THOU ART FIRED:
A CONDUCT VIEW OF TITLE VII'S RELIGIOUS EMPLOYER EXEMPTION

John T. Melcon[*]

ABSTRACT

With federal circuit courts beginning to recognize that Title VII prohibits employment discrimination on the basis of sexual orientation—most recently in Hively v. Ivy Tech and Zarda v. Altitude Express—a new question arises in the unfolding conflict between religious liberty and LGBT rights: to what extent will Title VII's longstanding exemption for religious employers permit such organizations to discriminate against LGBT employees for religious reasons? Courts have flagged this question but not had occasion to answer it—yet. And because the text of the exemption is somewhat ambiguous, the answer they might give is far from obvious.

This article addresses the issue, first, by drawing out the possible approaches to the religious exemption and framing them into three distinct positions: what this article calls the Coreligionist View, the Broad View, and the Religious Conduct View. After describing the contours of each approach, the article proceeds to defend the Religious Conduct View, which has the advantage of occupying a middle position between the more polarized alternatives. Although ignored by other commentators, the Religious Conduct View turns out to be better supported by the text of Title VII, more consistent with the current caselaw, and further bolstered by practical considerations. Finally, this article examines the potential real-world effects of each treatment of the religious exemption—especially the Religious Conduct View—by running two hypothetical scenarios of religiously-motivated LGBT employment discrimination through the framework.

---

[*] J.D., Expected 2019, University of Virginia School of Law. I am especially grateful to Professors Micah Schwartzman, Richard Schragger, and Douglas Laycock for their valuable guidance and feedback. I am also indebted to Professor Caleb Nelson for his enlightening lectures on statutory interpretation.

I. INTRODUCTION

In early February 2018, Jocelyn Morffi married her girlfriend.[1] Several days later, after posting pictures of her same-sex wedding on Facebook, Ms. Morffi was fired from her job as a first-grade teacher at a Catholic school in Miami, Florida.[2] A spokesperson for the Archdiocese of Miami—the school's religious authority—explained that Ms. Morffi "broke the contract she signed when she began teaching at a Catholic school."[3] In response, Ms. Morffi stated "In their eyes, I'm not the right kind of Catholic for my choice of partner."[4]

Jocelyn Morffi's story is hardly unique—similar incidents have taken place all across America.[5] Each of these stories represents a microcosm of the much larger conflict unfolding between religious liberty and LGBT rights—a clash that has continued to garner national attention ever since the legalization of same-sex marriage in *Obergefell v. Hodges*.[6] One recent blockbuster Supreme Court case, which typifies the broader dilemma, involved a Christian baker's religious objection to creating a wedding cake for a same-sex marriage ceremony.[7] It remains to be seen whether and to what extent traditional religious beliefs must yield—on the whole—to contemporary nondiscrimination norms regarding human sexuality, but in the meantime the law appears to be

---

[1] *Openly Gay Teacher Fired After Posting Wedding Pictures on Social Media*, NBC4 (Feb. 10, 2018), http://nbc4i.com/2018/02/10/openly-gay-teacher-fired-after-posting-wedding-pictures-on-social-media/.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, Louis Llovio, *Gay man fired by Catholic Diocese of Richmond files federal lawsuit*, RICHMOND TIMES-DISPATCH (Aug. 23, 2016), http://www.richmond.com/news/virginia/ap/gay-man-fired-by-catholic-diocese-of-richmond-files-federal/article_6ad8142c-a71c-502d-88ef-258ae67368ef.html (executive director of a Catholic nursing home fired after same-sex marriage discovered); Michael Gordon, *Gay teacher who lost job at Charlotte Catholic High sues, alleging discrimination*, CHARLOTTE OBSERVER (Jan. 11, 2017), http://www.charlotteobserver.com/news/local/education/article125835989.html (substitute teacher fired after announcing same-sex wedding); *Minneapolis Catholic School Sued by Former Employee*, ABC5 (Aug. 17, 2017), http://kstp.com/news/minneapolis-catholic-school-sued-by-former-employee-mary-loso/4577457/ (gym teacher asked to resign after deciding to marry same-sex partner).

[6] 135 S. Ct. 2584 (2015).

[7] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

approaching the conflict one sector at a time, e.g. marriage,[8] contraception access,[9] and public accommodations.[10] Somewhere in this progression lies the question of employment discrimination: to what extent can employers discriminate against LGBT individuals—particularly non-ministers[11]—because of those employers' religious beliefs about human sexuality?

Federal law currently provides no answer to this question, not least because Congress has balked at passing legislation that would prohibit employment discrimination based on sexual orientation.[12] In other words, employment discrimination against LGBT individuals is not explicitly illegal under federal law.[13] But where Congress has hesitated, courts have begun to take action. In 2017, the Seventh Circuit Court of Appeals, sitting en banc, held in *Hively v. Ivy Tech Community College* that sexual orientation discrimination is prohibited under the existing federal employment nondiscrimination statute—that is, under Title VII[14]—as a form of sex discrimination.[15] In early 2018 the Second Circuit, also sitting en banc, reached the same conclusion in *Zarda v. Altitude Express*.[16]

While neither *Hively* nor *Zarda* involved employers with *religious* objections to homosexuality, there can be little doubt that many—if not most—of the forthcoming cases applying *Hively* and *Zarda* will involve defendants with traditional religious beliefs about the morality of same-sex intimacy.[17] Conservative religious individuals seem to be some of the last American hold-outs against

---

[8] *Obergefell*, 135 S. Ct. 2584.
[9] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
[10] *Masterpiece*, 138 S. Ct. 1719.
[11] Employees who qualify as ministers are understood to be exempt from employment nondiscrimination laws under the "ministerial exception." *See infra* notes 32-37.
[12] *See infra* note 172.
[13] Some state laws explicitly prohibit employment discrimination on the basis of sexual orientation, but those laws—and the various religious exemptions within them—are beyond the scope of this article.
[14] 42 U.S.C. § 2000e-2 (2012).
[15] Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017).
[16] Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018).
[17] *See* Emma Green, *Why Religious Employers Can Fire Trans People, According to a Michigan Court*, THE ATLANTIC (Aug. 18, 2016), https://www.theatlantic.com/politics/archive/2016/08/in-michigan-its-totally-legal-to-fire-trans-people-for-their-gender-identity/496559/ ("What may be coming next is more cases of people claiming they have a right to fire LGBT people as a matter of faith.") *and* Stephanie Pisko, *(Un?)lawful Religious Discrimination*, 9 DREXEL L. REV. 101, 119 (2016) ("On the horizon, a potentially bigger issue will be sexual orientation.").

same-sex marriage.[18] Yet the majority opinions in both *Hively* and *Zarda* recognize that introducing religion to the legal analysis adds a significant wrinkle. In *Hively*, the Seventh Circuit noted that if Ivy Tech had contended "that it was a religious institution and the positions it denied to Hively related to a religious mission" that would raise a "complication" to be "saved for another day."[19] Similarly, the Second Circuit in *Zarda* clarified that it was "express[ing] no view on whether some exception . . . under a different provision of Title VII . . . might immunize from liability discriminatory conduct rooted in religious beliefs."[20]

The primary source of the complication here is Title VII's statutory exemption for religious employers, although other statutes and the Constitutional itself might play a separate role.[21] The statutory exemption, which dates in its present form to 1972, releases religious organizations from liability under Title VII "with respect to the employment of individuals of a particular religion."[22] This statutory language presents a fundamental interpretive question: how should courts understand the exemption's ambiguous phrase "of a particular religion?" Put differently, what sort of discrimination does the exemption authorize? Can a religious organization discriminate on the basis of Title VII's protected statuses—e.g. sex—for sincere religious reasons? Or is a religious organization merely permitted to favor those who affiliate with a particular denomination? More to the point, can a religious organization enforce a religiously-motivated code of conduct—like the one referenced by the Archdiocese of Miami—against all its employees, whether denominationally affiliated or not? How might this all play out for someone like Jocelyn Morffi?

In engaging these questions, this article makes three contributions to the existing literature. First, it offers a framework for thinking about the current debate regarding the interpretation of Title VII's exemption for religious employers. While a handful of commentators have offered arguments about the meaning of the

---

[18] *See, e.g.*, *Changing Attitudes on Gay Marriage*, PEW RESEARCH FORUM (June 26, 2017), http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/ (showing that only 35% of White Evangelical Protestants favor same-sex marriage, compared to 62% of Americans overall).

[19] *Hively*, 853 F.3d at 351 (citing the religious exemption at 42 U.S.C. § 2000e-1(a)).

[20] *Zarda*, 883 F.3d at 122 n.22.

[21] 42 U.S.C. § 2000e-1(a) (2012). The extent to which the Religious Freedom Restoration Act ("RFRA"), the First Amendment, or the doctrine of Constitutional Avoidance might play a role in these questions is beyond the scope of this article.

[22] *Id.*

exemption, none has provided an effective way of framing these views. To this end, after surveying the history of the debate, Part I distinguishes and clarifies three views under which the various treatments of the exemption can be classified: the Coreligionist View, the Broad View, and the Religious Conduct View.

Second, this article posits that the Religious Conduct View—a middle interpretation occupying the space between the narrow Coreligionist View and the Broad View—represents the best interpretation of the religious exemption in Title VII. To date, few scholars have articulated anything along the lines of the Religious Conduct View, let alone defended such an approach. This article takes on that task in Part II, showing that the Religious Conduct View is—compared to the alternatives—better supported by the text of the exemption, the current caselaw, and several practical considerations.

Third, this article applies the framework developed below to the sorts of sexual orientation discrimination claims likely to be brought against religious employers in the wake of *Hively* and *Zarda*. 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. In the past, relatively few religious employers were to be found discriminating based on Title VII's protected statuses, e.g. race and sex (at least with respect to *non*-ministerial employees). Now, insofar as *Hively* and *Zarda* insert sexual orientation protections into Title VII, this almost certainly sets up a collision between these new nondiscrimination requirements and conservative religious employers' longstanding moral beliefs about sexuality and marriage. Consequently, courts will soon be forced to wrestle with the extent to which the exemption allows religious employers to discriminate against employees based on sexual orientation. To shed light on how this might play out, Part III presents a pair of hypothetical scenarios involving religious employers engaged in religiously-motivated sexual orientation discrimination (much like in Jocelyn Morffi's real case), and then evaluates probable outcomes on each of the framework's three views about the exemption (with special attention given to the Religious Conduct View).

II. RELIGIOUS EXEMPTIONS IN TITLE VII

A. HISTORICAL BACKGROUND

In June 1963, President Kennedy called on Congress to pass civil rights legislation that would, among other things, "promote the

general welfare by eliminating discrimination based on race, color, religion, or national origin."[23] At the President's suggestion, the House took up H.R. 7152, which, after months of debate and significant revision—especially in the Senate—finally became law on July 2, 1964.[24] Title VII of the Act focused on employment discrimination, making it unlawful for employers—defined as those with fifteen or more employees[25]—to take adverse employment action on the basis of an individual's race, color, religion, sex, or national origin.[26]

Early in the process of hashing out Title VII, Congress contemplated an exemption for religious employers. Initial versions of H.R. 7152 made religious organizations completely exempt from the nondiscrimination requirements of Title VII.[27] That exemption was eventually narrowed in the Senate, resulting in a provision that permitted religious organizations to employ "individuals of a particular religion" to perform work related to the organizations' "religious activities."[28] Congress revised this exemption in 1972, broadening the exemption to apply to employees engaged in any of a religious organization's activities, not just its religious activities.[29] Thus the present version of the exemption, referred to as §702(a),[30] reads:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation,

---

[23] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 245 (1964) (recounting the history of the Civil Rights Act).

