WHEN CIVIL RIGHTS AND RELIGIOUS FREEDOM COLLIDE: DISCERNING THE DIFFERENCE BETWEEN STATUTORY EXEMPTIONS TO ANTI-DISCRIMINATION STATUTES AND THE MINISTERIAL EXCEPTION

Ashley E. Treible[*]

Table of Contents

I. INTRODUCTION

There is little disagreement that discriminatory employment practices are often damaging and should generally be prohibited. The Fourteenth Amendment guarantees freedom from such injurious practices in public employment settings.[1] Nevertheless, our country's history is rife with examples of marginalized genders, races, or other groups being excluded from employment based solely on their group identity.[2] In response, almost six decades ago, the Civil Rights Act of 1964 laid a foundation for barring such practices, and nearly all states

---

[*] J.D. Candidate, Class of 2023, University of North Carolina School of Law

[1] *See Equal Protection*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/equal_protection (last visited Aug. 15, 2022).

[2] Roxann Wedegartner, *Editorial, History of Job Discrimination*, GREENFIELD RECORDER (June 27, 2018, 9:00 AM), https://www.recorder.com/wedegartner-18133865; *see also A History of Progress: African Americans in the Workforce*, PEOPLESCOUT, https://www.peoplescout.com/insights/racial-discrimination-in-the-workplace/ (last visited Aug. 1, 2022).

responded by enacting anti-discrimination laws at the state level, many of which exceed the federal protections.[3]

Both federal and state statutes largely exempt religious organizations from certain anti-discrimination requirements, allowing them the freedom to make employment decisions based on an applicant's religious beliefs.[4] These exemptions protect religious organizations from being forced to employ people who hold conflicting religious beliefs and ensure the separation of church and state established in the First Amendment.[5]

However, in the past decade, there has been a growing tension between the right of employees to be free from discriminatory employment practices and the right of religious organizations to hire only those who adhere to a similar belief system—a classification referred to as coreligionists.[6] As a result, "[t]he [C]ourt is confronted with the clash of two deeply held American convictions. One, embodied in the Civil Rights Acts . . . , is to prevent discrimination; the other, embodied in the First Amendment . . . is to protect the free exercise of religion."[7]

To complicate matters, the Supreme Court has created two different pathways by which religious organizations can seek protection for their hiring practices.[8] One path is embodied in the statutory exemptions to anti-discrimination laws, and the other is rooted in the First Amendment.[9]

---

[3] *See* Lisa Nagele-Piazza, *Not All State Employment Discrimination Laws Are Created Equal*, SHRM (Sept.15, 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/state-employment-discrimination-laws.aspx; *see also Discrimination - Employment Laws*, NAT'L CONF. OF STATE LEGISLATURES (July 27, 2015), https://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx.

[4] *See* John T. Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J. L. & RELIGION 280, 285 (2018).

[5] *See id.*

[6] *See id.* at 584 ("Even though the religious exemption in Title VII is nearly half a century old, real-world cases testing its limits are only just now visible on the horizon."); *see Coreligionist*, MERRIAM-WEBSTER (12th ed. 2022); *see also* Daniel J. Rosenthal, *Charitable Choice Programs and Title VII's Co-Religionist Exemption*, 39 CREIGHTON L. REV. 641, 642 (2006).

[7] EEOC v. Roman Cath. Diocese of Raleigh, N.C., 48 F. Supp. 2d 505, 507 (E.D.N.C. 1999), *aff'd*, 213 F.3d 795 (4th Cir. 2000).

[8] *See* Melcon, *supra* note 4, at 286 ("Title VII is also subject to an *implicit* religious exemption known as the 'ministerial exception,' not to be confused with the *explicit* exemption in §702(a). This implicit ministerial exception is thought to arise from the Establishment Clause, and precludes the application of Title VII and other employment nondiscrimination laws from claims concerning the employment relationship between a religious institution and its ministers. In other words, none of Title VII's prohibitions apply to ministers, even its prohibitions against sex and race discrimination." (citations omitted)).

[9] *Id.*

This Note seeks to clarify the distinctions between statutory exemptions for religious organizations to anti-discrimination statutes, which are found in both the federal Civil Rights Act and state statutes, and the ministerial exception, which is rooted in the First Amendment. Part One will examine the history and function of state and federal statutory exemptions for religious organizations. Part Two will analyze the constitutional ministerial exception. Part Three will assess the current judicial landscape concerning LGBTQ+ rights, discriminatory practices, and religious freedoms. Part Four will discuss how the convoluted interplay between the two defenses resulted in an erroneous ruling in *Woods v. Seattle's Union Gospel Mission*.[10]

While both anti-discrimination statutes and the Constitution permit religious organizations freedom in hiring decisions, clarifying the difference will allow courts to protect religious freedoms more effectively while simultaneously promoting equitable employment practices.

II. ANTI-DISCRIMINATION STATUTES' EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS

In accordance with the principles of equal protection, both state and federal legislatures have rightfully enacted legislation to prohibit employment discrimination and ensure equal protection for historically marginalized groups.[11] These statutes seek to protect those seeking employment and those already employed from unlawful discrimination—safeguarding employees from discrimination based on race, gender, religion, national origin, and more.[12] The protections make it impermissible for a company to refuse to hire a woman solely based on her gender or for a secular organization to fire an employee for recently converting to Judaism.

However, while discriminatory employment practices are often thought of as invidious and un-American, certain types of employment discrimination are not only permissible but crucial for building an effective workplace. Clearly, companies should be permitted to hire an applicant with more experience or whose personality would best fit the workplace. A daycare should refuse

---

[10] *See generally* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (Wash. 2021).

[11] *See* John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 FORDHAM L. REV. 423, 469–70 (2002).

[12] *See, e.g.*, 42 U.S.C. § 2000e-2.

to hire someone who does not like children. A nonprofit should pass over an applicant who does not believe in its cause. Similarly, statutory exemptions to anti-discrimination legislation permit religious organizations to only hire those whose religious beliefs accord with the organizations' stated beliefs.[13]

A. The History of the Civil Rights Act

The Civil Rights Act is the cornerstone of most anti-discrimination statutes.[14] In response to the racial unrest of the 1950s and early 1960s, President Kennedy proposed that Congress should introduce a bill that would guarantee freedom from discrimination regarding "race, color, religion, national origin, or ancestry."[15] Over the next year, the bill went through multiple revisions, drastically altering its content.[16]

From its inception, the bill was controversial and met with stringent resistance from certain factions within the legislature.[17] Members of Congress fiercely disagreed about which types of discrimination should be included.[18] Some advocated for including age as a protected class;[19] others saw the bill only as a mechanism to punish southern states for their racist heritage.[20]

Congressman Howard Smith, who vehemently opposed the bill, "offered an amendment that included sex among the protected categories, a measure aimed to prevent discrimination against what he gleefully called a 'minority sex.'"[21] Certain legislators were appalled at the implication that both sexes should be treated equally in the workplace.[22] In reality, Smith agreed with them.[23] He had no intention of sex being included in the bill; he merely wanted to point out that the bill was "as full of booby traps as a dog is full of fleas."[24]

---

[13] *See* Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L. J. 86, 118 (2002).
[14] *See* Rosenthal, *supra* note 6, at 642.
[15] H.R. REP. NO. 88-914, pt. 1 at 87 (1963), as reprinted in 1964 U.S.C.A.N. 2391, 2444.
[16] Belcove-Shalin, *supra* note 13, at 89–91.
[17] *See id.* at 89–90.
[18] *Id.* at 90.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 89 (quoting 110 Cong. Rec. 2484 (1964)).
[22] *See id.* at 89–90.
[23] *Id.* at 89.
[24] *Id.* (quoting CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE 116 (1985)).

