically amended the 702(a) exemption in 1972 to cover *all activities* of religious organizations.<sup>97</sup> As previously discussed, “Congress’ purpose was to minimize governmental ‘interfer[ence] with the decision-making process in religions.’”<sup>98</sup> This suggests that Congress was, or at least should have been, concerned that a less robust exemption might result in excessive government entanglement in religion.

Second, attempting to distinguish between secular and religious activities for the purpose of statutory construction raises the concerns noted in *Amos*, in which the Court stated

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. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.<sup>99</sup>

Placing such a burden on religious organizations raises serious constitutional questions.<sup>100</sup>

Furthermore, the rule of law requires a consistent application of Title VII. It is improper for a court to apply a statutory construction of Title VII that varies between cases based on the nature of an employee’s duties. In other words, the EEOC should not be permitted to apply, or argue for, a double standard by conceding that when a case involves a ministerial employee, Title VII permits an absolute exemption for a religious employer,<sup>101</sup> but when a case involves a non-ministerial employee Title VII’s nondiscrimination provisions should override an employer’s religious convictions. Such an approach, which infers that Congress intended different treatment for different employees of

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<sup>95</sup> *Id.* at 499–500.

<sup>96</sup> *Id.* at 501 (quoting *McCulloch*, 372 U.S. at 21–22).

<sup>97</sup> 1-5 LARSON, *supra* note 13.

<sup>98</sup> Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987) (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)).

<sup>99</sup> *Id.* at 336.

<sup>100</sup> *Id.* at 344 (Brennan, J., concurring in the judgment) (“A case-by-case analysis . . . would both produce excessive government entanglement with religion and create the danger of chilling religious activity.”).

<sup>101</sup> Such a concession is required under *Hosanna-Tabor*. See *infra* Section III.B.2.

religious organizations, raises serious constitutional questions, as discussed in *Amos*.<sup>102</sup> While the Court in *Hosanna-Tabor* distinguished between ministerial and non-ministerial employees for the purpose of the ministerial exception,<sup>103</sup> Title VII makes no such distinction. Rather, Congress expressly voiced its intention to avoid such distinctions when it removed the word “religious” from the 702(a) exemption.<sup>104</sup>

For these reasons, regardless of an employee’s duties, the test from *Catholic Bishop* requires that Title VII only be applied to religious organizations to the extent Congress’s intent to do so is clearly expressed. Because Congress passed 702(a), which by its plain language makes Title VII categorically not applicable to religiously-motivated hiring decisions of religious organizations,<sup>105</sup> the exemption must be interpreted to give Title VII narrow application to religious organizations. This can be effectively accomplished by construing 702(a) to preempt (override) Title VII’s nondiscrimination provisions when they conflict with an employer’s religiously-motivated employment decisions. This approach both avoids the serious constitutional issues that would arise from a reverse approach, and is consistent with Congress’s intent to safeguard the free exercise of religion.

## 2. The Ministerial Exception Mandates a Broad Interpretation and Application of 702(a)

The Supreme Court’s unanimous 2012 ruling in *Hosanna-Tabor* has two important implications for interpretation of 702(a). First, 702(a)’s exemption protecting freedom of religious organizations “with respect to the employment of individuals of a particular religion”<sup>106</sup> cannot be limited to, as the EEOC argues, allowing “religious organizations to prefer to employ individuals who share their religion.”<sup>107</sup> Such an interpretation, at least with respect to ministerial-type employees, is overly restrictive and unconstitutional under *Hosanna-Tabor* because it would only apply to religious organizations who utilize the exemption to hire members of their specific denomination or faith,<sup>108</sup> while the ministerial exception is clearly broader than that.<sup>109</sup>

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<sup>102</sup> See *supra* notes 98–100 and accompanying text.

<sup>103</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–09 (2012).

<sup>104</sup> 1-5 LARSON, *supra* note 13.

<sup>105</sup> 42 U.S.C. § 2000e-1(a) (2012) (stating that Title VII “shall not apply to an employer . . . with respect to the employment of individuals of a particular religion”).

<sup>106</sup> § 2000e-1(a).

<sup>107</sup> EEOC Compl. Man., *supra* note 31, at 18.

<sup>108</sup> The Court noted that the “ministerial exception is not limited to the head of a religious congregation” and stated its reluctance “to adopt a rigid formula for deciding

The second implication, which is similar to the first, is that under *Hosanna-Tabor* the 702(a) exemption must be allowed to preempt Title VII's nondiscrimination provisions with respect to ministerial employees, otherwise disgruntled ministerial employees could claim a religious reason given for dismissal was pretextual and sue under a claim of sex or racial discrimination.<sup>110</sup> Therefore, an interpretation that forces the 702(a) exemption to give way to Title VII's other protected classes makes Title VII unconstitutional vis-a-vis *Hosanna-Tabor*. Indeed, the EEOC, to its credit, has acknowledged this to be true with respect to ministerial employees.<sup>111</sup>

It does no good to say that the ministerial exception “saves” Title VII from being unconstitutional if the above interpretation guidelines are ignored (as the EEOC seems to be doing<sup>112</sup>). Such an approach requires believing that the Supreme Court has judicially rewritten Title VII by adding a sweeping exemption for ministerial employees that was omitted by Congress when it wrote Title VII, and such an approach blatantly violates the constitutional avoidance principle from *Catholic Bishop*.<sup>113</sup> Fortunately, there is a simple solution that is consistent with Supreme Court precedents and that does not require application of a double standard to Title VII cases.