[24] *Id.*

[25] 42 U.S.C. § 2000e(b) (2012).

[26] 42 U.S.C. § 2000e-2 (2012) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin").

[27] H.R. Rep. No. 914, 88th Cong. §703 (1963).

[28] Civil Rights Act, Title VII, §702, 78 Stat. 241 (1964); *See also* McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972) (summarizing the legislative history).

[29] Conf. Rep. on H.R. 1746 (1972), *as reprinted in* EEOC, Legislative History of Equal Employment Opportunity Act of 1972, at 1854 ("The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow such entities to employ individuals of a particular religion in all the activities instead of the present limitation to religious activities. Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.").

[30] The exemption is commonly denoted by its public law section number, 702(a).

> 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.[31]

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).[32] This implicit ministerial exception is thought to arise from the Establishment Clause,[33] 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.[34] In other words, none of Title VII's prohibitions apply to ministers, even its prohibitions against sex and race discrimination.[35]

The Supreme Court has declined to provide a test for which employment relationships fall within the ministerial exception,[36] but at least one thing seems to be clear: to be considered a minister an employee must be involved in the religious functions of the organization.[37] Since the statutory exemption in §702(a) currently applies to employees involved in *any* of an organization's activities—including but not limited to its religious activities—it follows that employees covered by the ministerial exception comprise only a subset of all the employees covered by §702(a). Since Title VII does not apply to the ministerial subset at all, this article sets those employees aside and focuses exclusively on *non-*

---

[31] 42 U.S.C. § 2000e-1(a) (2012). Title VII also contains a distinct exemption for religious educational institutions at 42 U.S.C. § 2000e-2(e)(2) but that provision is generally considered redundant to §702(a). 6 A.L.R. Fed. 3d Art. 6 §2 (2015).
[32] Rayburn v. Gen. Conference of Seventh-day Adventists, 772 F.2d 1164 (4th Cir. 1985) (holding that even though §702(a) did not preclude a pastoral candidate's Title VII sex and race discrimination claims, the ministerial exception did); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (recognizing the implicit ministerial exception.).
[33] U.S. Const. amend I. *See* Michael A. Helfand, *Religion's Footnote Four: Church Autonomy as Arbitration*, 97 MINN. L. REV. 1891, 1916 (2013).
[34] *Hosanna-Tabor*, 565 U.S. at 188.
[35] *See, e.g.*, Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 427 (2d Cir. Mar. 7, 2018) ("Where excessive government entanglement with religion is involved, it follows that employment discrimination claims by ministers must be barred.").
[36] *Hosanna-Tabor*, 565 U.S. at 190 ("We are reluctant . . . to adopt a rigid formula for deciding when an employee qualifies as a minister.").
[37] *Id.* at 193.

ministers; i.e. the balance of employees who fall under the qualified religious exemption in §702(a).[38]

The existence of the statutory religious exemption in Title VII reflects a fundamental tension in the law.[39] On one hand, allowing certain organizations the freedom to discriminate on the basis of religion "is in serious tension with our commitment to individual freedom of conscience in matters of religious belief."[40] Yet the Supreme Court has recognized that "religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'"[41] Despite this tension, the Supreme Court made it clear in *Corp. of Presiding Bishop v. Amos* that §702(a) stands on solid constitutional footing.[42] What remains less clear is the proper interpretation and application of the exemption.

One question that has plagued courts and scholars alike involves the *scope* of §702(a): exactly what sorts of religious organizations does the exemption cover? Perhaps it most obviously covers churches or other houses of worship; but does the exemption include religious schools, hospitals, publishing houses, nursing homes, or humanitarian organizations? Might it apply to some closely-held for-profit businesses after *Hobby Lobby*?[43] The Courts

---

[38] Perhaps this might include employees who qualify as ministers but whose employers have waived the ministerial exception. *See* Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861 (2017) (arguing that the ministerial exception can be waived as an affirmative defense).

[39] *See, e.g.*, Adam K. Hersh, Note, *Daniel in the Lion's Den: A Structural Reconsideration of Religious Exemptions from Nondiscrimination Laws Since Obergefell*, 70 STAN. L. REV. 265, 271 (2018) (assessing frameworks for evaluating religious accommodations to nondiscrimination laws).

[40] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (citing James Madison's Memorial and Remonstrance, 2 Writings of James Madison 184 (G. Hunt ed. 1901)).

[41] *Id.* (quoting Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

[42] *Id.* at 334-36 (holding that even if §702(a) delivers broader protections than the Free Exercise clause requires, it nevertheless does not violate the Establishment Clause).

[43] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014) (recognizing that the term "person" in RFRA does not exclude for-profit corporations); *But see* IRA C. LUPU & ROBERT W. TUTTLE, *Religious Exemptions and the Limited Relevance of Corporate Identity*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 373, 394 (Micah Schwartzman et al. eds., 2016) (arguing that *Hobby Lobby* should not be read to bring for-profit employers into the scope of §702(a)).

of Appeals are currently split on how to answer this question, having trotted out a series of multi-factor tests.[44] Commentators and even the government have offered their own proposals.[45]

Although the scope question is important and ongoing, this article is directed at §702(a)'s other interpretive challenge—one that has received less attention. This challenge involves determining what sort of discrimination §702(a) actually authorizes. When dealing with an employee who is *not* a minister, and an organization that *is* covered by the exemption in §702(a), then exactly what does it mean to say that Title VII "does not apply" to the organization "with respect to the employment of individuals *of a particular religion*?"

III. THREE VIEWS OF THE §702(A) EXEMPTION

Although there has been some commentary attempting to interpret the phrase "of a particular religion" in Title VII's religious exemption, the contours of the various views represented in the debate have not been staked out. In surveying the landscape, this section identifies and locates three distinct positions. The views receiving the bulk of attention in the current literature embody the narrowest and the broadest prevailing readings of the exemption—what this article calls the "Coreligionist View" and the "Broad View," respectively. But there also exists an overlooked third view situated between these other two: the "Religious Conduct View."

To be specific, the narrow Coreligionist View reads the exemption to mean that a covered religious organization is merely permitted to favor individuals on the basis of their religious

---

[44] Emily S. Fields, *VII Divided by Four: The Four-Way Circuit Split over the Title VII "Religious Organization" Exemption*, 63 WAYNE L. REV. 55 (2017); *See* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007) (presenting a nine-factor test)*;* Spencer v. World Vision, Inc., 633 F.3d 723, 730 (9th Cir. 2011) (setting aside the *LeBoon* factors).

[45] *See, e.g.*, Thomas M. Messner, Note, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL'Y 63 (2006); Roger W. Dyer, Jr., Note, *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test Spencer v. World Vision, Inc.*, 76 MO. L. REV. 545 (2010); Mark Jansen, Note, *Religious Organizations and Employment Decisions Based on Religion: A Principled Pluralist Critique*, 5 PHOENIX L. REV. 183 (2011); Brian M. Murray, *The Elephant in Hosanna-Tabor*, 10 GEO. J.L. & PUB. POL'Y 493 (2012). *See also* Attorney General, *Federal Law Protections for Religious Liberty*, 12a (Oct. 7, 2017) (https://www.justice.gov/opa/press-release/file/1001891/download) (asserting that the exemption applies to a broad range of organizations, possibly including for-profits).

affiliation.[46] The Broad View construes the exemption as being much more permissive, to the point that a religious organization may engage in any sort of discrimination—even against Title VII's other protected statuses—so long as the discrimination is motivated by sincere religious belief.[47] The Religious Conduct View understands the exemption to allow a religious organization to make employment decisions on the basis of employees' religiously significant conduct—not just their religious affiliation—but *not* on the basis of Title VII's other protected statuses, even if the organization puts forth religious reasons for doing so.[48]

Early treatment of §702(a) tended to ignore this interpretive question altogether, simply asserting the uncontroversial fact that §702(a) permits religious discrimination, as opposed to providing religious organizations a complete exemption from Title VII.[49] Moreover, initial scholarly attempts to interpret Title VII's statutory exemption were often overshadowed by the more animated controversy about the extent to which the Constitution itself exempted religious organizations from Title VII—what courts now refer to as the ministerial exception.[50] Still, at least one frequently-cited paper, written shortly before the Supreme Court confirmed the statutory exemption to be constitutional,[51] managed to raise the possibility of giving different readings to the word "religion" in §702(a).[52] Eventually, once the ministerial exception

---

[46] *See infra* Section I.B.1. *See also* Memorandum from Randolph D. Moss, Assistant Attorney General, to William P. Marshall, Deputy Counsel to the President, Application of the Coreligionists Exemption in Title VII, 30 (Oct. 12, 2000), https://perma.cc/PAL9-3NE4 (referring to §702(a) as the "coreligionist exemption" and asserting that it allows exempt employers to "prefer employees affiliated with a particular religious denomination").

[47] *See infra* Section I.B.2.

[48] *See infra* Section I.B.3.

[49] *See, e.g.*, Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1534 (1979).

[50] *See, e.g.*, Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and A Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 284-89 (1994); Jane Rutherford, *Equality As the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1058 (1996); *See also* Bagni, *supra* note 49.

[51] *See supra* note 40.

[52] Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1384-85 (1987); *See also* Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U. L. REV. 369, 371 (1996) ("While the statute permits religious institutions to engage in religious discrimination, the legal boundaries

questions had been addressed in *Hosanna-Tabor*,[53] the question about the meaning of "a particular religion" in §702(a)—now understood to be mainly relevant to non-ministers—was ready to emerge from its repose.

The contemporary debate about the meaning of §702(a) seems to have picked up steam during the summer of 2014, when then-President Barrack Obama proposed an executive order prohibiting LGBT-based employment discrimination by federal contractors—a group of employers that presumably included some religious organizations.[54] President Obama's order was to be an amendment to a Johnson-era directive prohibiting racial and other forms of discrimination by federal contractors.[55] Yet because that original Johnson order contained a religious exemption,[56] a critical question arose: to what extent would this existing exemption permit (or not permit) religious federal contractors to discriminate against LGBT individuals for religious reasons? The relevance of that question to the Title VII context stems from the fact that the Johnson-era religious exemption is lifted nearly verbatim from §702(a).

Kicking off what one participant has called "a fierce public debate,"[57] a group of religious leaders and legal scholars wrote to President Obama on June 25, 2014, urging him to include a comprehensive religious exemption in his new order to the effect that it would "not apply" to any religious organization within the scope of §702(a).[58] Importantly, the request was not for religious organizations to be exempt insofar as *religious* discrimination was concerned, but rather that the organizations be *completely exempt* from the new prohibitions on LGBT discrimination because such organizations "are free under Title VII to maintain a conduct standard that reflects their religions' sincerely held beliefs, which include deep convictions about human sexuality."[59]

---

between religious and other forms of prohibited discrimination, such as gender discrimination, remain unclear.").

[53] *Hosanna-Tabor*, 565 U.S. at 171. *See also supra* notes 32-38.

[54] Exec. Order No. 13,672 (July 21, 2014).

[55] Exec. Order No. 11,246 (Sept. 28, 1965).