Unsurprisingly, the process to get the bill signed into law was arduous.[25] After the longest filibuster in congressional history, the country's religious leaders rallied together to help get the bill passed.[26] "Two hundred clergymen from forty-one states traveled to Washington D.C. to solicit their representatives. Seminaries from different parts of the country dispatched their students to conduct a round-the-clock vigil at the Lincoln Memorial."[27]

Journalists Robert Novak and Rowland Evans remarked that "[n]ot since Prohibition has the church attempted to influence political action in Congress as it is now doing on behalf of President Johnson's civil rights bill."[28] Georgia Senator Richard Russell, who had led the filibuster attempt, lamented, "I have observed with profound sorrow the role that many religious leaders have played in urging passage of the bill, because I cannot make their activities jibe with my concept of the proper place of religious leaders in our national life."[29] Indeed, "[n]ever before . . . had so many religious people expended so much time, money, and energy in support of a single piece of legislation."[30]

Coupled with other heroic efforts, such as the March on Washington and protests across the South, the clergy members' show of support worked.[31] On June 10, 1964, the Senate passed the Civil Rights Act of 1964.[32] Ironically, Congressman Smith had miscalculated support for the inclusion of sex as a discriminating factor, and much to his horror, the bill's final iteration prohibited discrimination based on sex.[33]

B. Origins of the Exemption

Once passed, Title VII of the Civil Rights Act made it unlawful for an employer to hire, fire, or otherwise discriminate against an employee based on race, color, sex, national origin, or religion.[34]

---

[25] *See Civil Rights Act of 1964*, HISTORY.COM (Jan. 4, 2010), https://www.history.com/topics/black-history/civil-rights-act.
[26] *See* Belcove-Shalin, *supra* note 13, at 90.
[27] *Id.*
[28] JOHN W. COMPTON, THE END OF EMPATHY: WHY WHITE PROTESTANTS STOPPED LOVING THEIR NEIGHBORS 169 (Oxford Univ. Press 2020).
[29] *Id.* at 169–70.
[30] *Id.* at 170.
[31] *See* Belcove-Shalin, *supra* note 13, at 90.
[32] *Id.*
[33] *Civil Rights Act of 1964*, ENCYCLOPEDIA VA., https://encyclopediavirginia.org/entries/civil-rights-act-of-1964/ (last visited Mar. 17, 2022).
[34] 42 U.S.C. § 2000e-2.

> This legislation put every employer and federal agency on notice that racism would no longer be tolerated. It provided an enforcement mechanism in the form of the Equal Employment Opportunity Commission endowed with subpoena power and the right to sue biased employers. And, it gave blacks, women, and religious minorities strong protections against discrimination in the workplace.[35]

While the bill was born out of a desire to do good and ensure that all people were treated equitably, Congress also realized that the legislation could have disastrous consequences for religious organizations.[36] Catholic churches could be forced to violate their sincerely held beliefs and hire female priests and male nuns. Likewise, Protestant churches could face litigation if they refused to hire an atheist as their pastor.

To prevent these type of conflicts, Congress provided an exemption for religious organizations whose hiring practices might violate the Act's prohibition on discrimination.[37] When the bill was originally passed in 1964, the exemption was limited only to employment decisions involving an organization's "religious activities."[38] However, there was concern that the exemption's language would only offer protection for hiring decisions involving employees directly connected to an organization's religious activities—like a chaplain or pastor—but would not protect religious employers seeking like-minded employees whose duties could be considered religiously neutral—like a secretary or janitor.[39]

Recognizing the limitations of the exemption's language, six years after the bill was passed, Congress broadened the 2000e exemption to clearly include all employees within a religious organization, not just those whose job descriptions were "religious."[40] Today, this broadened protection allows for churches and parochial schools to hire only coreligionists,

---

[35] Belcove-Shalin, *supra* note 13, at 90.
[36] *See* Jessica Cappock, Note, *Meeting the Religious Organization Exemption to Title VII of the Civil Rights Act of 1964: Choosing the Proper Test,* 20 FLA. COASTAL L. REV. 147, 149 (2020).
[37] 42 U.S.C. § 2000e-1; *see also* Cappock, *supra* note 36, at 149.
[38] Civil Rights Act of 1964 § 702; 42 U.S.C. § 2000e-1.
[39] *See* Cappock, *supra* note 36, at 149.
[40] Act of Mar. 24, 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-4.

regardless of the job's duties.[41] Furthermore, it allows religious organizations the freedom to fire employees who no longer adhere to the tenets of the organization's beliefs, even if their jobs do not require them to perform duties that are religious in nature.[42]

C. State Equivalents to the Civil Rights Act

Nearly all states have passed their own version of the Civil Rights Act.[43] Some states extended the federal language to protect other marginalized groups.[44] For example, Washington state's anti-discrimination statute, the Washington Law Against Discrimination (WLAD), prohibits employers from discriminating against employees based on age, sex, marital status, sexual orientation, gender identity, race, creed, color, national origin, military status, disability, breastfeeding, pregnancy, and retaliation.[45]

Many states have also included an exemption that parallels the 2000e exemption.[46] For instance, the WLAD exempts any "religious or sectarian organization not organized for private profit" from the statute's definition of employer.[47]

D. Judicial Interpretation of Statutory Exemptions

Generally, courts have interpreted statutory religious exemptions narrowly[48] so that the protection only applies when a religious organization's employment decisions are "based on religious convictions . . . and not on [other] discriminatory reasons prohibited."[49] Thus, while the exemption broadly covers all positions within an organization, it limits the permissible

---

[41] *See* Religious Discrimination: EEOC Guidance No. 915.063 (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_430474065131916107487270 11.
[42] *See id.* at 56–57.
[43] *See* Discrimination – Employment Laws (July 27, 2015), https://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx.
[44] *See id.*
[45] *Id.*
[46] Thomas M. Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL'Y 63, 79 (2006).
[47] Wash. Rev. Code Ann. § 49.60.040 (West 2020).
[48] *See* Messner, *supra* note 46, at 79.
[49] Nevin D. Beiler, Note, *Deciphering Title VII & Executive Order 13672: To What Extent Are Religious Organizations Free to Discriminate in Their Hiring Practices?* 29 REGENT U. L. REV. 339, 342 (2017).

