NAVIGATING SCYLLA AND CHARYBDIS: FOR-PROFIT, RELIGIOUS BUSINESSES AND RELIGIOUS EXCEPTIONS TO TITLE VII

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ABSTRACT

In Bostock v. Clayton County*, the United States Supreme Court added sexual orientation and gender identity to the definition of a protected class under Title VII of the Civil Rights Act of 1964. Because Title VII prevents employment discrimination against protected classes such, religious businesses holding sincere religious objections to sexual orientation and gender identity are now required to comply with this new interpretation of federal employment law at the expense of their beliefs. This note evaluates the efficacy of applying exceptions to Title VII in order to empower religious businesses to retain their religious beliefs and remain in the market. This note proposes that traditional exceptions to Title VII, such as the religious organization or bona fide occupational qualification exceptions, are not viable strategies for profit-oriented businesses. Instead, religious businesses should present claims under either the Religious Freedom Restoration Act or the new* Fulton v. City of Philadelphia *paradigm to protect the free exercise of their closely-held religious beliefs, even in a for-profit business environment.*

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INTRODUCTION

Small businesses are the backbone of the American economy, with 32.5 million small businesses employing nearly half of all US workers in 2021.[1] Moreover, many of these small businesses are closely held corporations, since closely held corporations make up almost ninety percent of all businesses in the U.S.[2] The Supreme Court has stated that any closely held corporation (whether C Corporations, S Corporations, or LLC's) is able to carry the same social or religious beliefs as its owners, even if the corporation has an independent legal identity.[3] Recently, this doctrine has come into question, as some religious businesses and business owners are experiencing tension between expressing their religious beliefs and participating in the market.

A pertinent example comes from the 2019 Sixth Circuit case of *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*[4] In this case, the Equal Employment Opportunity Commission (EEOC) and an employee identifying as transgender sued a religious business owner for terminating the transgender employee after they transitioned from their sex assigned at birth.[5] Although the businessowners had a sincere religious belief in upholding biological sex distinctions, the Sixth Circuit found that the actions of the business violated the anti-discrimination provisions of Title VII because the businessowners had refused to provide the transgender employee with gender affirming clothing and subsequently fired the employee.[6] The Supreme Court granted certiorari, and this case was merged within the Court's consideration of *Bostock v. Clayton County*.[7]

In June 2020, the Supreme Court announced its decision in *Bostock*. Writing for the majority, Justice Gorsuch (joined by the liberal justices and Chief Justice Roberts) ruled that Title VII of the Civil Rights Act of 1964 included sexual orientation and gender identity within the protections against discrimination on the basis of sex.[8] This ruling was celebrated as a milestone

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[1] U.S. SMALL BUS. ADMIN. OFF. ADVOC., 2021 SMALL BUSINESS PROFILE: UNITED STATES 3 (2021) https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30144808/2021-Small-Business-Profiles-For-The-States.pdf.
[2] *Closely Held Corporations*, INC., https://www.inc.com/encyclopedia/closely-held-corporations.html (last updated Feb. 6, 2020).
[3] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 705–707 (2014).
[4] E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc, 884 F.3d 560 (6th Cir. 2018).
[5] *Id.* at 566.
[6] *Id.* at 571.
[7] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).
[8] *Id.* at 1737.

achievement for LGBTQ+ rights.[9] Specifically, this decision broadened the standard for Title VII interpretation, allowing more individuals to sue for discrimination in hiring and employee benefits. However, the majority opinion deferred ruling on the pivotal question of whether to extend religious exceptions to this expanded vision for Title VII.[10] Following *Bostock*, many religious businesses remain unsure about their freedom to enforce employment decisions and provide healthcare benefits in line with their sincerely held religious beliefs, resulting in numerous lawsuits in the lower courts.[11] This wave of litigation has led one legal commentator to observe that "violations of Title VII of the Civil Rights Act of 1964, the Affordable Care Act, and other statutes, is poised to be the next front for transgender workers [sic] rights."[12]

This conflict of ideology will become increasingly contentious in light of recent anti-discrimination statutes. For example, North Carolina was recently in the national spotlight as its statewide moratorium on nondiscrimination ordinances expired in December 2020, allowing local governments to institute a broad range of new workplace discrimination bans.[13] The expiring statute, originally passed in 2016, required bathrooms to only be open to "single, biological birth genders."[14] The General Assembly passed this law in response to the city of Charlotte instituting a local ordinance that allowed individuals to use the bathroom of their preferred gender identity.[15] However, after a national backlash (including the National Basketball Association (NBA) removing the 2017 All-Star Game from Charlotte in protest), the General Assembly repealed the law except for a small portion which included the recently-expired moratorium on nondiscrimination ordinances.[16] This example demonstrates how quickly the moral and legal issues surrounding sexual orientation and gender identity can become hostile and volatile. Even now, North Carolina expects a rapid rise in religious exception cases following new local ordinances.[17]