[56] *Id.* § 204.

[57] Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 36, 94 (2015).

[58] Letter from Stanley Carlson-Thies et al. to President Barack Obama (June 25, 2014), http://www.irfalliance.org/wp-content/uploads/2014/06/LGBT-EO-letter-to-President-6-25-2014-w-additional-signatures.pdf [hereinafter June 25 letter].

[59] *Id.* at 1.

Shortly thereafter, another group of religious liberty scholars dispatched their own letter to President Obama, arguing that a comprehensive exemption for faith-based organizations would be "unprecedented" and would "allow religious employers to create or maintain discriminatory workplaces."[60] The letter noted that the existing exemption for religious organizations was patterned after §702(a), which the letter argued only "allows certain religious organizations to favor employees *of their own faith.*"[61] The authors suggested that the June 25 letter "misreads the relevant law in urging an inappropriately *broad interpretation* of Title VII's accommodation of religion"[62] to the point of having "enormous practical implications."[63] Then the authors reiterated their narrower treatment of §702(a): "Title VII includes only narrowly drawn language that allows religious organizations to prefer people of their own faith in employment, but does not excuse discrimination on the basis of race, sex, or national origin *just because that discrimination happens to be motivated by religious belief*."[64]

These two letters jump-started the modern controversy about the meaning of §702(a)'s "particular religion" language, but they did little delineate the precise interpretive claims being made. Only by examining the literature that followed—a combination of internet publications and scholarly articles—can one extract the three distinct positions in play: the Coreligionist View, the Broad View, and the Religious Conduct View.

I.B.1. The Coreligionist View

In the immediate wake of this letter writing campaign,[65] advocates on both sides took to the Cornerstone Blog to defend their respective interpretations of §702(a). Several of those pieces, in criticizing the comprehensive exemption sought by the initial June

---

[60] Letter from Katherine Franke et al. to President Barack Obama (July 14, 2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/executive_order_letter_final_0.pdf [hereinafter July 14 letter].

[61] *Id.* at 2 (emphasis added).

[62] *Id.*

[63] *Id.* at 3 ("Under the expansive interpretation urged in the aforementioned letter, a religious organization working as a federal contractor could refuse employment to a person who was in an interfaith or interracial relationship or marriage, who was an unmarried parent, or whom the employer learned had had an abortion or used contraception. The exception would truly swallow the rule.").

[64] *Id.* at 2 (emphasis added).

[65] *See supra* notes 57-64. For the record, President Obama's new protections for LGBT status left in place the existing religious exemption—an outcome aligned with the request made in the July 14 letter. *See* Exec. Order No. 13,672, 79 FR 42971 (July 21, 2014).

25 letter, laid out the basics of the Coreligionist View, which asserts that exempt religious organizations are permitted to favor members of their own faith based on affiliation, but discrimination based on any other status disfavored for religious reasons is not permitted. Rose Saxe, an ACLU attorney, wrote that the exemption in Title VII simply "allows religiously affiliated employers to consider religion in some of their employment decisions, specifically by *favoring those of the same faith* in hiring decisions."[66] Rejecting a broader reading, Saxe claimed that "Title VII does not allow religious organizations to make employment decisions on the basis of race, sex, or national origin—even where religiously motivated."[67] In a separate Cornerstone Blog response, Professor Martin Lederman characterized the religious exemption in Title VII as permitting "primarily religious" organizations to "prefer coreligionists."[68] Lederman acknowledged that some courts have held—perhaps wrongly, he seems to think—that "the exemption allows a qualifying religious entity not only to favor employees who belong to a particular church or denomination, but also to insist that employees adhere to particular religious tenets."[69] Yet Lederman emphasized that such entities still would not be permitted to engage in any form of discrimination otherwise prohibited by Title VII.[70]

While an exhaustive scholarly defense of the Coreligionist View is still lacking, the most thorough treatment can be attributed to Professor Ira Lupu, a leading signer of the July 14 letter.[71] Lupu asserts that §702(a) "permits religious entities to *prefer members of their own religious community* for the purposes of carrying out the organization's mission."[72] Like Lederman, though, Lupu goes a bit farther, noting that "[b]y judicial interpretation, it extends to practices forbidden or required by religious faith. An Orthodox Jewish congregation, for example, could fire an Orthodox Jewish

---

[66] Rose Saxe, *The Truth About Religious Employers and Civil Rights Laws*, CORNERSTONE (July 28, 2014), https://perma.cc/9CZD-XJJZ (emphasis added).
[67] *Id.* Applying this to the LGBT context contemplated by Executive Order 13,672, Saxe says "Thus, federal contractors will no longer be able to fire or refuse to hire LGBT people because of their gender identity or their sexual orientation—including because they are in same-sex relationships—regardless of the [religious] motivation for such discrimination." *Id.*
[68] Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees*, CORNERSTONE (July 31, 2014), https://perma.cc/5YRW-Z4WY.
[69] *Id.*
[70] *Id.*
[71] July 14 letter, *supra* note 60 at 4.
[72] Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L.L. REV. 1, 43 (2015) (emphasis added).

employee for failing to follow Jewish dietary laws, or for disrespecting the Sabbath."[73]

This last point merits some clarification: although the Coreligionist View reads the exemption narrowly, so that it merely permits religious organizations to discriminate on the basis of affiliation, there is a general recognition that—at least in some cases—an employee's religious affiliation may turn on his or her beliefs and conduct.[74] But as Professor Lupu's example reveals, on the Coreligionist View an employer may only consider an employee's conduct insofar as it is integral to the employee's religious affiliation. That is, if a religious organization requires certain employees to be members of a particular denomination—say, Roman Catholicism—then the organization is permitted to discipline or fire those employees if by their conduct they invalidate their religious memberships. On the other hand, the Coreligionist View rejects the idea that organizations can enforce these same religious conduct requirements against other employees—i.e. those who were never expected to maintain a particular denominational affiliation in the first place.

I.B.2. The Broad View

In contrast to this narrow reading, the Broad View interprets §702(a) to permit a religious organization to engage in virtually any form of discrimination—even discrimination on the basis of Title VII's other protected statuses—as long as the organization does so for sincere religious reasons. Professor Carl Esbeck, a primary author of the June 25 letter, hinted at that idea in his own piece on Cornerstone, writing that "[c]ontrary to the [July 14] letter, the exemptions are not limited . . . to preferences for employees of the same faith as the employer."[75] The contours of the Broad View are even more visible in one of Esbeck's subsequent articles.[76] There, Esbeck suggests that the plain language of Title VII's religious exemption (and its derivative in Executive Order 11246)—while not granting religious employers *complete immunity* from claims of discrimination based on other protected status (e.g. race, sex, etc.)—

---

[73] *Id.* at 43-44.
[74] *See* July 14 letter, *supra* note 60 at 2 n.8.
[75] Carl Esbeck, *Differences: Real and Rhetorical*, CORNERSTONE (July 22, 2014), *archived at* https://perma.cc/8MQQ-XSUC.
[76] Carl Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?,* 4 OXFORD J.L. & RELIGION 368 (2015) [hereinafter Esbeck, *Federal Contractors*].

does permit such discrimination if motivated by a religious belief, even if the invoked religious precept "*by its very terms* makes a distinction that coincides with the employee's protected class."[77] He goes on to assert that "when following a religious precept and making an employment distinction adverse to a protected class are the same act, the plain language of §702(a) . . . resolve[s] the apparent conflict in favor of the religious employer."[78] In other words, he says, the only significant distinction between the Broad View of §702(a) and the view that §702(a) provides a *complete exemption* from Title VII is that the former "require[s] proof that the employment decision was motivated by the employer's religious beliefs or practices."[79]

To demonstrate just how far the Broad View of the exemption goes, Esbeck provides the example of a religious school dismissing one of its female teachers after she married, based on the school's religious belief that married women of childbearing age should function as homemakers.[80] Even though such a policy could be construed as sex discrimination—i.e. it discriminates on the basis of employees' female status—its religious justification would, on the Broad View, make such employment action permissible under §702(a).[81] Another Broad View advocate concedes that this treatment of the exemption "opens the door to religious employers legally discriminating against women by invoking sexist religious doctrines."[82] Rather than deny that legal possibility, she simply offers an empirical claim that "since 1972, religious doctrines have not been invoked this way."[83] Professor Esbeck further illustrates the Broad View by giving attention to the status-based sexual orientation protections introduced by President Obama in Executive Order 13672.[84] In that context, Esbeck argues that the text of the religious exemption "operates to exempt the religious contractor from liability when the adverse employment decision

---

[77] *Id.* at 389 (emphasis in original).
[78] *Id.*
[79] *Id.* at 372. *See also id.* at 392, where Esbeck further explains: "Immunity for religious employers would mean that they could discriminate on the basis of race, color, sex, or national origin even if the reason had nothing to do with the organization's religious beliefs or practices . . . The construction argued for here still requires a religious employer to point to a relevant religious precept in answer to a charge of discrimination."
[80] *Id.* at 390.
[81] *Id.* at 372.
[82] Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 302-03 (2016).
[83] *Id.* at 313. *But see infra* notes 128-131 and accompanying text.
[84] *See supra* note 65.

based on SOGI [sexual orientation] was motivated by religious belief or practice."[85] Similar claims have been made by other advocates of the Broad View.[86]

I.B.3. The Religious Conduct View

Perhaps due to preconceptions about the degree of liberty religious employers should or should not have, proponents of these views—what this article calls the Coreligionist View and the Broad View—have overlooked a third option, one which avoids the polarization of the prevailing interpretations.[87] On this view—the Religious Conduct View—religious organizations may discriminate on the basis of religious affiliation *and*, importantly, on the basis of *religiously significant conduct*, even if that conduct is not the sort that would inherently invalidate an individual's religious affiliation (and even with respect to employees who never claimed the relevant religious affiliation in the first place). To say that the conduct must qualify as "religiously significant" is simply to say that its disapproval is 1) widely held within the religious group and 2) at least plausibly grounded in sincere religious belief.[88] In other words, the Religious Conduct View of §702(a) permits an exempt organization to take employment action based on an employee's conduct insofar as the organization has a widely-held religious objection to that conduct, independent of the employee's purported or actual religious affiliation. In the typical case, the organization's religious objection is spelled out in something like a code of conduct,

---

[85] Esbeck, *Federal Contractors*, *supra* note 76 at 393.

[86] *See* 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 (2017) (claiming that the exemption for religiously-based employment decisions "preempts" the protection for certain classes of individuals enumerated in Title VII). *See also* Phillips, *supra* note 82 ("[W]hen a religious employer makes an employment decision based on its religious beliefs, Title VII does not apply.").

[87] *See* Pisko, *supra* note 17 at 117 (noting that "there remains a slightly more interesting scenario in which an employee is fired not for being of a different religion, but for being a less than ideal member of the same religion"). *See also* James A. Davids, *Religious Colleges' Employment Rights Under the "Ministerial Exception" and When Disciplining an Employee for Sexually Related Conduct*, 21 TEX. REV. L. & POL. 423, 448-66 (2017) (exploring cases where religious schools have enforced codes of conduct against employees, even non-coreligionists).