discrimination to only those stemming from disparate religious beliefs.[50]

The Supreme Court affirmed the constitutionality of statutory religious exemptions in *Corporation of Presiding Bishop of Jesus Christ of Latter-day Saints v. Amos*.[51] The *Amos* Court addressed whether a gymnasium "intimately connected" to the Mormon church could fire a building engineer because he refused membership to any Mormon temple.[52] Ultimately, the Court upheld both the church's right to fire the employee and the constitutionality of the 2000e exemption, noting that the exemption neither violated the Equal Protection Clause nor the Establishment Clause.[53] Thus, the Court affirmed that, regardless of an employee's job duties, religious organizations had the statutory and constitutional freedom to terminate employees if they did not adhere to the organization's belief system.[54]

E. Boundaries of the Statutory Exception

When evaluating these statutory exemptions, it is important to consider what is still prohibited. The exemption is not a carte blanche for religious organizations to discriminate. All other types of discrimination not based on religious beliefs, like those based on race, national origin, sex, and color, are still barred.[55]

Unsurprisingly, the distinction between permissible discrimination based on religious beliefs and impermissible discrimination that involves protected classes can become murky because religious beliefs often also implicate "race, color, sex, [or] national origin."[56] For example, many types of Christianity, Judaism, and Islam believe that only one gender can hold certain roles,[57] a practice that could be seen as sex discrimination. Also, certain orthodox religions require a particular maternal ancestral

---

[50] *Id.*
[51] 483 U.S. 327, 330 (1987).
[52] *Id.* at 332.
[53] *See id.*
[54] *See id.*
[55] Messner, *supra* note 46, at 80.
[56] 42 U.S.C.A. § 2000e-2.
[57] David Crary, *Male-Dominated Religions Challenge Women*, THE COLUMBIAN (Jan. 19, 2019), https://www.columbian.com/news/2019/jan/19/male-dominated-religions-challenge-women/; *see also* Aleksandra Sandstorn, *Women Relatively Rare in Top Positions of Religious Leadership*, PEW RSCH. CTR. (Mar. 2, 2016), https://www.pewresearch.org/fact-tank/2016/03/02/women-relatively-rare-in-top-positions-of-religious-leadership/.

lineage for membership.[58] There is even disagreement about whether Judaism should be considered a religion or a race.[59]

When both religious beliefs and a protected class are implicated, courts have required that the accusing party show that similarly situated employees were treated differently, and thus the employment decision could not have been based solely on religious beliefs.[60] For example, in *EEOC v. Fremont Christian School*, the Ninth Circuit considered whether a Christian school could refuse to provide health insurance for married female employees under the Title VII exemption.[61] According to the school, their sincerely held religious beliefs espoused that the husband was the "head of the household" and part of his responsibility in that role was providing health insurance for his family.[62] Therefore, the school argued that it should not be forced to provide health insurance to married women.[63]

The plaintiff employees argued that the discrimination was not based on the school's religious beliefs but instead solely on the employee's sex.[64] The Ninth Circuit agreed, ruling that the statutory exemption should not apply.[65] In support of their ruling, the court reasoned that the school's decision could not have been based solely on its religious beliefs because it had previously "abandoned [a] policy of paying the [male] 'head of household' at a rate higher than similarly situated female employees."[66] This prior flexibility for similarly situated employees "evidence[d] that there would be no substantial impact upon religious beliefs by forcing Fremont Christian to drop a similar policy of giving heads of household health insurance, to the exclusion of similarly situated women."[67]

---

[58] Oscar Schwartz, *What Does it Mean to be Genetically Jewish?*, THE GUARDIAN (June 13, 2009), https://www.theguardian.com/lifeandstyle/2019/jun/12/what-does-it-mean-to-be-genetically-jewish.
[59] Julie Zaumer Weil, *Is Judaism an Ethnicity? A Race? A Nationality? Trump Signs an Order and Provokes an Identity Crisis*, WASH. POST (Dec. 19, 2019), https://www.washingtonpost.com/religion/2019/12/19/is-judaism-an-ethnicity-race-nationality-trump-signs-an-order-provokes-an-identity-crisis/.
[60] *See* Tricia M. Beckles, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage If They Have No "Similarly Situated" Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 464 (2008).
[61] 781 F.2d 1362, 1365 (9th Cir. 1986).
[62] *Id.* at 1364–65.
[63] *Id.* at 1365.
[64] *Id.*
[65] *Id.* at 1368.
[66] *Id.*
[67] *Id.*

III. THE CONSTITUTIONAL MINISTERIAL EXCEPTION

Some religious freedom advocates have expressed worry that statutory exemptions do not go far enough; there is concern that allowing the state to become involved in any way in a religious organization's employment decisions "breach[es] the wall between church and state."[68] This concern is rooted in the well-established doctrines relating to the Free Exercise Clause,[69] which strictly prohibits excessive entanglement between the state and religion.[70] While there is no bright line between permissible governmental intrusion and excessive entanglement, courts have generally been extremely hesitant to delve too deep into whether a religious belief is sincerely held.[71] The question then arises—how can the legislature statutorily protect employees at a religious organization from prohibited types of discrimination while the court also simultaneously protects religious organizations from unconstitutional governmental entanglement?

To address these concerns, the Supreme Court adopted a constitutionally based doctrine known as the ministerial exception.[72] The exception is "judicial shorthand for two conclusions: the first is that the imposition of secular standards on a church's employment of its ministers will burden the free exercise of religion; [and] . . . second . . . that the state's interest in eliminating employment discrimination is out-weighed by a church's constitutional right of autonomy in its own domain."[73]

While statutory exemptions and the ministerial exception might seem duplicative, there are clear distinctions between them. Unlike statutory exemptions, the ministerial exception allows religious organizations to engage in all types of discrimination but only towards those employees who serve as ministers.[74] This allows religious organizations to retain ultimate autonomy over the selection of its spiritual leaders, while the state is still permitted to protect all other employees from

---

[68] *See* Belcove-Shalin, *supra* note 13, at 91; *see also Fremont Christian Sch.,* 781 F.2d at 1366.
[69] *See* Cappock, *supra* note 36, at 148.
[70] *See id.*
[71] *See* Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 3 (2011); *see also* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.") (citing Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716).
[72] *See* Lund, *supra* note 71, at 3.
[73] *See id.*
[74] *Id.*

discrimination that does not stem from a religious conviction.[75] Depending on one's view, the ministerial exemption either offers religious employers full constitutional protection from government interference regarding its ministerial employees, or it permits religious organizations full license to discriminate against their ministerial employees. Unsurprisingly, the question then becomes—who should be considered a minister?