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[9] *Id.* at 1837 (Kavanaugh, J., dissenting).
[10] *Id.* at 1754 ("But how [the statutory exception for religious organizations, the ministerial exception, and Religious Freedom Restoration Act] doctrines protecting religious liberty interact with Title VII are questions for future cases").
[11] *See, e.g.*, Bear Creek Bible Church v. E.E.O.C., 571 F. Supp. 3d 571, 621 (N.D. Tex. 2021), *appeal docketed*, No. 22-10145 (5th Cir. Feb. 14, 2022); Complaint at 29, Christian Emps. All. v. E.E.O.C., No. 1:21-cv-00195, 2022 WL 1573689 (D.N.D. Oct. 18, 2021).
[12] Erin Mulvaney, *'Not Completely Me:' Transgender Workers Fight for Health Care*, BLOOMBERG L. (Oct. 20, 2021, 5:21 AM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X6NU6SD4000000?bna_news_filter=daily-labor-report#jcite.
[13] Chris Marr, *North Carolina Anti-Bias Laws Sprout as 'Bathroom Bill' Era Ends*, BLOOMBERG L. (Nov. 22, 2021, 5:30 AM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X1PEMI10000000?bna_news_filter=daily-labor-report#jcite.
[14] Public Facilities Privacy & Security Act, H.B. 2, 2016 Second Extra Session (2016).
[15] Chris Marr, *supra* note 13.
[16] *Id.*
[17] *Id*.

Expanding legal protections for sexual orientation and gender identity are paralleled by a repeal of protections for religious liberty and right to conscientious objection. For example, the U.S. Department of Labor's Office of Federal Contract Compliance Programs recently repealed certain religious exceptions for federal government contractors and subcontractors.[18] Business owners are allowed to act on religious preference in their private lives, but they are discouraged from acting in accordance with their beliefs within their businesses. Given the vast amount of nondiscrimination laws at both the state and federal level,[19] federal courts must determine the ramifications of *Bostock* on religious, for-profit business. Although some may construe Title VII as a neutral law of general applicability regarding any for-profit entities,[20] religious businesses should have a religious exemption from allegedly discriminatory actions resulting from sincerely held religious beliefs through exceptions to Title VII. There are several potential avenues to achieve this outcome, such as using the Religious Freedom Restoration Act or a Bona Fide Occupational Qualification. However, following the Supreme Court's recent decision in *Fulton v. City of Philadelphia*,[21] a new avenue for religious accommodations may be to challenge the general applicability of Title VII given its numerous statutory exceptions, and thereby subject Title VII to strict scrutiny.

The remainder of this note is organized as follows. Section two evaluates the legal distinction between religious organizations and entities that merely have a religious owner. Section three evaluates the recent Supreme Court decision in *Bostock*. Section four outlines legal theories which could justify religious exceptions from the amended requirements of Title VII for businessowners. Section five offers some concluding remarks.

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[18] The current attempt seeks to rescind the regulations established in the final rule titled "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption." 85 Fed. Reg. 79,324 (Dec. 9, 2020) (to be codified in 41 C.F.R. § 60-1), which took effect on January 8, 2021. This rule added a definition of closely held religious corporations to the federal contractor religious exceptions. *See* Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 Fed. Reg. 62,115, 62,117 (proposed Nov. 9, 2021) (to be codified 41 C.F.R. § 60-1).

[19] *See, e.g.*, 20 U.S.C. § 1681 (Federal law declaring no discrimination on the basis of sex in educational benefits); s*ee also, e.g.*, CAL. GOV'T. CODE § 11139.8 (West 2022) (California law preventing any state funding or reimbursement for travel to states that "has enacted a law that voids or repeals, or has the effect of voiding or repealing, existing state or local protections against discrimination on the basis of sexual orientation, gender identity, or gender expression").

[20] *See generally* Robin Cheryl Miller, Annotation, *What Laws are Neutral and of General Applicability Within Meaning of Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 167 AM. L. REP. FED. 663, § 10 (2022) (dealing with cases pertaining to Civil Rights Law and whether they are neutral and of general applicability).

[21] Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

I. LEGAL DISTINCTIONS BETWEEN RELIGIOUS ENTITIES AND FOR-PROFIT ENTITIES IN TITLE VII

Passed in 1964, Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.[22] As noted by the Supreme Court in 1984, the primary purpose of Title VII was to root out discrimination in employment.[23] However, Congress never intended this law to be merely a tool for government litigation and regulation. Instead, Title VII sought to promote voluntary compliance with its statutory requirements rather than relying on courts to resolve every complaint against employers.[24] This is why Congress gave the EEOC a statutory mandate to attempt to resolve any Title VII discrimination complaint through conciliation prior to initiating litigation.[25]

As part of this broader view of voluntary compliance with the law, Congress included numerous exceptions to the general legal mandate, such as not covering employers with less than fifteen employees, a bona fide occupational qualification exception, and, most importantly, a religious organization exception. The relevant section for religious organization exception reads:

> This title . . . shall not apply to an employer with respect to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[26]

Federal courts have interpreted this clause to provide relief from the provisions of Title VII to churches (through the ministerial exception), religious schools, non-profits, and, in some cases, for-profit businesses.[27]

A. Churches, Schools, and Religious Non-profits Exceptions to Title VII Discrimination Claims

Congress and federal courts have historically respected the divide between the distinct spheres of authority between church and state and have held any undue interference between the sacred and the secular as inherently

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[22] *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964 (last visited Feb. 5, 2022).
[23] E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 77 (1984).
[24] *Id.*
[25] *Id.*
[26] 42 U.S.C. § 2000e-1(a).
[27] *See, e.g.*, Anders Bengtson, *For-Profit Religious Corporations and Qualifying for a Title VII 702 Exemption: Either Redefine 'Religious Corporations' or Bring a RFRA Action*, 15 LIBERTY UNIV. L. REV. 211, 214–15 (2021).