[88] Insofar as the Religious Conduct View supports employment action based on *commission* of disfavored conduct, it also supports action based on the o*mission* of obligatory conduct. Often these are two sides of the same coin: a failure to engage in obligatory conduct frequently entails positive engagement in some disfavored conduct.

which all employees must sign.[89] Still, the Religious Conduct View retains an important limiting principle: a religious organization may not discriminate against any of the other protected statuses in Title VII, even if the organization supplies religious reasons for wanting to do so.

To illustrate: on the Religious Conduct View, an exempt organization may permissibly fire an employee who engages in sex outside of marriage if its basis for doing so is a religiously-motivated code of conduct that prohibits extramarital sex. Indeed—and this is where the Religious Conduct View diverges from the Coreligionist View—the organization can enforce this conduct requirement whether or not extramarital sex is the sort of thing that automatically invalidates the requisite religious affiliation, and even in cases where the employee has never purported to be a religious adherent at all. However, on the Religious Conduct View an exempt organization may not, for example, fire a female employee who becomes pregnant—even if married—*simply because of a religious conviction that mothers should stay at home full-time.* Such action would constitute prohibited status-based sex discrimination, despite the fact that those embracing the Broad View would allow the discrimination in view of its religious justification.[90]

PART II – Navigating a Middle Road: A Defense of the Religious Conduct View

With the debate thus framed, and three distinct positions on the meaning of §702(a) apparent, which one should courts adopt? That is to say, which view of Title VII's exemption for religious employers is correct as a matter of statutory interpretation? This Part argues that the Religious Conduct View constitutes the best reading of the exemption. Compared to the alternatives, the Religious Conduct View is better aligned with the text of Title VII, is more consistent with current caselaw, and is supported by several practical considerations.

II. A. Textual Support for the Religious Conduct View

Although the text of the religious exemption in §702 of Title VII is clear in some respects, one of its critical phrases—

---

[89] Catholic schools, for example, often require employees to comply with certain standards of sexual morality, even where the employees are not themselves Catholic. Angela C. Carmella, *Catholic Institutions in Court: The Religion Clauses and Political-Legal Compromise*, 120 W. VA. L. REV. 1, 31 (2017).

[90] *See supra* note 80 and accompanying text.

"individuals of a particular religion"—is ambiguous. The Coreligionist View's narrow interpretation of this phrase, reading it to refer to an individual's religious affiliation, seems to ignore the broad definition of "religion" throughout Title VII. Meanwhile the Broad View's treatment of this phrase, understanding it to encompass any status disfavored by the employer for religious reasons, also falls short. It fails to recognize that the text focuses on the *employee's* religion, not on the religious justification supplied by the employer for its discriminatory action. Moreover, the Broad View is in tension with the drafting history of Title VII. The Religious Conduct View, in contrast, avoids these pitfalls—it incorporates Title VII's broad definition of "religion" while rejecting the misplaced focus of the Broad View.

The Coreligionist View construes the phrase "of a particular religion" in §702(a) as pertaining to religious affiliation only,[91] yet such a reading overlooks the much broader definition of religion supplied elsewhere in the text of Title VII, where the word "religion" in Title VII means more than mere affiliation.[92] When Title VII was amended in 1972, Congress expanded the definition of "religion" in §701—captioned "Definitions"—to include "all aspects of religious *observance* and *practice*, as well as belief."[93] This expansive definition of "religion" applies broadly to the whole of Title VII, including the religious exemption in §702(a).[94] In permitting exempt employers to enforce religiously-motivated codes of conduct, the Religious Conduct View seems to make better sense of this definition: the organization is permitted to take employment action based on an individual's religious "observance and practice," not merely his or her belief or affiliation.

Somewhat ironically, by treating religion in Title VII as merely a matter of affiliation, the Coreligionist View might have the unintended consequence of *increasing* instances of discrimination. If religious discrimination is to be understood in terms of affiliation only, rather than conduct, then *non-exempt* (i.e. secular) employers could presumably refuse to accommodate a great deal of religious observance and practice, such as the wearing of religious head coverings. However, that sort of religious discrimination seems to

---

[91] *See* Lederman, *supra* note 68 ("A Catholic church, for example, may prefer Catholics for employment positions.").
[92] 42 U.S.C. § 2000e(j) (2012).
[93] *Id.* (emphasis added).
[94] Little v. Wuerl, 929 F.2d 944, 950 (3d Cir. 1991) ("Section 701(j) of Title VII, which applies to both exemptions, defines religion broadly.").

be precisely what Title VII is understood to prohibit.[95] If discrimination against employees because of their religious *observance* and *conduct* is the sort of religious discrimination prohibited by Title VII for secular employers, then—to be consistent—exempt religious organizations must be permitted to make their employment decisions on the basis of observance and conduct as well, just as the Religious Conduct View suggests, insofar as §702(a) permits them to engage in *religious* discrimination.[96] Imagine, for example, an LGBT employee at a *non*-exempt business who, after being fired, claims *religious* discrimination, i.e. that his employer is imposing on him its religiously-motivated sexual standards. If courts are to understand this as a violation of Title VII's prohibition on religious discrimination, then symmetry suggests the same be treated as *permissible* religious discrimination in the context of an exempt religious employer. The term should be read consistently across the statute.

The Coreligionist View is further undermined by a comparison between the text of Title VII and the text of the Americans with Disabilities Act of 1990 ("ADA"). Title I of the ADA, which prohibits discrimination in employment on the basis of an individual's disability, contains a provision allowing religious organizations to make employment decisions on the basis of religion, a provision copied nearly word-for-word from §702(a) of Title VII.[97] Importantly, the ADA exemption is followed by a clarifying provision not found in Title VII: "a religious organization may require that all applicants and employees conform to the religious tenets of such organization."[98] According to Professor

---

[95] EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033-34 (2015) (characterizing a clothing retailer's decision not to accommodate a Muslim job applicant whose head coverings violated the employer's dress policy as religious discrimination under Title VII).

[96] *See, e.g.*, State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985) (construing a sports club's failure to hire women who were living with their boyfriends as religious discrimination). *See also* James Nelson, *Corporate Disestablishment*, VA. L. REV (forthcoming) (citing cases where secular for-profit employers were found liable for religious discrimination because they enforced "work rules based on the Bible" or "evaluate(d) employees according to religious criteria").

[97] 42 U.S.C. § 12113(d)(1) (2012) ("This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.").

[98] 42 U.S.C. §12113(d)(2) (2012).

Douglas Laycock, this clarifying language in the ADA reflects an attempt by Congress to address the ambiguity of Title VII's religious exemption, to the effect that—at least under the ADA—the right to hire persons "of a particular religion" includes *conformity in conduct*, not mere affiliation.[99] Moreover, the ADA clarification explicitly provides that religious employers are free to require this conduct conformity of *all* applicants and employees, not just those professing to be religious adherents—precisely what the Religious Conduct View espouses. To be sure, Congress has not inserted this language into Title VII, but the existence of the provision in the ADA—a closely-related parallel employment discrimination law with a nearly identical religious exemption—is at least suggestive as to how the term "religion" ought to be interpreted in §702(a). It would be odd if the identical "particular religion" language in Title VII and the ADA carried significantly different meanings.

Like the Coreligionist View, the Broad View also fails to square with the text of Title VII. As written, the exemption permits religious employers to take into consideration an individual's "particular religion," yet fails to provide any explicit authorization to discriminate on the basis of Title VII's other protected statuses. Moreover, the language of the exemption focuses on the *individual employee's* religion, not the *employer's* religion.[100] If Congress intended to permit religious employers to discriminate in virtually any fashion so long as they provide a religious justification, then in all likelihood Congress would have written the exemption to emphasize the *employer's* religion. In fact, Congress did exactly that in Title IX of the Education Amendments of 1972, which reads: "this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets *of such organization*."[101] Such an exemption might have permitted religious organizations to discriminate on the basis of any of Title VII's protected statuses as long as the organizations did so for religious reasons—exactly the sort of thing suggested by the Broad View.[102] But Congress did not write the exemption that way. Instead, it wrote the exemption to focus on the particular religion of the individual employee.

---

[99] Douglas Laycock, *Defense Authorization Bill Needs to Protect Religious Liberty*, THE HILL (Nov. 17, 2016), http://thehill.com/blogs/congress-blog/labor/306539-defense-authorization-bill-needs-to-protect-religious-liberty.
[100] 42 U.S.C. § 2000e-1(a) (2012) ("individuals of a particular religion").
[101] 20 U.S.C. §1681(a)(3) (2012) (emphasis added).
[102] *See supra* note 79 and accompanying text.

While not strictly a textual argument, the drafting history of §702(a) provides further evidence that the Broad View strains the exemption's meaning. In 1963, H.R. 7152—the House version of the Civil Rights Act of 1964—*completely exempted* religious organizations from the coverage of Title VII.[103] Eventually, over in the Senate in May 1964, Senators Dirksen and Mansfield presented a substitute that ultimately became law.[104] On June 3 a comparison between H.R. 7152 and the Dirksen-Mansfield amendment noted that, among other differences, the original House version completely exempted "religious corporations, associations, or societies" while the amendments instead exempted "religious organizations *with respect to employment practices based on religion*."[105] Senator Dirksen himself, on June 5, provided his interpretation of the changes: "The general exemption of a religious corporation, association or society from this title of the bill is limited by the amendment to the employment of individuals of a particular religion to perform work connect with its religious activities."[106]

The key takeaway from this drafting history is that Congress specifically denied religious organizations a comprehensive exemption from Title VII, and while the Broad View does not take §702(a) to be a comprehensive exemption, its proponents admit that it comes close.[107] Correctly understood, the text of §702(a) exempts religious employers from Title VII's prohibition on religious discrimination; §702(a) does not authorize religiously-motivated discrimination against the statute's other protected statuses.[108]

Both the Coreligionist View and the Broad View face challenges comporting with the final text of Title VII, yet the Religious Conduct View avoids these problems. By suggesting that religious employers can discriminate not only on the basis of religious affiliation, but also on basis of religiously significant conduct, the Religious Conduct View aligns with the broad

---

[103] *See supra* note 27.
[104] *See McClure*, 460 F.2d at 558.
[105] Comparative Analysis of Title VII of H.R. 7152 as Passed by The House with S. 1937, as reported in 110 Cong. Rec at 12597 (emphasis added).
[106] 110 Cong. Rec. at 12818.
[107] *See supra* note 79.
[108] The EEOC's own position, which may or may not be entitled to any deference, emphasizes this point. EEOC, No. 915.003, Compliance Manual on Religious Discrimination, §12, at 18 (2008) ("[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.").

definition of religion used in Title VII.[109] The Religious Conduct View also provides an important degree of definitional symmetry between secular and religious employers. Just as it is *impermissible* for secular employers to impose religious conduct requirements on their employees, so it is *permissible* for religious employers to impose those same sorts of religious conduct requirements on their employees. Yet, unlike the Broad View, the Religious Conduct View still coheres with text's focus on the religion of the employee (rather than the employer), and with the fact—evident in the text and its drafting history—that Congress exempted religious organizations from Title VII's prohibition on religious discrimination, not discrimination based on other statuses such as race, sex, and national origin.

IV. CASELAW SUPPORT FOR THE RELIGIOUS CONDCUT VIEW

Not only does the text of the statute favor the Religious Conduct View, so does the current case law. While the Supreme Court has yet to provide a definitive treatment of the phrase "individuals of a particular religion," the Courts of Appeals have consistently brushed aside both the Coreligionist View and the Broad View. What emerges from these cases is, in essence, the Religious Conduct View.