A. Judicial History of the Ministerial Exception

The history of the ministerial exception illustrates both the complexities in determining who should be considered a minister and when the court has crossed the line into excessive entanglement. In 1871, the Supreme Court, in *Watson v. Jones*, refused to rule in a case involving a property dispute between two warring factions of a church.[76] The Court held that the judiciary runs the risk of excessive entanglement by ruling in *any* ecclesiastical matters.[77] It further cautioned that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories . . . the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."[78]

For nearly a century following *Watson*, the Court was silent on the matter. Finally, in 1952, a similar property dispute to *Watson* arose in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*.[79] The Court again refused to become involved and specifically cautioned that, when delving into the employment of religious leaders, the risk of excessive entanglement is particularly strong.[80] In neither case did the Court prescribe a specific test or even factors to consider when deciding how to rule.

Twenty years after *Kedroff* and eight years after the Civil Rights Act was adopted, the Fifth Circuit articulated the first iteration of the ministerial exception in *McClure v. Salvation Army*.[81] Plaintiff McClure was a female officer in the Salvation Army and brought a Title VII sex-based discrimination claim because her comparable male counterparts received a higher

[75] *Id.* at 35.
[76] 80 U.S. 679, 734–35 (1871).
[77] *Id.*
[78] *Id.* at 727.
[79] 344 U.S. 94, 119 (1952).
[80] *Id.*
[81] 460 F.2d 553 (5th Cir. 1972).

salary and greater benefits.[82] Importantly, both parties agreed that officers were the equivalent of ministers within the organization.[83] The Salvation Army argued that the discrepancy was permissible because their decision to pay men more stemmed from their sincerely held religious beliefs regarding the role of men as head of their households.[84]

The Fifth Circuit refused to analyze the claim under Title VII. Instead, it noted that "Congress could not have intended through the nonspecific wording of the applicable provisions of Title VII, to regulate the employment relationship between [a] church and [a] minister."[85] It also noted the importance and distinction of ministerial positions:

> [T]he relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.[86]

The court reasoned that any judicial intrusion "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the Free Exercise Clause of the First Amendment."[87]

While the ministerial exception could be erroneously viewed as an extension of the Title VII exemption, the *McClure* Court made it clear that there are two related but distinct defenses that can be raised by religious organizations as a defense to an employment discrimination claim.[88] First, statutory

---

[82] *Id.* at 555.
[83] *Id.* at 556.
[84] *Id.*
[85] *Id.* at 560–61.
[86] *Id.* at 558–59.
[87] *Id.* at 560.
[88] *Id.*

exemptions provide a defense against *any* employee's claim involving discrimination based upon religious beliefs.[89] Second, if an employee holds a ministerial position, excessive entanglement can be raised as a constitutional defense via the ministerial exception.[90]

Thus, a court could find that even though a statutory exemption was inapplicable, a religious organization could still find protection under the ministerial exception or vice versa. For example, if a spiritual leader brought a claim that she was discriminated against because of her national origin, the court could hold that even though discriminatory practices based on national origin are statutorily prohibited, the ministerial exception prevents the court from becoming entangled in the church's relationship with their spiritual leaders. Conversely, if a church groundskeeper claimed she was fired because of her gender, the church could not claim protection under the ministerial exception because the janitor did not serve in a spiritual leadership role.

Unsurprisingly, the interplay between statutory exemptions and the ministerial exception has triggered much confusion in the courts. For several decades, lower courts attempted to resolve the differences between the two defenses. Absent clear guidance from the Supreme Court, some lower courts reasoned that the ministerial exception barred discrimination claims against only those classes expressly listed in Title VII—race, disability, national origin, sexual harassment, and sex.[91] Other lower courts completely rejected the idea that the ministerial exception provides any constitutional defense against such claims.[92]

Moreover, confusion remained over how the court should define a minister. For many years, lower courts largely used the primary duties test, which held that "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy," and thus the employer was constitutionally

---

[89] *See id.* at 558 ("The language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.").

[90] *See id.* at 560–61.

[91] *See id.* at 557–58; *see generally* Belcove-Shalin, *supra* note 13.

[92] *See generally* Belcove-Shalin, *supra* note 13.

protected.[93] However, the Supreme Court neither accepted nor rejected the primary duties test.

In 2012, it appeared that the Supreme Court would provide some clarity into when and how the ministerial exception should be applied. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, a parochial schoolteacher claimed that she had been fired in violation of the Americans with Disabilities Act because she was terminated after a diagnosis of narcolepsy made it difficult for her to work.[94] The school argued that the claim was judicially barred because the teacher's role fell under the ministerial exception.[95] The Court agreed, holding that the teacher should be considered a minister because her responsibilities included spiritual instruction to her students.

Even though the circuit courts were still using a variety of tests to determine who should be considered a minister,[96] the Supreme Court declined to establish a bright-line rule or endorse any circuit's test.[97] However, it did note that the primary duties test was *not* appropriate and should *not* be used.[98] It also enumerated factors that can be helpful in making a ministerial determination, though not necessarily determinative.[99] These factors included that (1) the employee had the title of minister and had a role separate from most members; (2) the position reflected religious training followed by formal commissioning; (3) the employee held herself out as a minister; and (4) the job duties involved a role of conveying the church's message.[100]

In 2020, the Supreme Court once again granted certiorari to an employment discrimination claim involving the firing of two parochial schoolteachers.[101] *Our Lady of Guadalupe School v. Morrissey-Berru* merged two lower court cases.[102] One plaintiff "alleg[ed] that she was discharged because she had requested a leave of absence to obtain treatment for breast cancer."[103] The other plaintiff claimed that her contract had not been renewed due to her age, which was in violation of the Age Discrimination

---

[93] Rayburn v. Seventh-day Adventist, 772 F.2d 1164, 1169 (4th Cir. 1985).
[94] 565 U.S. 171, 179 (2012).
[95] *Id.* at 180.
[96] *See* Lund, *supra* note 71, at 65–66.
[97] *Hosanna-Tabor*, 565 U.S. at 194.
[98] *Id.*
[99] *Id.* at 193.
[100] *Id.*
[101] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
[102] *Id.* at 2055.
[103] *Id.* at 2059.

in Employment Act.[104] Again, many hoped that the Court would offer more guidance on how to define a minister.