suspect.[28] As a result, the Supreme Court adopted precedent under the First Amendment which defers to religious hierarchy in matters relating to the government of the church and church functions.[29] Circuit courts have defined this doctrine of religious deference as the "ministerial exception" to otherwise neutral laws such as Title VII.[30] The Supreme Court adopted this doctrine from the Circuits, and the ministerial exception now provides immunity from judicial review to churches and church-aligned organizations in all activities pertaining to the selection of ministers and other religious functions.[31] This does not imply that churches are immune from all anti-discrimination action. If discrimination is unrelated to ministerial selection or religious functions, then the church could be subject to judicial review of

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[28] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (creating the test for Establishment Clause violations under the First Amendment). However, it is important to note that the Supreme Court has recently abandoned the *Lemon* test, so it remains to be seen if cases relying on *Lemon* remain good law. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) ("this Court long ago abandoned *Lemon* and its endorsement test offshoot").

[29] *See, e.g.*, Watson v. Jones, 80 U.S. 679, 727 (1871) ("we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them"); *see also* Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 116 (1952) (holding precedent dictates "a spirit of freedom for religious organizations, an independence from secular control or manipulation -- in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine").

[30] The first court to enunciate the "ministerial exception" doctrine was the Fifth Circuit in McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) (holding that the application of Title VII to a minister of the Salvation Army would result in a forbidden encroachment by the state into an area of religious freedom). In 1985, the doctrine was officially titled the "ministerial exception" by the Fourth Circuit when ruling that a church can discriminate in hiring based on religious belief. Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1168–69 (4th Cir. 1985). Circuits have upheld the principle that the ministerial exception is not limited to members of the clergy, but rather encompasses all employees of a religious institution, whether ordained or not. E.E.O.C v. Cath. Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996). However, with regards to specifically excepting religious institutions from Title VII, *see generally* Natal v. Christian & Missionary All., 878 F.2d 1575 (1st Cir. 1989) (Free Exercise Clause bars wrongful termination action brought by clergyman against not-for-profit religious corporation); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (Religion Clauses bar application of Title VII and ADEA claims against church-affiliated hospital); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) (holding that courts can hear Title VII claims against religious entities in normal matters, but should refrain from claims arising under a church's religious mission and propagation of its ecclesiastical pursuits); Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. 1999) (holding that the ministerial exception insulates religious organization's employment decisions regarding its ministers from judicial scrutiny under Title VII but Title VII applies without constitutionally compelled exception when a church is not choosing its ministers nor claiming discriminatory behavior as constitutionally protected religious practice); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000) (holding Title VII is not applicable to employment relationship between church and its ministers).

[31] *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (holding that teachers in a religious school qualify as ministers under the ministerial exception). *See also* Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 300 (2016).

an employee's termination.[32] However, religious functions extends to all aspects of religious observance, including both practice and belief.[33] Alleged discrimination may require the court to defer to a jury's determination regarding the facts of a particular situation.[34] Yet, in these determinations, federal courts have given wide deference to a religious organization's self-professed religious activities.[35]

In line with this wide deference to religious activities, courts have interpreted "religious organizations" to also include religiously aligned non-profits.[36] For example, in 1987 the U.S. Supreme Court ruled that the Mormon Church could terminate an employee from his job at a non-profit gymnasium which the church directly owned.[37] The church claimed that the attendant had fallen away from his Mormon faith and thus could be fired.[38] Applying the *Lemon v. Kurtzman* test to Title VII, the Supreme Court held that not only did the religious exceptions to Title VII survive constitutional muster, but that they also applied to non-profits with religious ties.[39] As Justice Brennan noted in his concurrence:

> The risk of chilling religious organizations is most likely to arise with respect to nonprofit activities. The fact that an

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[32] *See, e.g.*, Boyd v. Harding Acad. of Memphis, Inc., 887 F. Supp. 157 (W.D. Tenn. 1995), *aff'd*, 88 F.3d 410 (6th Cir. 1996) (holding religious employers are not immune from liability for discrimination based on race, sex or national origin; in order for religious entities' exemption to apply, religious employer must make its employment decision upon religious basis or criteria); E.E.O.C. v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school's application of insurance policies was not a function covered by the religious exception to Title VII).

[33] *See* Jason J. Muehlhoff, Note, *A Ministerial Exception for All Seasons: Our Lady of Guadalupe School v. Morrissey-Berru*, 45 HARV. J. L. & PUB. POL'Y 465, 466 (2022).

[34] Phillips, *supra* note 31, at 301–302.

[35] *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171 (2012) (holding that a teacher in a religious school could be considered a minister of the church and thus immune from wrongful termination).

[36] *See, e.g.*, Spencer v. World Vision, Inc., 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J., concurring) ("a nonprofit entity qualifies for the section 2000e-1 exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious").

[37] Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[38] *Id.* at 330.

[39] *Id. But compare* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996) (adopting a narrow "co-religionist preference" interpretation) ("This provision does not, however, exempt religious educational institutions with respect to all discrimination. It merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination"), *with* E.E.O.C. v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980) (holding that the religious-employer exemption could be invoked by a religious, non-profit college as a defense to a sex discrimination claim). However, it is important to note that the court has recently abandoned the *Lemon* test, so it remains to be seen if cases relying on *Lemon* remain good law. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) ("this Court long ago abandoned *Lemon* and its endorsement test offshoot").

> operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation . . . This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose . . . Churches often regard the provision of [community] services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster . . . A substantial potential for chilling religious activity makes inappropriate a case-by-case determination of the character of a nonprofit organization, and justifies a categorical exemption for nonprofit activities. Such an exemption demarcates a sphere of deference with respect to those activities most likely to be religious. It permits infringement on employee free exercise rights in those instances in which discrimination is most likely to reflect a religious community's self-definition. While not every nonprofit activity may be operated for religious purposes, the likelihood that many are makes a categorical rule a suitable means to avoid chilling the exercise of religion.[40]

While Brennan wrote this legal standard of a categorial exemption for religious non-profits in a concurrence, lower courts have adopted this dictum and created a categorical rule that religious non-profits are exempt from the dictates of Title VII if their activities are related to a religious purpose.[41] As long as there is a religious purpose or mission, a religious non-profit or church-aligned institution is immune from judicial review under Title VII.[42]

Nowhere is the categorial rule of exemption for religious non-profits more apparent than in the religious educational sphere. Title VII explicitly includes an exception for religious schools:

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution . . . to hire and employ employees of a particular religion if such . . . [is] owned, supported, controlled, or managed by a particular religion . . . or if the curriculum . . . is directed

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[40] Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. at 344–45 (Brennan, J., concurring).

[41] *See, e.g.*, LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226-27 (3rd Cir. 2007) (holding that a Jewish non-profit was religious, even if it was not entirely devoted to religious activity, and thus subject to the religious exception of Title VII); *see also* Hall v. Baptist Memorial Care Corp., 215 F.3d 618 (6th Cir. 2000) (where a college has clear religious overtones, the fact that it trains its students for health care, a secular activity, does not deprive it of Section 702 protection).

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

> toward the propagation of a particular religion.[43]

This exception has been widely litigated and almost universally applied to the protection of religious institutions, even if the relationship between religion and education is tenuous at best.[44] For example, Marquette University, a Jesuit School, was found to have properly rejected a female professor for a teaching position because of her controversial stance on abortion.[45] Loyola University Chicago, also a Jesuit School, properly reserved three tenure track positions in their philosophy department for only Jesuit priests because part of the school's mission involved exposing students to Jesuit professors.[46] A parochial primary school was within its rights to summarily discharge a teacher who held beliefs and engaged in conduct that was inconsistent with the moral living standards of the religious organization.[47] These examples demonstrate a presumption in federal courts that religious educational institutions are exempt from Title VII if the institutions can demonstrate the employment in question relates to a religious mission or goal. This even can include sexual orientation and gender identity if it relates to the religious mission of the religious institution.[48]

B. Title VII and Exceptions For Religious, For-Profit Organizations

Given that a religious non-profit is inherently exempt from Title VII with regards to religious functions, the next logical question is whether those same exemptions apply to for-profit religious employers. Before addressing the core question of religious employers, it is important to note that Congress included several statutory exceptions to Title VII that apply to any for-profit employer regardless of religious belief. The first statutory exception is the employee threshold of 15 full time employees.[49] If a business employs less than 15 employees for 20 weeks, they are exempt from any of the provisions

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[43] 42 U.S.C. § 2000e-2(e)(2).

[44] *See, e.g.*, Killinger v. Samford Univ., 113 F.3d 196, 201 (11th Cir. 1997) (ruling that a religious graduate school and seminary qualified for a religious exception by nature of teaching religious classes and having all faculty ascribe to a Baptist statement of faith, even if hiring was non-sectarian usually). However, if the actions of the religious institution are not related to religious qualifications, they can come under judicial review even if the non-profit is a religious school. *See*, *e.g.*, Elbaz v. Congregation Beth Judea, Inc., 812 F. Supp. 802, 807–08 (N.D. Ill. 1992) (ruling a Jewish not-for-profit educational corporation that fired female education director of Israeli national origin is not exempt from Title VII, since the religious exception clause does not permit discrimination on basis of sex, race or national origin).

[45] Maguire v. Marquette Univ., 814 F.2d 1213 1218 (7th Cir. 1987).

[46] Prime v. Loyola Univ. of Chicago, 803 F.2d 351, 354 (7th Cir. 1986).

[47] Little v. Wuerl, 929 F.2d 944, 951 (3rd Cir. 1991).

[48] *See, e.g.*, Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 945 (7th Cir. 2022) (affirming the removal of a teacher at a religious school who publicly violated the religious lifestyle terms of their contract outside of their school duties by living in a same-sex union).

[49] 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person").

of Title VII.[50] The second statutory exception is the bona fide occupational qualification exception for businesses with required employment prerequisites.[51] However, this exception has historically been limited to a very narrow scope, since the traits used for any employment decisions must be essential or necessary to the business as a whole and not tied to any particular job or preference.[52] Any business can claim these two statutory exceptions if it qualifies; however, the broader question of religious for-profit entities still remains.