All that is required to make Title VII pass constitutional muster under *Hosanna-Tabor* and *Catholic Bishop* is to (1) broadly construe the phrase “of a particular religion”<sup>114</sup> to cover all aspects of “conduct or religious beliefs,”<sup>115</sup> and (2) follow the plain language of Title VII, which states that “[t]his subchapter shall not apply,”<sup>116</sup> by allowing a religious

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when an employee qualifies as a minister.” *Hosanna-Tabor*, 132 S. Ct. at 707. Therefore, the exact scope of the exception and corresponding impact on Title VII is not clear.

<sup>109</sup> *Id.* at 709 (“The 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.”).

<sup>110</sup> *Id.* (stating that the plaintiff’s claim that the “asserted religious reason for firing [plaintiff] . . . was pretextual . . . misses the point of the ministerial exception” because religious organizations retain absolute discretion when hiring ministers).

<sup>111</sup> *Id.* at 706 (“The EEOC . . . acknowledge[s] that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary.”).

<sup>112</sup> See *supra* Section II.D.

<sup>113</sup> See *supra* notes 35–37 and accompanying text.

<sup>114</sup> 42 U.S.C. § 2000e-1(a) (2012).

<sup>115</sup> *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (citing *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991)).

<sup>116</sup> § 2000e-1(a).

organization's religiously-motivated hiring decisions to preempt all other provisions of Title VII.<sup>117</sup> This would functionally allow religious organizations complete freedom to apply whatever criteria they please when hiring their ministers, satisfying *Hosanna-Tabor*,<sup>118</sup> while also avoiding serious constitutional issues, satisfying *Catholic Bishop*.<sup>119</sup>

Also, allowing religious organizations to exercise this same freedom with respect to employees who are not ministers, while not required by the ministerial exception, is consistent with the intent of Congress in passing the 1972 amendment to Title VII that expanded the applicability of 702(a) to *all employees* of religious organizations.<sup>120</sup> Furthermore, such an interpretation avoids the excessive entanglement issue and chilling of religious free exercise, as discussed in *Amos*, which would result from religious organizations being required to predict which employees a court might (or might not) deem to be a minister.<sup>121</sup>

### 3. Title VII's 702(a) Exemption Was Written to Broadly Accommodate and Protect Religious Freedom

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, the Supreme Court held that an employer must accommodate a religious practice, unless the accommodation creates an undue hardship, even if the employer merely maintained an otherwise-neutral policy that happened to prohibit a

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<sup>117</sup> For comprehensive treatment of the plain language arguments for a broad interpretation of 702(a), see generally Esbeck, *supra* note 23; Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious Employer Exemption*, 20 TEX. REV. L. & POL. 295 (2016).

<sup>118</sup> Technically speaking, under this interpretation Title VII would still be unconstitutional under *Hosanna-Tabor* if applied to a religious organization that fired or refused to hire a ministerial employee based solely on race, sex, etc. without any corresponding religious belief or practice being implicated. This is because 702(a) requires a religious reason to trigger its protections for religious organizations, § 2000e-1(a), while *Hosanna-Tabor* held that the government simply cannot be involved in regulating the hiring and firing of ministerial employees, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704–06 (2012). However, such cases are likely to be rare, and allowing a religious conviction to preempt the nondiscrimination provisions of Title VII brings the Act into the best alignment possible with the Religion Clauses. *Id.*

<sup>119</sup> Title VII is also subject to challenge under the Religious Freedom Restoration Act (RFRA), discussion of which is beyond the scope of this Note, but the interpretation of 702(a) argued for in this Note makes Title VII much more likely to survive such a challenge. RFRA provides that the government “shall not substantially burden a person’s exercise of religion[,] even if the burden results from a rule of general applicability,” 42 U.S.C. § 2000bb-1(a) (2012), unless the government demonstrates its action “is in furtherance of a compelling governmental interest” and that the act “is the least restrictive means of furthering that compelling governmental interest,” § 2000bb-1(b)(1)–(2).

<sup>120</sup> See *supra* Section III.A.

<sup>121</sup> See *supra* notes 95–97 and accompanying text.

religious practice.<sup>122</sup> The Court stated that “Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment. . . . Title VII requires otherwise-neutral policies to give way to the need for an accommodation.”<sup>123</sup> While this holding was in the context of accommodating the religious practice of an individual, it nonetheless demonstrates the deference Congress intentionally provided to religious free exercise rights when passing Title VII.