However, the Court again shed little light on how or when to apply the ministerial exception. Instead, it largely mimicked the reasoning from *Hosanna-Tabor*.[105] It barred the plaintiffs' claim because their jobs were ministerial, reasoning that judicial examination would impermissibly encroach into the religious practices of the school.[106] While it applied the *Hosanna-Tabor* factors, it cautioned against using them as *the* determinative factors.[107]

B. Current Status

Today, the ministerial exception is broadly invoked as a defense to many types of discriminatory practices. It has been invoked in claims involving race, national origin, sex, sexual harassment, disability, retaliation, pregnancy, sexual orientation, unpaid wages, and hostile work environments.[108] Lower courts have used it to bar claims involving a hospital chaplain,[109] a Protestant Reverend,[110] a female Elder,[111] a Catholic priest,[112] a parochial schoolteacher, a teacher of Indian spiritual practices,[113] a choir director,[114] a church's press secretary,[115] and a faculty member of a Christian university.[116] However, lower courts have also ruled that the ministerial exception did not apply when used against a church

[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See id.* at 2067 ("In holding that Morrissey-Berru and Biel did not fall within the *Hosanna-Tabor* exception, the Ninth Circuit misunderstood our decision. Both panels treated the circumstances that we found relevant in that case as checklist items to be assessed and weighed against each other in every case, and the dissent does much the same. That approach is contrary to our admonition that we were not imposing any 'rigid formula'").
[108] *See* Lund, *supra* note 71, at 7.
[109] Penn v. N.Y. Methodist Hosp., 884 F.3d 416 (2d Cir. 2018).
[110] Gomez v. Evangelical Lutheran Church in Am., No. 1:07-CV-00786, 2008 WL 3202925 (M.D.N.C. 2008).
[111] Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994).
[112] Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008).
[113] Stately v. Indian Cmty. Sch. of Milwaukee, Inc., 351 F. Supp. 2d 858 (E.D. Wis. 2004).
[114] Miller v. Bay View United Methodist Church, Inc., 141 F. Supp. 2d 1174 (E.D. Wis. 2001).
[115] Alicea-Hernandez v. Cath. Bishop of Chi., 320 F.3d 698 (7th Cir. 2003).
[116] Lishu Yin v. Columbia Int'l Univ., 335 F. Supp. 3d 803 (D.S.C. 2018).

receptionist,[117] a minister applying for a lay position,[118] and a synagogue's facilities manager.[119]

The Supreme Court has yet to provide meaningful guidance on how to delineate the exception's boundaries. Though the limits are muddled, it seems that the exception is inapplicable if the employee is "not tasked with performing any religious instruction and [] is charged with no religious duties."[120] However, without clear guidance from the Supreme Court, lower courts are still vulnerable to misapplying the exception.

IV. THE INTERPLAY WITH LGBTQ+ RIGHTS

While the courts have spent nearly six decades attempting to delineate the boundaries of statutory exemptions and the ministerial exception, the past decade has also seen an explosion in cases that explore the tension between religious freedoms and LGBTQ+ rights. The lion's share of these cases "seek to preserve and define . . . religious freedoms in the face of ordinances which prohibit *places of public accommodation* from discriminating based on sexual orientation."[121] The Supreme Court has not yet considered whether anti-discrimination statutes should apply to a religious organization's hiring decisions involving sexual orientation.[122]

When discrimination occurs in the marketplace, courts have generally shown a desire to protect LGBTQ+ rights.[123] In *Bostock v. Clayton County*, the Supreme Court ruled that firing an employee based on sexual orientation is strictly prohibited in the secular workplace.[124] Other Supreme Court cases like *Obergefell*

---

[117] Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975).
[118] Shirkey v. Eastwind Cmty. Dev. Corp., 941 F. Supp. 567 (D. Md. 1996); A.L.R. Fed. 2d 445 (Originally published in 2009).
[119] Davis v. Balt. Hebrew Congregation, 985 F. Supp. 2d 701 (D. Md. 2013).
[120] Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132, 1145 (D. Or. 2017); *see also* Alexandra Brown et. al., *Religious Exemptions*, 22 GEO. J. GENDER & L. 335, 345 (2021).
[121] Brush & Nib v. Phoenix, 418 P.3d 426, 434 (Ariz. Ct. App. 2018) (emphasis added).
[122]Lydia E. Lavelle, *Saving Cake for Dessert: How Hearing the LGBTQ Title VII Cases First Can Inform LGBTQ Public Accommodation Cases*, 30 GEO. MASON U. CIV. RTS. L.J. 123, 124 (2020) ("Although *Masterpiece* provided guidance for future cases involving conflicts between public accommodation anti-discrimination statutes and business owners' sincerely held religious beliefs, the constitutional issue is still unsettled."); *see also* Melcon, *supra* note 4, at 290.
[123] *See generally* Lavelle, *supra* note 122, 126–30.
[124] 140 S. Ct. 1731, 1754 (2020).

and *Lawrence* have also upheld the rights of the LGBTQ+ community.[125]

However, both lower courts and the Supreme Court have noted that were the defendant a religious organization, the analysis would be more complex.[126] In his *Bostock* opinion, Justice Gorsuch noted "deep[] concern[] with preserving the promise of the free exercise of religion" in similar cases involving a religious organization.[127] Accordingly, in *Fulton v. City of Philadelphia*, the Court ruled that a Catholic foster care agency did not have to contract with same-sex couples if doing so would violate a tenet of their faith.[128]

The Court has also upheld the rights of for-profit businesses that ascribe to sincerely held religious beliefs. In *Burwell v. Hobby Lobby*, the Supreme Court held both that a corporation can hold religious beliefs and cannot be forced to comply with laws that run counter to those beliefs.[129] Although *Hobby Lobby* was not based on a discrimination claim,[130] there are obvious implications for whether a business with religious affiliations could also seek protection from employment discrimination claims. The *Hobby Lobby* Court also affirmed that it was not for the judiciary to decide whether religious beliefs are "mistaken or insubstantial."[131] Instead, the Court noted that the belief must only be "an honest conviction."[132]

Likewise, in *Masterpiece Cake Shop Ltd. v. Colorado Civil Rights Commission*, the Court narrowly ruled in favor of the defendant, who claimed that a business owner's religious faith should be able to dictate business decisions.[133] In *Masterpiece*, the defendant, a baker, refused to bake a wedding cake for a gay couple's marriage ceremony, claiming that the marriage conflicted with his religious beliefs.[134] The Court warned that a

---

[125] *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); *see generally* Lawrence v. Texas, 539 U.S. 558 (2003).
[126] *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351 (7th Cir. 2017) ("We close by noting that we have decided only the issue put before us. Additional complications can be saved for another day, when they are actually involved in the case. Ivy Tech did not contend, for example, that it was a religious institution and the positions it denied to Hively related to a religious mission.").
[127] 140 S. Ct. 1731, 1754 (2020) (noting "how these doctrines protecting religious liberty interact with Title VII are questions for future cases").
[128] Fulton v. City of Phila., 141 S. Ct. 1868, 1882 (2021).
[129] 134 S. Ct. 2751, 2775, 2785 (2014).
[130] Instead, the claim was based on a RFRA violation. *See id* at 2759.
[131] *Id.* at 2779.
[132] *Id.*
[133] 138 S. Ct. 1719, 1734 (2018).
[134] *Id.* at 1726.

ruling "cannot be based on the government's own assessment of offensiveness,"[135] nor should the government play any role "in deciding or even suggesting whether the religious grounds for [] conscience-based objection is legitimate or illegitimate."[136]

However, the Court's reasoning in *Masterpiece* centered on the perceived hostility by the Civil Rights Commission towards the plaintiff and his religious beliefs.[137] It cautioned that the ruling was not a broad declaration regarding LGBTQ+ rights and religious freedoms.[138] In fact, the Court affirmed that sexual orientation should be constitutionally protected. Thus, the outcome would likely have been different had the Court not found that the governmental commission exhibited hostility towards the defendant.