Simply because the owners of a for-profit corporation have religious beliefs does not automatically satisfy the requirements of a "religious corporation" under Title VII.[53] As a result, courts have been hesitant to apply "religious corporation or organization" to for-profit businesses in a Title VII context, especially since the Supreme Court left the question of religious for-profit businesses open in *Amos*.[54]

Although circuit courts have long held that businesses can have the same religious views as their owners, these religious views do not necessarily entitle them to an exception from Title VII under the religious organization exception.[55] The Ninth Circuit has developed the so-called "primary religious" test to determine if the motivating principle of a religious organization is primarily religious or secular.[56] While several courts have

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[50] *Id.*

[51] 42 U.S.C. § 2000e-2(e)(1) ("it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

[52] *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991) ("[P]ermissible distinctions based on sex must relate to ability to perform the duties of the job"); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 387–89 (5th Cir. 1971) (finding airline history and airline passenger preferences to be served only by female flight attendants could not excuse the company's discriminatory refusal to hire males).

[53] *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2021-3, EEOC COMPLIANCE MANUAL SECTION 12: RELIGIOUS DISCRIMINATION, 12-I(C)(1) (Jan. 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_430474065131916107487270 11.

[54] Spencer v. World Vision, Inc., 633 F.3d 723, 734 n.13 (9th Cir. 2011) (O'Scannlain, J. concurring) ("In *Amos*, the Supreme Court expressly left open the question of whether a for-profit entity could ever qualify for a Title VII exemption").

[55] *Cf.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 716–17 (2014) ("HHS contends, statutes like Title VII . . . expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. In making this argument, however, HHS did not call to our attention the fact that some federal statutes do exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations" (internal citations omitted)).

[56] *See, e.g.*, E.E.O.C. v. Townley Engineering & Mfg. Co., 859 F.2d 610, 619–20 (9th Cir. 1988) (ruling that while businesses could carry the beliefs of their owners but that did not entitle them to an exception of Title VII since the business was primarily motivated by profit even with its religious ideals); Stormans, Inc. v. Selecky, 586 F.3d 1109, 1120 (9th

followed the Ninth Circuit's lead, the Third Circuit has suggested a more nuanced approach, considering factors such as (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[57] The Third Circuit noted that "not all factors will be relevant in all cases, and the weight given each factor may vary from case to case."[58] In the end, the majority of circuits have concluded that, unless the for-profit has a religious mission or purpose, it is subject to the rules and antidiscrimination constraints of Title VII.

C. Hobby Lobby *and For-Profit, Religious Corporations*

Since the primary purpose of a for-profit business is to generate profit (historically presumed to be a secular endeavor), there is an implied threshold question of whether for-profit business entities could ever be considered religious. Although business partnerships can entail religious belief given that they are formed from individuals who possess religious liberties, can the same be true of corporate entities?

The keystone case in addressing this question is the 2014 Supreme Court case *Burwell v. Hobby Lobby Stores, Inc*.[59] In this decision, the Supreme Court ruled that closely held businesses could raise independent free exercise claims (such as Religious Freedom Restoration Act [RFRA] claims) based upon the sincerely held religious beliefs of their owners.[60] In the same way that corporations can have free speech views in elections, they can also possess religious views in their operations.[61] As Justice Alito argued in

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Cir. 2009) (affirming the *Townley* standard and ruling that where a business represents an extension of owner's beliefs, those owners are allowed to bring free exercise claims on behalf of their business).

[57] LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3rd Cir. 2007).

[58] *Id.* at 227.

[59] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[60] *Id.* at 709-710, 718.

[61] *Compare* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010) (ruling that corporate entities have a right to free speech, and do not lose the right to free speech in political contexts simply because the speaker is a corporation) *with* Hobby Lobby, 573 U.S. at 691 ("we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs").

writing for the majority:

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind . . . If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.[62]

Justice Alito grounds his reasoning on the legal principle of corporate personhood in American jurisprudence. By doing so, he opened the door for corporations to seek religious accommodation to neutral laws of general applicability, such as anti-discrimination laws.[63]

But what defines a closely held corporation under *Hobby Lobby*? According to the IRS, a closely held corporation is one that 1) is not a personal service corporation and 2) has more than 50% of its outstanding stock owned by five or less individuals for the last half of the tax year.[64] This definition would cover both Hobby Lobby corporation and Conestoga Wood Specialties, the combined plaintiffs in the *Hobby Lobby* case.[65] While this definition provides a clear bright line, Pew Research suggests that S Corporations may also qualify as closely held under the *Hobby Lobby* standard since they cannot have more than 100 shareholders.[66] Along with private corporations (C Corporations or LLC's), S Corporations may be exempt from registering with the Securities and Exchange Commission.[67] This ambiguity of the law means that there is a large degree of discretion given to lower courts in deciding if a religious business qualifies as closely held.

Nevertheless, this deference regarding religious beliefs has not been extended to publicly traded corporations. This is because public corporations would suffer from a crisis of religious identity if they had religiously

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[62] Hobby Lobby, 573 U.S. at 711–12.
[63] *See generally* ROBIN FRETWELL WILSON, *Bargaining for Religious Accommodations: Same-Sex Marriage and LGBT Rights After Hobby Lobby*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 257 (Micah Schwartzman et al. eds., 2016).
[64] INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. 542 CORPORATIONS 3 (Jan. 2019).
[65] Hobby Lobby, 573 U.S. at 701-02, 702.
[66] Drew Silver, *What is a 'closely held corporation,' anyway, and how many are there?*, PEW RESEARCH CENTER (July 7, 2014), https://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/.
[67] *Id. See also* 15 U.S.C. § 781(g).

heterogenous shareholders.[68] Whose religious beliefs would control if there were a disagreement among public shareholders? Thus, businesses possess a right to protection under the First Amendment only so long as they maintain and reflect the religious principles of their close owners. Although the principles of *Hobby Lobby* were formed within the context of the First Amendment, they can also apply to the operation of Title VII since Title VII includes religious organizations within its statutory framework.