One of the early §702(a) cases to cast doubt on the Coreligionist View and instead adopt something along the lines of the Religious Conduct View arose in 1982.[110] The case, *Larsen v. Kirkham*, involved a Mormon, Mary Larsen, employed as a teacher at a Mormon "Business College."[111] The school declined to renew Ms. Larsen's teaching contract based on its perception that she, *though a professed Mormon*, "was insufficiently involved in ecclesiastical activities to justify her retention as a teacher at a church school."[112] Ms. Larsen responded by claiming religious discrimination in violation of Title VII based on a Coreligionist View under which she argued that while the school could permissibly restrict hiring to members of the Mormon Church, it could not exercise "internal control" of such Mormons by enforcing certain standards of church participation—i.e. conduct.[113] The district court, in an opinion

---

[109] 42 U.S.C. § 2000e(j) (2012).
[110] Larsen v. Kirkham, 499 F. Supp. 960 (D. Utah 1980), *aff'd*, No. 80-2152, 1982 WL 20024 (10th Cir. Dec. 20, 1982).
[111] *Id.* at 961.
[112] *Id.*
[113] *Id.* at 966.

affirmed by the Tenth Circuit, rejected Ms. Larsen's view for two reasons. First, the court noted that her Coreligionist treatment of the §702(a) exemption was inconsistent with the definition of "religion" found in § 701(j).[114] Second, the court reasoned that policy considerations foreclosed the Coreligionist View: "it is inconceivable that the exemptions would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task."[115] Ms. Larsen's complaint was dismissed.[116]

An even better-known case is *Little v. Wuerl*.[117] In that case, a Catholic school knowingly hired non-Catholic teacher, Susan Little.[118] Later on the school dismissed Ms. Little when she remarried in violation of Catholic doctrine, as spelled out in the school's employee handbook.[119] In evaluating Little's claim of unlawful religious discrimination under Title VII, the Third Circuit carefully examined the text and history of §702(a), finding that the broad definition of "religion" in Title VII served to permit the school's action.[120] The holding in *Little* is not reconcilable with the Coreligionist View—this was not merely a situation where the school gave hiring preference to Catholics. The plaintiff was hired as a non-Catholic and remained a non-Catholic when she was terminated. Her termination had nothing to do with her religious *affiliation*, but everything to do with the *conduct* that was considered religiously significant by her employer.[121] Other cases are similarly inconsistent with the Coreligionist View.[122]

---

[114] *Id. See supra* notes 93-94 and accompanying text.
[115] *Larsen*, 499 F. Supp. at 966.
[116] *Id.* at 976.
[117] 929 F.2d 944 (3d Cir. 1991).
[118] *Id.* at 945.
[119] *Id.* at 946.
[120] *Id.* at 951 ("We conclude that the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts.").
[121] *Id.* at 950.
[122] *See, e.g.*, Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000) (holding that a religious school could dismiss a teacher for having engaged in premarital sex, as long as that was the real reason for its dismissal), Hall v. Baptist Memorial Health Care Group, 215 F.3d 618, 623 (6th Cir. 2000) (finding that the exemption covered a Baptist college when it fired its Student Services Specialist after she—a lesbian—became ordained in local church widely known for its pro-LGBT stance), *and* Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 194 (4th Cir. 2011) (concluding that §702(a) permitted a Catholic nursing home to terminate an employee who refused to stop wearing the long skirts and head coverings prescribed by her non-Catholic religion).

The Broad View has also been subject to critique by the courts, with the clearest cases discrediting the Broad View being *EEOC v. Pacific Press Publishing Association* and *EEOC v. Fremont Christian School*, both from the Ninth Circuit.[123] In *Pacific Press*, Lorna Tobler, a Seventh Day Adventist in good standing with her church, sued her employer, an Adventist publishing house, for sex discrimination on account of its written wage scale that specified higher salaries and additional financial allowances for males (especially married males) as compared to females.[124] After examining the drafting history of Title VII's religious exemption and finding it to preclude the view that religious organizations were completely exempt from Title VII, the Ninth Circuit noted that "[e]very court that has considered Title VII's applicability to religious employers has concluded that Congress intended to prohibit religious organizations from discriminating among their employees on the basis of race, sex or national origin."[125] Thus the court affirmed the judgment in favor of Ms. Tobler.[126] Pacific Press Publishing did not actually assert any religious justification for its unequal pay scale—in fact the Adventist Church was said to be in full support of equal pay.[127] Nevertheless, the Ninth Circuit's approach suggests that it would find for a plaintiff even where a religious organization was asserting religious justification for what amounted to sex discrimination.

In *Fremont*, decided just four years after *Pacific Press*, the EEOC brought a Title VII sex discrimination action against an Assemblies of God school in virtue of the school's health insurance provisions for "head of household" employees, since the provisions favored "single persons and married men."[128] Fremont Christian based its practice of offering health insurance coverage only to heads of households on a literal interpretation of the Bible, believing "based on, *inter alia,* Ephesians 5:23, that in any marriage, the husband is the head of the household and is required to provide for that household."[129] In other words, the school put forth a *religious*

---

[123] EEOC v. Pacific Press Publishing Ass'n, 676 F.2d 1272 (9th Cir.1982), *abrogated on other grounds as recognized by* American Friends Service Committee Corp. v. Thornburgh, 951 F.2d 957, 960 (9th Cir.1991); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986).
[124] *Pacific Press*, 676 F.2d at 1275.
[125] *Id.* at 1277.
[126] *Id.* at 1283.
[127] EEOC v. Pac. Press Pub. Ass'n, 482 F. Supp. 1291, 1307 (N.D. Cal. 1979) (lower court opinion).
[128] *Fremont*, 781 F.2d at 1364.
[129] *Id.*

justification for an employment practice that fundamentally discriminated on the basis of sex—its policy of providing fewer benefits to women than to men. This is precisely the sort of situation thought to be permissible under §702(a) by those who advocate for the Broad View.[130] Indeed, Fremont Christian mounted a defense based on the statutory exemption, which the Ninth Circuit rejected.[131] Citing a religious justification for its sex discrimination was not enough to save the school from liability, contra what the advocates of the Broad View might suggest.

Perhaps recognizing this problem, Professor Esbeck attempts to distinguish *Fremont*, arguing that the Ninth Circuit determined that the school's proffered religious justification for its practice was merely a "pretext."[132] If Esbeck is right, i.e. if the thing about Ephesians 5:32 can be written off as a pretext for sex discrimination, then *Fremont* is not *really* a case where an exempt religious employer has a genuine religious reason for its status-based discrimination. Yet Esbeck's attempt to distinguish *Fremont* faces two challenges. First, it is far from clear that the courts were actually treating the school's religious justification as pretextual. The body of the Ninth Circuit opinion explicitly references the school's religious basis for its practices, whereas the court's mention of the religious justification being pretextual is relegated to a footnote.[133] That footnote purports to affirm the district court's finding of pretext, but in fact the lower court never used the term "pretext" and instead "assume[d] the School's insurance policy *to be based upon religious belief*."[134] Second, *Fremont* suggests—if nothing else—that even if the Broad View were technically correct as a matter of statutory interpretation, this view would rarely if ever have the real-world effect of allowing religiously-motivated sex or race discrimination, for the simple reason that courts—like the one in *Fremont*—would be quick to impose liability by writing off the purported religious rationale as pretextual. *Fremont*, therefore, remains a solid indicator that the Broad View of §702(a) goes too far and will likely not be entertained by the courts.

---

[130] *See supra* notes 80-83.

[131] *Fremont*, 781 F.2d at 1365 (citing *Pacific Press* and the legislative history of §702(a) for its finding that the exemption does not immunize religious employers from liability for sex discrimination).

[132] Esbeck, *Federal Contractors*, *supra* note 76, at 395.

[133] *Fremont*, 781 F.2d at 1364 n.1.

[134] EEOC v. Fremont Christian Sch., 609 F. Supp. 344, 349 (N.D. Cal. 1984) (emphasis added).

Insofar as *Pacific Press* and *Fremont* both emerged from the Ninth Circuit; might advocates for the Broad View seek support elsewhere?[135] Take, for instance, *EEOC v. Mississippi College*,[136] a case that Professor Esbeck relies upon, asserting that it "forthrightly" says §702(a) provides "a defense to an employee's claim of discrimination no matter the employee-plaintiff's protected class."[137] *Mississippi College* involved a sex discrimination claim initiated by part-time psychology professor at a Baptist college after she was passed over for a full-time opening. The school proffered two reasons for her rejection. First, that it wanted to hire an experimental psychologist, and second, that it wanted to hire a Baptist (in accordance with its written policy), whereas the plaintiff was a Presbyterian.[138]

Mississippi College seems like a very informative case—it pits a plaintiff's sex discrimination claim up against a religious organization's defense of permissible religious discrimination under §702(a). What happens when two such claims collide? Ultimately, the Fifth Circuit in *Mississippi College* remanded for the district court to figure out whether the school's rejection of Dr. Summers was in fact based on its preference for Baptists (basically a pretext question), noting that if so, then "§702 exempts that decision from the application of Title VII."[139] One might be tempted to construe this holding—like Esbeck attempts to do—as suggesting that religious organizations can engage in status-based discrimination (e.g. sex discrimination) as long as they can show that what they are

---

[135] One might argue that there is a circuit split on this question, with the Ninth Circuit taking a narrower view of the §702(a) exemption than the other circuits. *See, e.g.*, Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132 (D. Or. 2017). In that recent case, a professor at a Christian university brought a marital discrimination claim under Oregon law after she was dismissed for having sex while unmarried. The parties agreed that Oregon has an exemption for religious employers "identical" to §702(a). *Id.* at 1152. Although the University cited *Hall* and *Little* for the proposition that this exemption permits religious employers to terminate an employee whose conduct is inconsistent with the religious beliefs of the employer, the court—citing *Fremont*—claimed that "[t]he Ninth Circuit, however, has squarely limited the federal exemption to barring claims of *religious* discrimination." *Id.* at 1152-53 (emphasis original). Still, it might be premature to christen a circuit split, since only the Ninth Circuit seems to have handled a case—*Fremont*—directly on point, i.e. where a religious employer claims religious reasons for discriminating on the basis of another protected status.

[136] 626 F.2d 477 (5th Cir. 1980).

[137] Esbeck, *Federal Contractors*, *supra* note 76, at 378.

[138] *Mississippi College*, 625 F.2d at 479. The school did offer Dr. Summer continued part-time employment at an increased salary, having no apparent objection—with her in that position—to her Baptist views. *Id.* at 480.

[139] *Id.* at 486.

doing is religiously motivated. On closer inspection, though, *Mississippi College* does not support such logic. The College never claimed that its religious beliefs motivated a preference for *men over women* but rather a religious preference for *Baptists over non-Baptists*. The College's religious preference fails to implicate otherwise-prohibited sex discrimination, and therefore, while consistent with either the Coreligionist View or the Religious Conduct View, the case falls short of the kind of situation envisioned by the Broad View.[140]

Essentially, *Mississippi College* says that if a religious organization can show that it really made a hiring decision on the basis of the applicant's religion, that ends the inquiry. On the other hand, if it looks like the religious organization made the decision on the basis of preference for males over females (whether that preference is religiously motivated or not), then §702(a) does not prevent the EEOC from investigating a sex discrimination claim. As a result, *Mississippi College* cannot be read to support the Broad View.