In lower courts, the rights of the LGBTQ+ community have largely been upheld, even when a business's religious beliefs are implicated. In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*,[139] *State v. Arlene's Flowers, Inc.*,[140] and *Brush & Nib Studio v. City of Phoenix*,[141] lower courts ruled in favor of LGBTQ+ rights over religious freedoms. In fact, in *Arlene's Flowers*, the fact pattern was nearly identical to *Masterpiece Cake Shop*, except there was no perceived, governmental hostility towards the defendant's religious beliefs.[142] As such, the lower court ruled that the defendant had violated the plaintiff's constitutional rights by refusing service.[143]

Given the varied rulings, it is difficult to predict how the Supreme Court might rule if the employment rights of the LGBTQ+ community conflicted with a religious organization's sincerely held beliefs. Even though cases like *Fulton* and *Masterpiece* evidence that the Supreme Court is generally supportive of religious freedoms, other cases like *Obergefell*, *Lawrence*, and *Bostock*, evidence that the Supreme Court is also concerned with preserving LGBTQ+ rights.

---

[135] *Id.* at 1731.
[136] *Id.*
[137] *Id.* at 1732.
[138] *Id.* at 1728.
[139] 884 F.3d 560 (6th Cir. 2018).
[140] 441 P.3d 1203, 1237 (Wash. 2019).
[141] 418 P.3d 426 (Ariz. Ct. App. 2018).
[142] *Arlene's Flowers*, 441 P.3d at 1210.
[143] *Id.* at 1237.

V. *WOODS V. SEATTLE'S UNION GOSPEL MISSION*

Recently, in *Woods v. Seattle's Union Gospel Mission*, the Washington Supreme Court heard a case that explores this tension between LGBTQ+ rights, employment discrimination, and religious freedoms and also evidences the complexities between statutory exemptions and the ministerial exception.[144] While the U.S. Supreme Court denied certiorari, Justice Alito clarified that the denial was only because of the interlocutory nature of the claim.[145] He noted the seismic implications that the case could have on religious organizations, remarking that "the day may soon come when we must decide whether the autonomy guaranteed by the First Amendment protects religious organizations' freedom to hire coreligionists without state or judicial interference."[146] He also gave a glimpse into what might be the Court's reasoning, noting that

> [t]o force religious organizations to hire messengers and other personnel who do not share their religious views would undermine not only the autonomy of many religious organizations but also their continued viability. If States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by those who disagree with their theological views most vigorously. Driving such organizations from the public square would not just infringe on their rights to freely exercise religion but would greatly impoverish our Nation's civic and religious life.[147]

A. Case History

Open Door Legal Services (ODLS) is a branch of Seattle's Union Gospel Mission (SUGM) that provides free legal services to Seattle's homeless population.[148] Its mission statement describes the legal clinic as a "[p]assionate community of people who follow Christ in his relentless, redeeming love for all

---

[144] *See generally* 481 P.3d 1060 (Wash. 2021).
[145] Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1097 (2022) (Alito, J., concurring).
[146] *Id.* at 1094.
[147] *Id.* at 1096.
[148] Petition for a Writ of Certiorari at 2, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144) [hereinafter Petition].

people."[149] Staff members also share their faith and pray with clients.[150]

While attending the University of Washington School of Law,[151] Plaintiff Matt Woods frequently volunteered at ODLS.[152] After graduation, Woods met with one of ODLS's staff attorneys to inquire about an open staff attorney position.[153] During this meeting, Woods discussed his bisexuality and inquired whether his sexual orientation would conflict with the clinic's beliefs.[154] The ODLS attorney said she did not think it would be an issue, but she would further investigate the matter.[155]

The next day, the attorney sent Woods excerpts from the Mission's Employee Handbook.[156] Included in the handbook was a prohibition on "homosexual behavior."[157] As such, the attorney recommended that Woods schedule a meeting with the clinic's director to further discuss the matter.[158] Woods followed up with the director, who confirmed that the Mission's "code of conduct excludes homosexual behavior."[159]

In November 2017, Woods filed a lawsuit against SUGM in Washington state court.[160] Despite the fact that the Washington Law Against Discrimination exempts religious organizations from the definition of employer,[161] Woods argued that the Mission had violated the WLAD by refusing to hire him because of his sexual orientation.[162]

The claim centered on whether the Mission refused to hire Woods exclusively because of his sexual orientation apart from any religious convictions, which would seemingly violate the WLAD, or whether his lifestyle was evidence that he did not

---

[149] *Id.* at 6.
[150] *See* Petition for Certiorari app. at 64a–65a, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144).
[151] Brief in Opposition at 2, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144).
[152] *Id.*
[153] Brief in Opposition, *supra* note 151, at 2–3.
[154] *Id.* at 3.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 4.
[160] *Id.*
[161] Wash. Rev. Code Ann. § 49.60.040(11) (West 2020) ("Employer includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit.").
[162] The Washington Law Against Discrimination prohibits employers from discriminating against employees based on sexual orientation. *Id.*

espouse the same religious values as the Mission, which would likely implicate the WLAD's exemption.[163] Woods did not contend that the Mission was not a religious organization.[164] Indeed, the Mission is classified as a church by the IRS.[165] Additionally, neither Woods nor the court disputed whether the Mission's beliefs concerning sexual orientation were either sincerely held or religious in nature.[166] Furthermore, Woods did not seek to strike down the entire statutory exemption as unconstitutional; he only brought an as-applied challenge.[167]

Woods claimed that he was not hired solely because of his sexual orientation, not his religious beliefs.[168] He evidenced his religious beliefs by noting that his application stated that "his worldview is shaped by the ministry of Jesus Christ" and that he had been involved in various Christian groups while in college.[169] Furthermore, Woods argued that the court should look to the staff attorney's job description to determine if it was necessary for him to ascribe to a particular religious persuasion.[170] In doing so, he advocated for a "job duties" test like the one disfavored in *Hosanna-Tabor*[171] that "would . . . undertake an objective examination of the job description at issue as well as the employee's responsibilities within the organization."[172]

---

[163] *See* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1062 (2021), *cert. denied*, 142 S. Ct. 1094 (2021). Specifically, the Mission defined the issue as whether the Washington Constitution requires a religious organization "to hire someone who would publicly reject the organization's sincerely-held religious beliefs." Petition, *supra* note 150, at 8 (quoting Brief of Respondent at 1, Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060 (2021).

[164] *See* Petition, *supra* note 148 at 7.

[165] Petition for Certiorari app. at 163a–68a, Woods v. Seattle's Union Gospel Mission, 142 S. Ct. 1094 (2021) (No. 21-144).