II. BOSTOCK AND UNCOVERING SEXUAL ORIENTATION AND GENDER IDENTITY IN THE MEANING OF "SEX" IN TITLE VII

In *Bostock*, the majority's core opinion centered around trying to interpret the ordinary public meaning of the term "on the basis of sex" in Title VII.[69] The Court consolidated three appeals, all addressing the question of whether "on the basis of sex" includes sexual orientation and gender identity (SOGI) as a protected class. Justice Gorsuch writing for the majority, stated:

> An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.[70]

As a result of discovering this prohibition in the Title VII text, the Court inferred that ordinary public meaning of "on the basis of sex" includes SOGI. The majority went on to say:

> An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.[71]

This means that Title VII requires employers to treat "[a]n individual's

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[68] *See, e.g.*, Catherine A. Hardee, *Schrödinger's Corporation: The Paradox of Religious Sincerity in Heterogeneous Corporations*, 61 B.C.L. REV. 1763 (2020) (evaluating the potential monetary, ideological, and identity paradoxes that could arise from religiously heterogeneous shareholders within a single corporation post-*Hobby Lobby*).
[69] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).
[70] *Id.* at 1737.
[71] *Id.* at 1741.

homosexuality or transgender status [as] not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[72]

Commentators hailed this ruling as a victory for civil rights that finally provided long needed protection from discrimination for members of the LGBTQ+ community.[73] It fundamentally is an encapsulation of the "live-and-let-live" jurisprudence advocated by former Justice Kennedy in cases such as *Obergefell v. Hodges* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[74] However, the majority skirted the deeper question of what to do when the rights of religious freedom and antidiscrimination come into direct conflict. In fact, the Court explicitly declined to make any comment on the applicability of the ruling to religious freedom claims. [75] As such, circuits will have to rely on the established exceptions and frameworks when evaluating religious claims that arise under the newly recognized rights in Title VII.

III. RELIGIOUS EXCEPTIONS FOR BUSINESSES SEEKING TO ESCAPE ENFORCEMENT OF SOGI STANDARDS IN TITLE VII

Religious business owners now stand at a crossroads. While businesses can follow the sincerely held religious ideology of their owners, they risk conflict with current antidiscrimination laws. Religious owners with views contrary to current antidiscrimination laws may be forced to choose between their faith and their livelihood. It is important to note that not all religious businessowners inherently espouse religious views that run into conflict with current antidiscrimination laws, but for those that do, they face a modern Scylla and Charybdis. They are required to either violate the law or violate their conscience.

The issue of religious exemptions from SOGI anti-discrimination statues under religious free exercise, free speech, and freedom of association

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[72] *Id.*

[73] *See, e.g.*, Jamie Bishop et al., *Sex Discrimination Claims Under Title VII of The Civil Rights Act of 1964*, 22 GEO. J. GENDER & L. 369, 406 (2021); Sachin S. Pandya & Marcia Mccormick, *'Sex' and Religion After Bostock*, AM. CONST. SOC'Y, https://www.acslaw.org/sex-and-religion-after-bostock/#_ednref63 (last accessed Apr. 12, 2022),

[74] Chris Stewart & Gene Schaerr, *Why Conservative Religious Organizations and Believers Should Support the Fairness For All Act*, 46 J. LEGIS. 134 (2020).

[75] Bostock, 140 S. Ct. at 1754 ("how these doctrines protecting religious liberty interact with Title VII are questions for future cases too . . . So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way").

remains an open question before the courts.[76] Regardless of the outcome of these legal questions, Title VII inherently contains numerous exceptions which religious employers could use to run their business in accordance with their belief. As noted above, Title VII only applies to businesses with more than 15 employees for twenty weeks per year.[77] According to the 2021 U.S. Small Business Administration's annual profile, there are 32.5 million small businesses that employ 46.8% of the private workforce.[78] Of these, 26.4 million businesses have no employees and 5.4 million businesses have less than twenty employees.[79] This means that the vast majority of small businesses are inherently immune from the provisions of Title VII.

However, any successful small business must risk Title VII scrutiny if it wishes to grow beyond 15 employees. Thus, a potential solution to resolve the current standoff over religious business accommodation would be to amend Title VII to include religious, for-profit businesses in the "religious corporation" exception, as suggested by the Supreme Court in *Hobby Lobby*.[80] However, the likelihood of such a Congressional action is low in the current political climate. As such, religious businesses require strategies for protecting their religious convictions while upholding the law as currently constructed. Three potential solutions have been offered: BFOQ statutory exemptions, RFRA exemptions, and exemptions under *Fulton*. Each will be discussed in turn.