Admittedly, cases wrestling with the Broad View of §702(a) are thin on the ground with the exception of *Fremont*.[141] Yet *Fremont* remains good law, and the general tenor of other cases suggests that courts will not let religious organizations get away with discrimination against non-ministers on the basis of another protected status, even if the discrimination is allegedly compelled by sincere religious belief. It seems even more certain, though, that courts will not restrict permissible religious discrimination under §702(a) to that which is based on mere religious affiliation. Instead, courts have regularly allowed exempt employers to discriminate on the basis of religious affiliation *and* religiously significant conduct, in harmony with the Religious Conduct View.

II.C. Practical Considerations Supporting the Religious Conduct View

Besides the text and the case law, there are important practical arguments favoring the Religious Conduct View of §702(a) over the narrow Coreligionist View and over the Broad View. Specifically, the Religious Conduct View ensures that religious organizations are not unfairly advantaged or disadvantaged

---

[140] *Mississippi College* involved only discrimination on the basis of religious affiliation, never raising the question of discrimination based on conduct. 626 F.2d at 478.

[141] This is likely because religious organizations seeking to engage in religiously-motivated sex or race discrimination against non-ministers are quite rare.

compared to secular ones, reduces the importance of the scope controversy, minimizes the role of the ministerial exception debate, and diminishes the incentive for further denominational splintering. Some of these arguments, taken individually, might equally support both the Religious Conduct View *and* one of the others, but—taken as a lot—these practical arguments favor the Religious Conduct View.

First—and perhaps most importantly—the Religious Conduct View effectively levels the playing field for religious organizations compared to secular ones when it comes to the constraints of Title VII, which seems to be the intent of the exemption.[142] In contrast, the Broad View would give religious organizations excessive latitude and the Coreligionist View would put them at an unfair disadvantage.

It is fairly easy to see how the Broad View would grant a concerning degree of latitude to religious organizations, aside from whatever is already provided by the ministerial exception: the Broad View purports to allow religious employers to be free from liability under Title VII as long as they ground their discrimination in religious belief. An organization like Bob Jones University of the 1970's, for example, would apparently be permitted to engage in racially discriminatory hiring practices in light of the school's religious views.[143] Such an approach would give religious organizations a great deal of latitude not available to secular organizations, even those with strong moral convictions.

On the other hand, the Coreligionist View saddles religious organizations with an unfair disadvantage. Under Title VII even secular organizations are free to discriminate based on various unprotected grounds. As a result, secular organizations can enforce moral codes of conduct—such codes of conduct might even prohibit things like extramarital sex. In *Boyd v. Harding Academy*, for

---

[142] In *Amos*, the Court construed §702(a) as "lifting a regulation that burdens the exercise of religion" rather than "singl[ing] out religious entities for a benefit." Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987). *See also* LUPU & TUTTLE, *supra* note 43, at 386 ("The exemption places religious nonprofits on equal footing with other cause-oriented organizations. The Democratic Party may insist that all its employees be enrolled as voting Democrats; likewise, environmental groups may require all employees to embrace green commitments.").

[143] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983) ("The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage."). *Bob Jones* was not a Title VII case, but one can, without much difficulty, imagine an employment discrimination claim arising from this same religious belief. *See infra* Section III.B.

example, the Sixth Circuit allowed a school to enforce a code of conduct prohibiting extramarital sex without invoking the §702(a) exemption.[144] Yet a problem arises on the Coreligionist View when a *religious* employer attempts to enforce such a code of conduct: the aggrieved plaintiff asserts that the conduct requirement—insofar as the conduct is based on the employer's religious beliefs—amounts to *religious* discrimination, which *is* illegal (unless, of course, religious organizations are exempt from liability for discrimination based on religious conduct, as the Religious Conduct View holds). This is basically what transpired in *Little v. Wuerl*, where Susan Little was dismissed by her employer—a Catholic school—after her unauthorized remarriage.[145] Ms. Little claimed *religious* discrimination, i.e. that the school's enforcement of its religiously-motivated conduct requirements was impermissible, since "her religious affiliation never changed."[146] On her view—the Coreligionist View—she probably would have won. But even a secular organization—say, for example, a humanitarian non-profit with morally conservative directors—might conceivably adopt codes of conduct that involve certain prohibitions as to divorce and remarriage. Since marital status is not itself protected by Title VII, such a code of conduct would be nondiscriminatory; an employee in Ms. Little's situation would have no Title VII claim against a secular employer, even under a Coreligionist View of §702(a).

Curiously, then, the Coreligionist View would permit *secular* organizations to enforce moral conduct codes without fear of liability, whereas *religious* organizations—insofar as their conduct codes are usually motivated by religious belief—could be found in violation of Title VII when enforcing the very same sorts of conduct requirements. By extending "religion" in §702(a) to include religious belief *and conduct*, as the courts have already done, the Religious Conduct View avoids this problem of disadvantaging religious organizations, while at the same time ensuring that religious organizations are not unfairly liberated from the constraints of Title VII.

Second, the Religious Conduct View—especially as compared to the Broad View—reduces the importance of the "scope" controversy regarding §702(a).[147] The scope controversy—that is,

---

[144] Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 414 (6th Cir. 1996). *See also* Saxe, *supra* note 66, ("engaging in premarital sex is not protected under Title VII").
[145] *Little*, 929 F.2d at 945.
[146] *Id.* at 950.
[147] *See supra*, notes 43-45 and accompanying text.

exactly what organizations are covered by the religious exemption in Title VII—remains a heated line-drawing problem, as evidenced by the recent *World Vision* case.[148] In that case, there was no dispute that employees of World Vision, a humanitarian non-profit organization, had been terminated for religious reasons.[149] The key question was whether or not World Vision, Inc. should be considered a *religious* organization under the exemption.[150] The district court looked at various scope cases and ultimately applied the Third Circuit's nine-factor test.[151] A Ninth Circuit panel, in reviewing the case and affirming that World Vision qualified for the exemption, nevertheless disagreed about the test to use, with the majority describing some of the Third Circuit's factors as a "constitutional minefield."[152]

Now imagine cases arising under the Broad View where organizations that fall under the §702(a) exemption can discriminate for religious reasons even to the point of discriminating on basis of Title VII's other protected statuses.[153] If §702(a) provides such a degree of latitude to exempt organizations—as opposed to merely leveling the playing field between religious organizations and secular ones—then it seems plausible that more organizations might find themselves clamoring to qualify for the exemption, even for-profit ones.[154] Conversely, under the Religious Conduct View the scope of the exemption is not so pivotal. Whether an organization is exempt or not, it still cannot discriminate on the basis of Title VII's other protected statuses. If the discrimination is based on a violation of a moral conduct code, the organization is probably fine (on the Religious Conduct View) whether exempt or not: if exempt, then the employment action is permissible on the basis of religiously significant conduct. If not exempt, then the organization can simply show that the employment action was based on nondiscriminatory moral conduct requirements, as in *Boyd v. Harding Academy*.[155]

---

[148] Spencer v. World Vision, Inc., 570 F. Supp. 2d 1279 (W.D. Wash. 2008), *aff'd,* 619 F.3d 1109 (9th Cir. 2010), *aff'd,* 633 F.3d 723 (9th Cir. 2011).
[149] The employees in question had been terminated for their non-Trinitarian views, i.e. for disbelieving in the deity of Jesus Christ. *Id.* at 1282.
[150] *Id.* at 1280.
[151] *Id.* at 1285-86 (applying the test from *LeBoon*, 503 F.3d 217 at 226).
[152] *World Vision*, 633 F.3d at 730. *See supra* note 44.
[153] Suppose, for example, World Vision or some similar organization adopted a policy of hiring only males for its executive leadership positions.
[154] *See supra* note 43.
[155] 88 F.3d at 414-15.

It might seem like the scope problem is equally minimized on both the Coreligionist View and on the Religious Conduct View, yet that is not necessarily true. Take organizations that do not practice coreligionist hiring (that is, they hire people of all faiths or no faith at all) yet do enforce religiously motivated codes of conduct—say, codes that prohibit extramarital sex. On the Coreligionist View, a plaintiff who has been terminated for engaging in prohibited sexual activity is likely better off arguing that his employer *is* exempt under §702(a) but that its action against him was *religious* discrimination beyond the scope of permissible coreligionist preference in hiring. If instead the organization is found to be secular, i.e. non-exempt, the termination would be permissible as legitimate nondiscriminatory moral conduct enforcement.[156] Thus while the scope controversy will likely remain important, especially for cases involving mere religious affiliation, the Religious Conduct View does the best job of minimizing the drama.

Third, the Religious Conduct View conceivably minimizes the controversy over the breadth of the ministerial exception. In *Hosanna-Tabor*, the Supreme Court avoided providing a clear formula for courts to use in determining which employees at which sorts of organizations should be considered ministers, but nevertheless enforced a strong hands-off approach—with respect to government control—for those who qualify.[157] As a result, Title VII has little to no application when it comes to employees who count, somehow or other, as ministers. Consider the implications of this on the Coreligionist View: Title VII would have no application to *ministerial* employees at religious organizations, but *non-ministerial* employees at the very same organizations would be almost completely covered by Title VII except with respect to the narrow carve-out for religious affiliation preferences. This, it would appear, makes the scope of the ministerial exception tremendously important, maybe too important. Except in clear cases of religious employers carrying out their preference for a particular religious affiliation, an aggrieved non-minister plaintiff claiming any sort of discrimination under Title VII—including discrimination based on religiously significant conduct—would almost surely win, whereas

---

[156] *See, e.g.*, Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251, 2012 WL 1068165 at *7 (S.D. Ohio Mar. 29, 2012) ("Defendants' justification for their actions [firing an employee who engaged in artificial insemination] could ultimately have merit should it be proven to have been based on a prohibition of extramarital sexual activity.").

[157] *See supra* notes 32-37 and accompanying text.

if the plaintiff is found to be a minister, he or she would almost surely lose.

This bifurcation—which arises on the Coreligionist View—seems undesirable in a world where courts have no clear, consistent guidance as to how to go about determining whether a particular employer in fact *is* a minister.[158] The Religious Conduct View reduces this problem by making an employee's ministerial status less consequential. In cases where employment action is taken on the basis of the employee's religious conduct or belief, then—whether or not the employee is a minister—the employment action will still be permissible under §702(a).[159] This is not to say that the scope of the ministerial exception would be completely irrelevant, or that the ministerial exception simply dissolves into §702(a) on the Religious Conduct View. Fundamentally, the purposes of the two are distinct: the ministerial exception allows churches to have freedom in selecting their spiritual leaders and teachers,[160] while §702(a) exists to permit religious employers "to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."[161] This is where the Broad View goes too far, all but merging §702(a) into the ministerial exception. On the Broad View, the only difference is that for the non-ministers the employer needs to provide a non-pretextual religious justification for the discrimination.[162]

Finally, the Religious Conduct View avoids the incentive toward further sectarian and denominational splintering that might arise if the Coreligionist View were embraced by the courts. Professor Esbeck suggests that if the Coreligionist View prevails, employers might work around its constraints by restricting hiring to members of very narrowly-defined sects or denominations.[163] Professor Lederman, in defending the Coreligionist View,

---

[158] Providing such guidance may not even be possible, if Justice Thomas is right. *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring) ("Judicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'mainstream' or unpalatable to some.").