In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that for-profit corporations are capable of exercising religion.<sup>124</sup> Without question, religious organizations are then also able to exercise religion.<sup>125</sup> There is no indication that Congress had any intention of providing less free exercise protection to religious organizations than to religious individuals when enacting Title VII. Rather, Congress’s enactment of 702(a) shows solicitude to protect the free exercise rights of religious organizations.

Furthermore, the Supreme Court’s decision in *Hosanna-Tabor* demonstrates that free exercise rights must be prioritized over nondiscrimination laws.<sup>126</sup> Therefore, the religious freedom protection given by 702(a) should not merely be given deference equal to the otherwise-neutral nondiscrimination provisions of Title VII. Rather, in recognition of the deference to religious belief and practice that permeates the statute, Title VII’s religious accommodations must preempt its other provisions, even if the other provisions happen to promote important policy goals. Specifically, a religious employer must be permitted to claim protection under 702(a), even if the religious reason for doing so appears to incidentally discriminate against one or more of Title VII’s protected classes. This is also consistent with the fact

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<sup>122</sup> 135 S. Ct. 2028, 2034 (2015).

<sup>123</sup> *Id.*

<sup>124</sup> 134 S. Ct. 2751, 2768 (2014).

<sup>125</sup> See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring in the judgment) (stating that religious organizations must be protected by the Free Exercise Clause because individuals often exercise religion through such organizations).

<sup>126</sup> See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012) (“The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.”); Hinkle, *supra* note 44, at 342 (stating that the *Hosanna-Tabor* decision “clearly held that an interest in religious freedom always outweighs an interest in preventing discrimination”).

that protections for religious belief and practice are not only explicitly addressed in the First Amendment, they are given priority of placement.

C. *Employment Division v. Smith Does Not Apply to Title VII*

In *Employment Division v. Smith*, the Court stated that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>127</sup> Facially, this might seem to indicate that Title VII’s 702(a) exemption for religious organizations is not constitutionally mandated. After all, if Congress would strip all religious accommodations out of Title VII, the remaining statute would be a generally applicable law aimed at eliminating discrimination (not aimed at infringing upon religious liberty). However, the majority in *Smith* noted that its holding is limited to cases where *only* the Free Exercise Clause is at issue, not cases involving “the Free Exercise Clause in conjunction with other constitutional protections.”<sup>128</sup> Application of Title VII to religious organizations raises issues affecting not only the Free Exercise Clause, but also the Establishment Clause and freedom of association and expression.<sup>129</sup>

The Court further limited *Smith* in *Hosanna-Tabor* by characterizing *Smith* as involving “government regulation of only outward physical acts,” while *Hosanna-Tabor* involved regulatory interference with decisions of religious organizations that affect the “faith and mission” of such organizations.<sup>130</sup> Similarly, Title VII does not merely regulate outward physical acts, but rather affects the freedom of organizations with respect to the types of persons they wish to hire to carry out their mission and express their sincerely held religious

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<sup>127</sup> 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

<sup>128</sup> *Id.* at 881–82 (noting that “it is easy to envision a case in which a challenge on freedom of association grounds would . . . be reinforced by Free Exercise Clause concerns”).

<sup>129</sup> When arguing against application of the ministerial exception, the EEOC stated that religious organizations “could successfully defend against employment discrimination claims [with respect to ministerial employees] by invoking the constitutional right to freedom of association.” *Hosanna-Tabor*, 132 S. Ct. at 706. While a discussion of freedom of association and expression is beyond the scope of this Note, these constitutional rights also may provide substantial protection for expressive associations (including religious organizations) that seek to be selective in their hiring practices. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656, 661 (2000) (holding that a New Jersey public accommodation law prohibiting discrimination against homosexuals violated the Boy Scouts’ freedom of association and expression).

<sup>130</sup> *Hosanna-Tabor*, 132 S. Ct. at 707.



beliefs.<sup>131</sup> Therefore, *Smith* has no applicability to Title VII jurisprudence.

#### CONCLUSION

When interpreting Title VII's 702(a) exemption in light of Congress's intent and the Supreme Court's jurisprudence, it is evident that religious organizations must be given broad freedom in their hiring decisions. Title VII, the Religion Clauses, and the freedom of association and expression state that the ability of religious organizations to make employment decisions based on religious beliefs and practices may not be impeded by nondiscrimination laws. This freedom, however, should not be considered an opportunity to disparage or ignore the societal values inherent in nondiscrimination laws. Rather, it is an opportunity for society to respect and celebrate the diversity and freedoms available to citizens seeking to live in mutual respect and harmony, while exercising diversity of beliefs and practices under the shadow of the societal compact we call the Constitution.

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<sup>131</sup> See *supra* Section II.A.

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