[166] *See* Oral Argument at 14:33, Woods v. Seattle's Union Gospel Mission, 197 Wash. 2d 231 (2021) (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/?eventID=2019101014 ("[T]his is not a question of testing beliefs at all.").

[167] *Id.* at 5:59.

[168] Brief in Opposition, *supra* note 151, at 7.

[169] *See* Brief of Respondent in Opposition at 2, Seattle's Union Gospel Mission v. Woods, 531 U.S. __ (2021) (No. 21-144), https://www.supremecourt.gov/DocketPDF/21/21-144/198398/20211101140359012_21-144_Woods%20Brief%20in%20Opposition.pdf; *see also* Oral Argument at 8:10.

[170] *See* Brief in Opposition, *supra* note 151, at 6; Oral Argument, *supra* note 166, at 14:30 (explaining that Woods did concede that some of his job duties would be religious in nature).

[171] Brief in Opposition, *supra* note 151, at 6; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 194 (2012).

[172] Brief in Opposition, *supra* note 151, at 6; Oral Argument, *supra* note 166, at 14:50 ("There isn't really a factual dispute over the religiosity over the job duties.").

SUGM argued that because their full-time employees serve as the "hands, feet, and mouthpieces"[173] of the Mission, it was essential that their employees' beliefs align with the Mission's sincerely held beliefs.[174] It argued that Woods' lifestyle manifested that he did not adhere to the Mission's beliefs concerning homosexuality.[175] It further alleged that Woods also did not adhere to the Mission's broader beliefs because he admitted in his employment application that he was not a member of a church and was unable to clearly articulate his beliefs.[176]

The Washington Superior Court granted summary judgment to the Mission and dismissed the claim, finding that the court lacked jurisdiction because the claim fell under the WLAD's statutory religious exemption.[177]

B. Washington Supreme Court's Reasoning

Woods then petitioned the Washington Supreme Court for direct review.[178] Again, he advocated for using a primary job duties test to determine whether he could "legally be denied employment under Washington State law by a religious organization because of the person's sexual orientation."[179] He further argued that he had a fundamental right to sue for discrimination under the Washington Constitution's Privileges and Immunities Clause,[180] and thus the WLAD's exemption unconstitutionally granted the Mission immunity from discrimination legislation.[181]

---

[173] *See* Petition, *supra* note 148, at 7.
[174] *Id*. at 8–9.
[175] *Id.* at 3, 10.
[176] *Id.* at 3; *see also* Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094, 1095 (2022) (Alito, J., concurring).
[177] Woods v. Seattle's Union Gospel Mission, No. 17-2-29832-8 SEA, 2018 WL 11318472, at *1 (Wash. Super. Ct. July 9, 2018) rev'd, 197 Wash. 2d 231 (2021); *see also* Brief in Opposition at 2, Woods v. Seattle's Union Gospel Mission, 197 Wash. 2d 231 (2021) (No. 21-144), https://www.supremecourt.gov/DocketPDF/21/21-144/198398/20211101140359012_21-144_Woods%20Brief%20in%20Opposition.pdf.
[178] Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (2021).
[179] Brief in Opposition, *supra* note 151, at 6; Oral Argument at 26:13, Woods, 197 Wash. 2d 231 (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/?eventID=2019101014 ("It's really a primary job function test that the court should look at . . .").
[180] *See* Oral Argument at 51:43, Woods, 197 Wash. 2d 231 (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/?eventID=2019101014.
[181] Brief in Opposition, *supra* note 151, at 7.

The Washington Supreme Court disagreed with the lower court's view that the statutory exemption should preclude Woods from bringing a claim.[182] Instead, the court adopted Woods' argument that the exemption should trigger an analysis under the state's Privileges and Immunities Clause.[183] The court used a two-part test in its determination. Part one of the test asked whether a fundamental right had been implicated.[184] Part two asked if there were reasonable grounds for limiting the fundamental right.[185]

However, to satisfy the first prong, the court did not agree with Woods' position that he had a fundamental right to sue for discrimination.[186] Instead, it cited *Obergefell* and *Lawrence* and reasoned that Woods' fundamental rights to practice his sexual orientation and marry were implicated.[187]

When examining the second "reasonable grounds" prong, the court affirmed that there *were* reasonable grounds for the "WLAD to distinguish religious and secular nonprofits."[188] Indeed, the court acknowledged that in another Washington Supreme Court case, *Ockletree v. Franciscan Health Systems*, it had rightfully held that the statutory exemption was constitutional, applicable to non-ministerial employees like security guards, and that religious organizations "sometimes must[] be treated differently than nonreligious organization[s]."[189] It further affirmed "that religious organizations have a right to religious liberty guaranteed by the [state's] Free Exercise Clause," which "provides *greater* protection for the free exercise of religion than the First Amendment" prescribes[190] and also noted the importance of protecting religious liberties from state interference.[191]

However, the *Woods* court then held that "because [the] WLAD contains no limitations on the scope of the exemption provided to religious organizations," it should instead look to the

---

[182] *See* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (2021).
[183] *Id.* at 1065.
[184] *See id.*
[185] *See id.*
[186] *See id.* at 1067.
[187] *Id.* at 1065–66.
[188] *Id.* at 1066.
[189] In *Ockletree*, a Black security guard sued his hospital employer for terminating his employment following a stroke. The guard argued that he was fired on the basis of race and disability. *See* 317 P.3d 1009, 1018 (Wash. 2014).
[190] *See* Woods v. Seattle's Union Gospel Mission, 481 P.3d 1060, 1063 (Wash. 2021).
[191] *See id.* at 1067.

First Amendment's ministerial exception for guidance.[192] In sum, the court superimposed the boundaries of the ministerial exception upon the statutory exemption. The court then reversed the lower court's ruling and remanded the case back to the trial court to determine whether the staff attorney position was considered ministerial.[193] While the trial court had not ruled on whether Woods was a minister in its dismissal, it had noted that staff attorneys did not receive any specialized spiritual training, nor were they expected to "to nurture their converts' development in the Christian faith."[194]

C. Misapplication of the Ministerial Exception

There are several errors with the Washington Supreme Court's ruling. First, the court did not show any deference to the legislature's intent in adopting the WLAD's exemption. Instead, the court acknowledged the existence of the statutory exemption and then disregarded it because the legislature had not enumerated any restrictions on its application.[195] In doing so, it failed to consider whether the legislature intended for the exemption to be broadly applied or why there would even be a need for a statutory exemption if it only provided protection that was already afforded by the First Amendment.