[159] *Cf.* Herx v. Diocese of Fort Wayne-S. Bend, Inc., 772 F.3d 1085 (7th Cir. 2014) (finding that Catholic school teacher was not a minister but allowing the pretext question to go forward on the assumption that the school's stated religious justification for her termination—if not a pretext—would be permissible under Title VII) *and* Richardson v. Nw. Christian Univ., 242 F. Supp. 3d 1132 (D. Or. 2017) (similar).

[160] *Hosanna-Tabor*, 565 U.S. at 188.

[161] *Little*, 929 F.2d at 951.

[162] *See supra* note 79.

[163] Esbeck, *Federal Contractors*, *supra* note 76, at 387.

recognizes this as well.[164] After noting that Title VII might plausibly be interpreted to prohibit discrimination based on sexual orientation, Lederman hypothesizes about an "audacious" religious employer arguing that an employee is not a member of a particular religion—i.e. loses his or her religious affiliation—"just because that employee is gay, or is transgender, or has slept with or married someone of the same sex."[165] Some religions may already work this way, at least with respect to certain types of conduct. The Mormon plaintiff in *Amos*, for example, was fired because he "failed to qualify for a temple recommend" such as are "issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco."[166]

In this sort of situation, the religious employer requires employees to maintain valid membership in a specific church or denomination, and then permissibly terminates employees whose memberships become invalid due to conduct violations. Here, the employer is ostensibly discriminating merely on the basis of religious affiliation—permissible on the Coreligionist View—and yet the discrimination ultimately stems from the employee's religiously disfavored conduct. If this is right, and if this "solution" to the constraints of the Coreligionist View were adopted by religious employers, then the Coreligionist View could have the surprising effect of making employment at religious organizations *more exclusive* than the Religious Conduct View.

In sum, both the Coreligionist View and the Broad View have trouble aligning with the text of §702(a), the existing case law, and a handful of relevant practical considerations. Something more like the Religious Conduct View does a better job capturing the meaning of the exemption. But if the Religious Conduct View is in fact correct, how does it play out in practice? Specifically, what are the implications of the Religious Conduct View, as compared to the other views, for religious organizations that object to same-sex intimacy and marriage? The next Part attempts to address these questions.

---

[164] Lederman, *supra* note 68.

[165] *Id.* Lederman continues: "[t]here is no case law addressing that statutory question." *Id.* Yet he asserts that "the coreligionist exemption will not justify discrimination against LGBT employees, even as applied to a qualifying organization that opposes homosexuality on religious grounds." *Id. See infra* Part III for further discussion of these issues.

[166] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 330 n.4 (1987).

PART III – Applying the Framework to Sexual Orientation Discrimination

Perhaps one reason why the case law is relatively sparse with respect to the exemption for religious organizations in Title VII—especially as to the question about whether the exemption permits such organizations to discriminate on the basis of protected statuses like race, sex, and national origin *for religious reasons*—is that few religious organizations actually attempt to engage in such discrimination. It is hard to imagine, these days at least, very many religious employers intending to discriminate on the basis of race, even for religious reasons. Religiously motived discrimination on the basis of sex might be more likely—as in *Fremont*[167]—but much of that probably falls under the ministerial exception: e.g. hiring only male pastors, priests, etc.[168] All this is likely to change as Title VII is expanded to prohibit discrimination based on sexual orientation—it is easy to imagine religious employers discriminating on the basis of sexual orientation *for religious reasons*.[169] Even the Supreme Court has recognized that many religious individuals and organizations "deem same-sex marriage to be wrong . . . based on decent and honorable religious or philosophical premises."[170] Indeed, accounts of employment discrimination against homosexuals at religious organizations are already dotting the landscape.[171] Thus, changes to Title VII along such lines—that is, adding protections for sexual orientation—are bound to put any and all interpretations of the §702(a) exemption to the test.

As a preliminary matter, it is worth noting that although Congress could pass legislation amending or supplementing Title VII in order to prohibit employment discrimination on the basis of sexual orientation, the change—at least in the short run—is more likely to be brought about by judicial action.[172] In fact, this has already occurred in the Seventh and Second Circuits, where recent *en banc* decisions have concluded that "discrimination on the basis

---

[167] *See supra* notes 128-131 and accompanying text.
[168] *See supra* notes 32-37.
[169] *See supra* note 17.
[170] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).
[171] *See supra* note 5.
[172] Congress has made numerous attempts to amend or supplement Title VII in this respect. *See, e.g.*, H.R. 3185, 114th Cong. § 7 (2015) (proposing to replace "sex" in Title VII with "sex, sexual orientation, and gender identity"), *and* Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(a) (2013) (as passed by Senate Nov. 7, 2013) (prohibiting employment discrimination "because of such individual's actual or perceived sexual orientation").

of sexual orientation is a form of sex discrimination."[173] By reading sexual orientation protections into the existing prohibitions against sex discrimination, this judicial approach leaves Title VII's religious exemption undisturbed, and consequently catapults the challenging question of how §702(a) might apply to religious organizations with long-standing religious convictions about the morality of homosexual conduct onto center stage.[174]

To imagine how this might go, and to highlight the different outcomes generated by the various interpretations of §702(a), consider two hypothetical scenarios. In the first scenario a religious organization terminates a non-ministerial employee who "comes out" as a homosexual but who—for religious reasons—refrains from engaging in same-sex intimacy. In the second scenario, a similar religious organization terminates an employee who marries someone of the same sex. The Coreligionist View would probably prohibit the discrimination in either scenario, whereas the Broad View would allow the discrimination in both. The Religious Conduct View, in contrast, would likely prohibit the discrimination in the first scenario, but allow it in the second.

III. A. Scenario 1: The Celibate Homosexual

For the first hypothetical, picture a religious organization that—for sincere religious reasons—condemns homosexuality as sinful. The organization terminates a non-ministerial employee who "comes out" as a homosexual, but who—consistent with the organization's religious tenets prohibiting sexual conduct outside of traditional one-man-and-one-woman marriage—commits to a celibate lifestyle.[175] Or, for a variation on this hypothetical, imagine

---

[173] Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 341 (7th Cir. 2017) ("The question before us is not whether this court can, or should, 'amend' Title VII to add a new protected category . . . Obviously that lies beyond our power. We must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."); Zarda v. Altitude Express, Inc., 883 F.3d 100, 128 (2d Cir. 2018) ("[W]e now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'").

[174] As the *Hively* and *Zarda* majority opinions both recognized. *See supra* notes 19-20.

[175] This scenario might seem far-fetched, but in conservative religious circles it is apparently not unusual. *See* Evan Urquhart, *Thou Shalt Not Forsake Thy Celibate Christian LGBT Brethren*, SLATE (July 4, 2014), http://www.slate.com/blogs/outward/2014/07/04/celibate_LGBT_christians_the_mainstream_gay_community_should_be_more_welcoming.html (describing "a small, tight-knit group of LGBT people who, though fully out, remain committed to conservative Christian prohibitions on gay sexual activity"). *See also* Molly

the employee is in a monogamous opposite sex marriage and after "coming out" as a homosexual decides to remain faithful to the marriage in order to maintain conformity with religious conduct codes and to care for his or her immediate family members.[176] The important stipulation of either variation is that there is *no known homosexual conduct*, only the employee's self-ascribed "status" as a homosexual. The religious organization terminates the employee on the basis of this status alone, not on the basis of any conduct.[177] In response, the employee sues for sexual orientation discrimination under *Hively* and *Zarda*.[178]

The outcome on this first hypothetical seems fairly straightforward on the Coreligionist View. As long as the employee maintains his or her religious affiliation—which seems to be the case here—a termination on the basis of sexual orientation would constitute impermissible status-based discrimination. Things would be quite different under the Broad View. Under that interpretation, exempt employers are permitted to discriminate even on the basis of Title VII's protected statuses, as long as they do so for sincere religious reasons.[179] For Esbeck and other advocates of the Broad View, what really matters is whether the exempt employer offers religious reasons for its action, and whether or not the supplied reasons are pretextual. Assuming those requirements

---

Worthen, *Who Are the Gay Evangelicals?* NY TIMES (Feb. 27, 2016), https://www.nytimes.com/2016/02/28/opinion/sunday/who-are-the-gay-evangelicals.html.

[176] Again, this sort of situation is not unheard of, at least in some religious communities. A marriage of this variety is sometimes referred to as a "mixed orientation" marriage. *See* Preston Sprinkle, *An Open Conversation on Mixed Orientation*, PATHEOS (Jan. 5, 2015), http://www.patheos.com/blogs/theologyintheraw/2015/01/an-open-conversation-on-mixed-orientation/.

[177] For an example of just such a termination, consider the story of Joshua Gonnerman, an instructor at a Catholic institution. Despite his claimed celibacy, Mr. Gonnerman was allegedly fired from his position simply for being gay. *See* Melinda Selmys, *Thou Shalt Not Be Gay*, PATHEOS (May 26, 2017), http://www.patheos.com/blogs/catholicauthenticity/2017/05/thou-shalt-not-gay/.

[178] It is not immediately clear that *Hively*'s reasoning supports a discrimination claim by a celibate homosexual. Applying the comparative and association theories from *Hively* to a celibate homosexual, or to a homosexual who remains in a monogamous opposite-sex marriage, fails to expose discrimination based on the employee's *sex*. In the mixed marriage variation, for example, when we flip the employee's sex he or she is now in a same-sex marriage and would presumably have been fired for precisely that reason anyway.

[179] *See supra* Section I.B.

are satisfied, then the discrimination in this first scenario would be lawful under Title VII according to the Broad View.[180]

What about the Religious Conduct View? According to that interpretation of §702(a), exempt employers are permitted to discriminate against employees on the basis of religiously significant conduct, e.g. the employer can terminate an employee for violating some part of its religious moral code, such as entering into an unauthorized marriage.[181] However, religious employers cannot go so far as to discriminate on the basis of one of Title VII's protected statuses.[182] Assuming the reasoning in *Hively* and *Zarda* supports a sex discrimination claim by a celibate homosexual, or by one committed to a mixed orientation marriage, then there can be little doubt that Scenario 1 involves discrimination based on a protected status. The religious employer has terminated the employee simply because of his or her *status* as a homosexual, not because of any religiously significant *conduct*. Therefore, the religious organization in Scenario 1 would be liable for violating Title VII under both the Coreligionist View and the Religious Conduct View, but not the Broad View.

III. B. Scenario 2: The Same-Sex Marriage

A second scenario is perhaps more likely. Imagine, again, a non-ministerial employee at a religious organization. This time, there is no doubt that the employee has engaged in same-sex sexual conduct, and that the employer is aware of that conduct. Say, for example, the employee has recently married someone of the same sex—in violation of the employer's religious code of conduct prohibiting sexual intimacy outside the confines of "biblical" one-man-and-one-woman marriage—and was then fired after his or her employer discovered the marriage.[183] The introductory example—that of Jocelyn Morffi—provides a real-life version of this hypothetical.

Again, on the Coreligionist View it seems fairly clear that as long as the employee's religious affiliation remains unaffected, then termination on the basis of homosexual conduct is a violation of

---

[180] *See* Esbeck, *Federal Contractors*, *supra* note 76, at 393.
[181] *See supra* note 145.
[182] *See supra* Section I.B.3.
[183] A variation might be an employee who engaged in *extramarital* same-sex intimacy, but the marriage example seems to present the intuitively harder question. In the extramarital intimacy variation, it is perhaps clearer that the organization can show permissible religious conduct discrimination, as in cases like *Boyd*. *See supra* note 144.