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[76] *See, e.g.*, Green v. Miss United States of America, LLC, 533 F. Supp. 3d 978 (D. Or. Apr. 8, 2021), *aff'd*, 52 F.4th 773 (9th Cir. 2022) (holding that an LLC that contains language that only a "natural born female" can compete in a beauty pageant is permissible to uphold the free speech and free association rights of that LLC); Bear Creek Bible Church v. E.E.O.C., No. 4:18-cv-00824-O, 2021 U.S. Dist. LEXIS 210139 (N.D. Tex. Oct. 31, 2021), *appeal docketed*, No. 22-10145 (5th Cir. Mar. 21, 2022) (ruling that religious businesses could raise a free exercise claim to Title VII enforcement of SOGI discrimination challenges); Compl., Christian Emps. All. v. E.E.O.C., No. 1:21-cv-00195 (D.N.D. Oct. 18, 2021) (alleging that the EEOC has improperly interpreted Title VII so as to force religious non-profit and for-profit employers to pay for and provide health plans or health insurance coverage to their employees that cover gender transition surgeries, procedures, counseling, and treatments in violation of the employers' religious beliefs).

[77] 42 U.S.C. § 2000e(b).

[78] Press Release, U.S. Small Business Administration Office of Advocacy, Advocacy Release 2021 Small Business Profiles For The States (Aug. 31, 2021), https://advocacy.sba.gov/2021/08/31/advocacy-releases-2021-small-business-profiles-for-the-states/.

[79] U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., 2021 SMALL BUSINESS PROFILE: UNITED STATES 3 (2021) https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30144808/2021-Small-Business-Profiles-For-The-States.pdf.

[80] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 716–17 (2014) ("HHS contends, statutes like Title VII . . . expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. In making this argument, however, HHS did not call to our attention the fact that some federal statutes do exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations" (internal citations omitted)).

A. Potential Solution 1: The "Bona Fide Occupational Qualification" (BFOQ) Statutory Exception

The first potential strategy religious businessowners could utilize to exempt themselves from Title VII enforcement is a broader use of the BFOQ exception to Title VII. This exception provides that:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[81]

At a first glance, this may seem to be a general exception derived from the operations of a business; however, this clause has historically been subject to a very narrow interpretation.[82] From the beginning of the application of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC) had the authority to interpret the provisions of Title VII and enforce it by issuing guidelines and decisions on the statute.[83] The EEOC previously interpreted the BFOQ exception in a narrow manner, with the courts deferring to this narrow definition.[84] One commentator summarized this EEOC stance: "the basic tenet [is] that an employer cannot use a sexual stereotype about the class to which the employee belongs to evaluate him, but must instead consider each employee according to his individual capabilities."[85]

The narrow scope of a permissible BFOQ was emphatically reaffirmed in *International Union, UAW v. Johnson Controls, Inc*.[86] The Court stressed that a BFOQ arises from qualifications "reasonably necessary to the normal operation" of the particular business.[87] The most telling word, Justice Blackmun notes, is "occupational."[88] The requirements consist of verifiable

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[81] 42 U.S.C.S. § 2000e-2(e)(1).
[82] 29 C.F.R. § 1604.2(a) ("The commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly").
[83] John F. Cassibry, *Title VII: Sex Discrimination and the BFOQ*, 34 LA. L. REV. 590, 592 (1974).
[84] Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) ("We are persuaded by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission that the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex").
[85] Cassibry, *supra* note 83, at 592.
[86] *See generally* UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991) (ruling an employer's policy of not hiring females that were pregnant or capable of being pregnant did not qualify for BFOQ, since it was facially discriminatory on the basis of sex and did not relate to the production of batteries).
[87] *Id.* at 195.
[88] *Id.* at 201.

job-related skills and aptitudes.[89] Moreover, these skills and aptitudes must be essential to the business and not merely created by the employer as an obstacle to employment.[90] Even areas such as customer preference, which could be considered an essential part of a business, do not permit a business to qualify for a BFOQ exception.[91] Religious preference of a consumer is generally not a BFOQ justification, unless it places an employee in imminent danger of bodily harm.[92]

Since the BFOQ exception has historically been interpreted in a very narrow light, it is unlikely that an owner's religious beliefs can qualify as a BFOQ.[93] A religious business would have to show that the religious qualification for employment was not only directly related to the normal functioning of the business, but essential to its operations. This could be done with relative ease for religious non-profits, but these organizations already qualify for the religious organization exception to Title VII. So long as businesses exist to generate profit and that profit is viewed as a secular purpose, upholding religious beliefs will not qualify as a BFOQ.

There are several potential areas where religious business could construe business operations in such a way as to qualify for a BFOQ, but these are still unlikely to succeed on strictly religious grounds. Three areas in which a BFOQ has been upheld regarding sex discrimination are: 1) prison guard

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[89] *Id.*

[90] *See* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 416 n.24 (1985) (ruling an employer asserting a BFOQ defense must show that (1) the discriminatory qualification is reasonably necessary to the essence of the business, and (2) either (a) all or substantially all individuals excluded from the job involved are disqualified, or (b) some of the excluded individuals possess a disqualifying trait that cannot be ascertained except by reference to a protected category).

[91] *See, e.g.*, Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) (holding that a proffered consumer preference for female flight attendants was not a BFOQ and did not justify airlines discriminating in hiring on the basis of gender); *see also* W. Air Lines v. Criswell, 472 U.S. at 416 (holding that age qualifications for flight engineers were not reasonably related to the operation of the business and thus not a BFOQ).