Further, the court ignored its own precedent established in *Ockletree* that held the statutory exemption applies to employees who fall outside the bounds of the ministerial exception.[196] Instead, the court assumed that the only permissible interpretation of the statutory exemption was the narrowest view offered under the Constitution.[197]

Next, the court's Privileges and Immunities analysis was weak. In satisfying the first prong, the court did not present any explanation for how Woods' right to marry had been implicated or whether the fundamental right established in *Lawrence* should extend to religious organizations' hiring practices. Also, despite

---

[192] *Id.* at 1070; *see generally id.* at 1067 ("Because WLAD contains no limitations on the scope of the exemption provided to religious organizations, we seek guidance from the First Amendment as to the appropriate parameters of the provision's application.").
[193] *Id.*
[194] *Id.* at 1070.
[195] *Id.*
[196] *See* Ockletree v. Franciscan Health Sys., 317 P.3d 1009, 1020 (Wash. 2014); *see generally Woods*, 481 P.3d at 1069–70 (failing to consider that the U.S. Supreme Court intended the exemption to be read broadly).
[197] *See generally Woods*, 481 P.3d at 1069–70 (adopting a narrow view of the exemption that likely would not include a staff worker at a nonprofit).

the fact that it found there were reasonable grounds to apply the statutory exemption and thus satisfy the second prong, the court held the exemption failed the second part of the test.[198] To reach its conclusion, the court purported to balance the fundamental rights guaranteed in the Free Exercise Clause with one's rights to both marry and practice their sexual orientation but submitted no evidence as to how the balance was reached or why the free exercise rights were found lacking.

Also, at least one Washington Supreme Court Justice acknowledged that by allowing the court to consider whether the job's duties were ministerial, there were entanglement issues.[199] However, the court disregarded those concerns and held that it was up to the trial court to determine if the attorney position should be considered ministerial.

Additionally, the Washington Supreme Court ignored the U.S. Supreme Court's ruling in *Amos*, which not only upheld the constitutionality of statutory religious exemptions but established such exemptions should be interpreted to include employees not covered by the ministerial exception, noting "that '[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'"[200] The Washington Supreme Court instead ruled it was ministerial exception or nothing at all.

Finally, the Washington Supreme Court ignored U.S. Supreme Court precedent concerning the ministerial exception. Neither *Hosanna-Tabor* nor *Morrissey-Berru* imply that the ministerial exception outlines the limits of protection for statutory exemptions. In fact, in *Morrissey-Berru*, the U.S. Supreme Court clarified that the ministerial exception "serves an entirely different purpose" from the statutory exemption.[201] The Supreme Court rulings asserted only that the hiring and firing of ministerial employees is protected by the First Amendment, not that ministerial employees are the only employees subject to statutory protections.[202]

---

[198] *Id.* at 1066.
[199] Oral Argument at 19:48, *Woods*, 481 P.3d 1060 (No. 96132-8), https://tvw.org/video/washington-state-supreme-court-2019101014/.
[200] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (citation omitted).
[201] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2068 (2020).
[202] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171,190 (2012).

D. Implications from the Ruling

While it is possible to view the outcome from *Woods* as a positive step for LGBTQ+ rights, the reasoning employed could have devastating implications for both the First Amendment and statutory exemptions. By asserting that only ministers fall within the boundaries of both the Free Exercise Clause and statutory exemptions,[203] the court ignored decades of jurisprudence, disregarded the religious safeguards established by the legislature, and utilized an ill-fitted First Amendment doctrine. The misapplication could have wide-ranging implications for all religious organizations that have relied on the statutory right to hire only coreligionists for sixty years. Additionally, since the court found the rights guaranteed in the Free Exercise Clause lacking when balanced against another fundamental right, courts could now mandate that other types of rights outweigh the right to practice religion, which would substantially weaken the religion clauses.

V. CONCLUSION AND RECOMMENDATION

Given the confusion in *Woods*, the U.S. Supreme Court needs to clarify the differences between the ministerial exception and statutory exemptions. In contrast to the ruling in *Woods*, the U.S. Supreme Court has never asserted that the boundaries of statutory exemptions should mimic the boundaries of the ministerial exception. Until the Court provides clarity, lower courts can continue to misapply the law, which could have catastrophic consequences for religious organizations. Religious world-relief organizations could be forced to hire aid workers who fundamentally disagree with their value systems. Even LGBTQ+ friendly churches could be forced to hire people who hold homophobic beliefs.

Also, the Supreme Court needs to provide a brighter line for which positions qualify for the ministerial exception. In both *Hosanna-Tabor* and *Morrissey-Berru*, the Court refused to provide a clear test for determining when someone should be considered a minister.[204] As a result, lower courts have both broadened and narrowed the definition depending on the jurisdiction.[205]

While the Court could adopt the *Hosanna-Tabor* factors as a dispositive test for determining whether an employee is a

---

[203] *See Woods*, 481 P.3d at 1070.
[204] *Hosanna-Tabor,* 565 U.S. at 194–96; *Morrissey-Berru*, 140 S. Ct. at 2055.
[205] Reply Brief for Petitioner at 8–9, Seattle's Union Gospel Mission v. Woods, 142 S. Ct. 1094 (2022) (No. 21-144), 2021 WL 5364522, at *8–9.

minister, this Note proposes that the definition of minister should be tightened. By allowing a broad array of positions to fall under the ministerial exception, from elementary school teacher to church secretary, the court has opened the floodgates to allow all kinds of potentially invidious discrimination in the name of the Free Exercise Clause, even when the discrimination is completely unrelated to a group's religious beliefs. By narrowing the definition of minister, the sweeping protection offered by the ministerial exception would be limited to only a few positions, and the statutory exemption would still be available to allow religious organization to hire only coreligionists.

This Note does not argue that when religious views collide with discriminatory practices, religious freedoms should always prevail. Nor does it suggest that broad discrimination against LGBTQ+ persons should be permissible. Instead, it argues that statutory exemptions to anti-discrimination statutes should continue to allow religious organizations to hire only coreligionists, regardless of the employee's role or whether the religious beliefs adhere to the mainstream view.

It is simply beyond the purview of the judiciary to assess the legitimacy of a religious organization's stated beliefs or their discretion in hiring only coreligionists.[206] By their very nature, religious beliefs are often unpopular and misunderstood by those outside of the religion. Some religions require animal sacrifice;[207] others advocate for drug use.[208] Even more mainstream religions require certain members to remain celibate, restrict the role of women, or forbid consuming foods like pork and caffeine. And yet our country has time and again reaffirmed that, however unpopular or backwards a religion's beliefs are perceived to be by the majority, the freedom to practice these beliefs is a

---

[206] *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *see also* United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring) ("In my opinion, the principal reason for adopting a strong presumption against such claims is not a matter of administrative convenience. It is the overriding interest in keeping the government-whether it be the legislature or the courts-out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.").

[207] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) ("The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice.").

[208] *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 874 (1990).

fundamental American right. Indeed, if everyone agreed with a religion's beliefs, there would be no need for First Amendment protections. As Justice Brennan once wrote, "[W]e must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncracies."[209] As such, it is imperative that our courts continue to preserve the integrity of religious freedoms. However, without guidance from the U.S. Supreme Court, lower courts will still be free to misapply the ministerial exception, discount statutory exemptions, and jeopardize the protections guaranteed by the First Amendment.

[209] Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Breyer, J., dissenting).