Title VII (post-*Hively*).[184] Just the opposite seems true on the Broad View: since the employer posits a plausible religious justification for its action, the termination must be permissible. Analyzing Scenario 2 under the Religious Conduct View, however, yields a tension: on the one hand, the offending conduct is religiously significant—it violates the employer's religious moral beliefs; on the other hand, the conduct is arguably inseparable from a protected status under Title VII (one's sexual orientation, as a factor of one's sex). Nevertheless, under the Religious Conduct View the religious exemption could at least plausibly apply, since the discrimination in Scenario 2 is primarily conduct-based, not status-based.

The basic principle at work here is that §702(a) is best understood to permit adverse employment action based on religiously significant conduct, even where that conduct is closely tied to a protected status. The pregnancy cases provide the closest parallel, where *unmarried* women have been fired after becoming pregnant and subsequently claim sex discrimination. Even though discrimination on the basis of pregnancy does constitute sex discrimination,[185] the religious employers in these cases are given the option to successfully defended themselves by showing that the employment action was in fact based on the women's *conduct* (that is, engaging in extramarital sexual intimacy), rather than on the basis of pregnancy status itself.[186]

Scenario 2 is similar to these cases, insofar as the religious organization should be given the opportunity to show that its action was based on a religious conduct violation, not a protected status, despite the reality that the conduct and the status are closely intertwined. In Scenario 2, if the religious organization can show that it would terminate any employee who engages in sexual conduct outside of the organization's religiously-defined view of marriage, and—probably—that it would *not* terminate a celibate homosexual employee (Scenario 1), then the termination could be

---

[184] *See supra* note 67.

[185] 42 U.S.C. § 2000e(k) (2012).

[186] That fact question only matters where one of those reasons is permissible (termination based on religiously disfavored sexual conduct) and one is not (termination based on pregnancy). *See, e.g.*, Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000); Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802 (N.D. Cal. 1992); Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998); Redhead v. Conference of Seventh-Day Adventists, 440 F. Supp. 2d 211 (E.D.N.Y. 2006), adhered to on reconsideration, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132.

seen as permissible religious conduct discrimination under §702(a).[187]

The leading objection here is likely to be that the courts have declined to draw a distinction between status and conduct in the context of sexual orientation.[188] Thus, the objection would go, discrimination on the basis of homosexual conduct *just is* discrimination on the basis of homosexual status, and—unless we adopt the Broad View of §702(a)—such status-based discrimination is impermissible, even for religious reasons. As compelling as this objection may be, one potential problem is that it would ultimately allow *opposite-sex* intimacy and *same-sex* intimacy to be treated differently, a consequence that seems at odds with the goal of eliminating sexual-orientation-based discrimination. This strange result follows from the fact that courts have already established that religious organizations may, under the religious exemption in Title VII, terminate employees for engaging in *opposite-sex* intimacy that violates the organizations' religious views; namely, a belief that sexual conduct must be confined to traditional/biblical marriage.[189] For courts to then say that religious organizations are prohibited from terminating employees if the offending sexual conduct happens to involve two persons of the *same* sex would seemingly violate the nondiscrimination norms underlying Title VII. That is, the objection would subject people engaging in religiously-prohibited *opposite-sex* intimacy to harsher treatment (getting fired under §702(a)) than those engaging in religiously-prohibited *same-sex* intimacy, insofar as the latter would be automatically labeled "status" discrimination.

An objector might point out that this response, while perhaps sustainable in the context of *extramarital* sexual conduct, falls flat where the same-sex intimacy takes place exclusively within the bounds of a legally-recognized same-sex marriage.[190]

---

[187] The pretext question in Scenario 2 is similar to the pregnancy cases: did the employer act on the basis of the employee's sexual misconduct or on the basis of the employee's status as gay or lesbian? The Religious Conduct View suggests that the former is permissible under §702(a), but not the latter.

[188] Christian Legal Society v. Martinez, 561 U.S. 661, 689 (2010) (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

[189] *See supra* note 186.

[190] *See* Lupu, *supra* note 72 at 44-45 ("If religious organizations must articulate grounds that are neutral with respect to sexual orientation, they can maintain and enforce much of their teaching on sexuality without favoring heterosexuals. For example, they can insist that their employees refrain from sex outside of marriage, but they would have to respect same sex marriage equally with different sex marriage.").

That is, the Scenario 2 employee, who is in a monogamous same-sex marriage, might argue: "This is sex discrimination—I am married, and I would not have been terminated if I was a different sex than my spouse."[191] This argument, though, risks overlooking the fact that religious organizations remain entitled to hold and enforce their own views about marriage. *Obergefell*, of course, held that *states* cannot refuse to recognize same-sex marriages.[192] Yet that holding does not extend to private entities.[193] In fact, *Obergefell* explicitly contemplates—and sanctions—religious organizations retaining traditional views about marriage.[194] From the perspective of the religious organization, the fact that two people of the same sex can form a *state-recognized* marriage does not entail the existence of a *church-recognized* marriage.

Moreover, in this context it is precisely by authorizing religious organizations to implement their views about marriage that the exemption in §702(a) does the work it was intended to do.[195] After all, even secular organizations can—generally speaking—take adverse employment action on the basis of sexual misconduct.[196] The difference is that if a secular organization attempts to enforce a narrow traditional definition of marriage—perhaps because of the directors' religious views—it would likely be on the hook for *religious* discrimination.[197] But religious discrimination is exactly what §702(a) authorizes for religious organizations.[198]

Still, the objector may raise a further point: if §702(a)—on the Religious Conduct View—authorizes the termination in Scenario 2, would it not also authorize a school like Bob Jones University of the 1970's to terminate employees who violate the organization's religiously-motivated ban on interracial dating,

---

[191] Implicating the associational theory from both *Hively* and *Zarda*. *See supra* note 173.
[192] *Obergefell*, 135 S. Ct. at 2608.
[193] *Hively*, 853 F.3d at 372 (Sykes, J., dissenting).
[194] *Obergefell*, 135 S. Ct. at 2607 ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.").
[195] *See supra* note 127.
[196] *See supra* note 144 and accompanying text.
[197] *See, e.g.*, Erdmann v. Tranquility Inc., 155 F. Supp. 2d 1152, 1161 (N.D. Cal. 2001) (allowing plaintiff's religious discrimination claim to proceed where his *non-exempt* employer pressured him to "give up his homosexuality and become a Mormon").
[198] *See supra* Section I.A.

insofar as the ban ostensibly targets conduct, not race itself?[199] Indeed, Bob Jones University—in a non-Title VII case—contended that it did not actually discriminate on the basis of race, because "it now allows all races to enroll, subject only to its restrictions on the *conduct* of all students, including its prohibitions of association between men and women of different races, and of interracial marriage."[200]

There are perhaps two possible responses to this objection. First, it might be maintained that race is worthy of special protections, and that drawing a status-conduct distinction in the context of race discrimination is even *less* permissible than in the context of religion or sex.[201] If that is true, then §702(a) might authorize the termination in Scenario 2 but not in the Bob Jones hypothetical. Second, one might try to distinguish Bob Jones from Scenario 2. Without a doubt, the Court in *Bob Jones* correctly said that "discrimination on the basis of racial affiliation and association is a form of racial discrimination."[202] But while Bob Jones University would draw the line between moral and immoral association *at the race of individuals involved*, Scenario 2—which involves sexual conduct and not mere association—draws the line *at the (religious) definition of marriage*. To put it another way, the hypothetical organization in Scenario 2 says "We define marriage as *X*, and all sexual conduct outside the boundaries of *X* is grounds for disciplinary action."[203] Bob Jones, on the other hand, says, "We define marriage as *X*, and whereas *X* involving people of the *same race* is fine, *X* involving people of *different races* is grounds for

---

[199] Bob Jones eventually abandoned this policy, decades later. *See Bob Jones University Drops Interracial Dating Ban*, CHRISTIANITY TODAY (Mar. 1, 2000), http://www.christianitytoday.com/ct/2000/marchweb-only/53.0.html.

[200] *Bob Jones*, 461 U.S. at 604 (emphasis added).

[201] Consider Chief Justice Roberts' comment: "[T]he racial analogy obviously is very compelling, but when the Court upheld same-sex marriage in Obergefell, it went out of its way to talk about the decent and honorable people who may have opposing views. And to immediately lump them in the same group as people who are opposed to equality in relations with respect to race, I'm not sure that takes full account of that -- of that concept in the Obergefell decision." Transcript of Oral Argument at 73-74, Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 2016 WL 3971309 (2017). *See also* Ryan Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123 (2018) (arguing that opposition to same-sex marriage is "essentially" different from opposition to interracial marriage).

[202] *Bob Jones*, 461 U.S. at 604.

[203] Again, the organization will have to demonstrate consistent enforcement of this policy. If it only enforces the policy against those who engage in same-sex intimacy, but not those who engage in opposite-sex intimacy, it will be liable for sexual orientation discrimination.

disciplinary action."[204] If correct, this distinction suggests that the Bob Jones discrimination is directly status-based in a way that Scenario 2 is not.

Thus, the religious exemption in Title VII would, at least plausibly, permit a religious organization to take adverse employment action against an employee who has engaged in sexual conduct—including both same-sex and opposite-sex intimacy—outside the bounds of the organization's religiously-defined concept of marriage, even if the conduct occurs within a *legal* marriage. Such employment action, under the Religious Conduct View, arguably amounts to permissible religious discrimination, despite the fact that this assessment requires drawing some degree of distinction between sexual conduct and sexual orientation. Nevertheless, §702(a) does not authorize discrimination on the basis of mere homosexual status, nor does it authorize the biased enforcement of religiously-motivated sexual conduct prohibitions only against those engaging in same-sex sexual conduct as opposed to opposite-sex sexual conduct.

IV. CONCLUSION

At a time when the clash between religious liberty and nondiscrimination law continues to make national headlines, the religious exemption in Title VII might be perceived as a relic from the past. Yet with the Courts of Appeals beginning to treat Title VII as prohibiting discrimination on the basis of sexual orientation, §702(a) may soon debut in its most prominent role to date. As religious organizations seek to carry out their unique missions, some will no doubt be compelled to make employment decisions based on longstanding, sincere religious beliefs about sexual orientation—decisions that are likely to run afoul of Title VII's newfound prohibitions. In evaluating the legality of such employment decisions under Title VII, courts will be forced to deal with the ambiguity in the exemption's language: "of a particular religion." While three distinct interpretations of that phrase are available, a careful examination of the text, the relevant case law, and even a few practical considerations demonstrates that §702(a) permits religious employers to discriminate on the basis of religiously significant conduct, but not on the basis of Title VII's other protected statuses, even for religious reasons. Applying this interpretation—the Religious Conduct View—to the sorts of sexual

[204] This cycles back to whether or not religious organizations can retain their own definitions of marriage. *See supra* notes 192-194 and accompanying text.

orientation discrimination claims likely to arise after *Hively* and *Zarda* reveals that in cases where religiously significant conduct is involved—e.g. same-sex intimacy and marriage—the exemption may permit the discrimination. Yet where status alone is involved—e.g. a celibate homosexual—the religious employer is not immune from liability.