[92] *Compare* Abrams v. Baylor Coll. of Med., 805 F.2d 528 (5th Cir. 1986) (ruling that requiring doctors to be non-Jewish was not a BFOQ for a university with a contract to supply physicians on rotation at a Saudi Arabian hospital when the hospital presented no evidence to support its contention that Saudi Arabia would actually have refused an entry visa to a Jewish faculty member), *and* Rasul v. Dist. of Columbia, 680 F. Supp. 436 (D.D.C. 1988) (holding that a prison failed to show that Protestant religious affiliation was a BFOQ for a prison chaplain because chaplains were recruited and hired on a facility-wide basis and were entrusted with the job of creating a religious program for all inmates regardless of denominations), *with* Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983) (holding a requirement that pilots flying to Mecca convert to Islam was a BFOQ, since it was not based on a preference of contractor performing work in Saudi Arabia, but on the fact that non-Muslim employees caught flying into Mecca would be beheaded), *aff'd*, 746 F.2d 810 (5th Cir. 1984).

[93] See, e.g., R.G. & G.R. Harris Funeral Home v. E.E.O.C., 884 F.3d 560, 586–87 (6th Cir. 2015) (holding "a religious claimant cannot rely on customers' presumed biases" when hiring or firing based on LGBT identities).

employment in max security and all-female prisons,[94] 2) employment with strenuous physical labor requirements,[95] and 3) certain official dress code enforcements.[96] The first two areas are obvious examples of how working conditions affect the needs of the employment; however, the third is a little less settled. As a general rule, employers can require basic dress and grooming codes of their employees which can be gender distinguished.[97] This includes making all employees wear standard uniforms, like police. However, there is currently a circuit split with regard to the extent to which dress codes can be used as a BFOQ.

Additionally, *Bostock* did not provide any clarification on dress codes, especially in the light of gender identity issues, since the majority in *Bostock* explicitly reserved judgment on the constitutionality of dress codes, gender segregated bathrooms, and gender segregated locker rooms.[98] As a result, religious employers could rely on dress codes as a BFOQ, but they could run the risk of facing the same statutory challenges faced by the defendants in *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes*, when a male transitioned to female and they refused to provide updated work attire. Thus, unless an employer is working within a strictly gender partitioned field like an all-

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[94] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (holding that a policy of only hiring males at a max security prison with sex offenders was a BFOQ); Torres v. Wisconsin Dep't of Health & Social Services, 859 F.2d 1523 (7th Cir. 1988) (holding that hiring only female guards at an all-female prison was a BFOQ).

[95] *See, e.g.*, Pond v. Braniff Airways, Inc., 500 F.2d 161 (5th Cir. 1974) (ruling that the determination to hire a male over a female as a Customer Service Representative could be supported under a BFOQ since they would have to also deal with loading/unloading planes). *See also* Dothard, 433 U.S. at 332 ("If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures strength directly. Such a test, fairly administered, would fully satisfy the standards of Title VII because it would be one that 'measure[s] the person for the job and not the person in the abstract.' [internal citation omitted]"). *Compare* Weeks v S. Bell Tel. and Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969) (holding that refusing to hire women as switchmen did not qualify for a BFOQ because the defendant lacked any evidence that a female employee would be unable to perform the duties of the job, but if such evidence existed it could be used to support the policy), *with* Rosenfeld v S. Pac. Co., 444 F.2d 1219 (9th Cir. 1971) (Finding that Title VII supplanted California law that put weight restrictions on the jobs that females were allowed to perform and thus weight limits were not presumptively a BFOQ), *and* Long v. Sapp, 502 F.2d 34 (5th Cir. 1974) (holding that the mere assertion that a woman could not physically perform a job does not satisfy the BFOQ without giving the woman a chance to prove she can perform the job).

[96] *Compare* Lore v. City of Syracuse, 670 F.3d 127 (2nd Cir. 2012) (holding that the requirement that a police officer wear a uniform was a BFOQ and not sex discrimination) *and* Willingham v. Macon Tel. Publ' Co., 507 F.2d 1084 (5th Cir. 1975) (en banc) (holding that a job requirement for hair grooming was a BFOQ and not based on sex in violation of Title VII), *with* Carroll v. Talman Fed. Sav. & Loan Association, 604 F.2d 1028 (7th Cir. 1979) (holding that a business policy that required females to wear a uniform to work but allowed men to wear customary business attire was not a BFOQ and violated Title VII).

[97] *See generally* Lore v. City of Syracuse, 670 F.3d 127 (2nd Cir. 2012); Willingham v. Macon Tel. Publ' Co., 507 F.2d 1084 (5th Cir. 1975) (en banc).

[98] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020) ("[U]nder Title VII itself, [the employers] say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.").

female prison, requesting a BFOQ is unlikely to be a viable solution to the conflict between antidiscrimination and religious liberty for employers as currently interpreted.

B. Potential Solution 2: Enjoining Enforcement Through Religious Freedom Restoration Act Protections (RFRA) For Religious Entities

A second strategy to claim exception to the new interpretation of Title VII could be a broad use of RFRA claims to protect religious right to conscience for both religious businesses and individuals alike. Under RFRA, the federal government cannot place a "substantial burden" on any sincerely held religious belief unless the government has a compelling interest in the law and the proffered policy is the least restrictive means to achieve that interest.[99] This law, passed in the 1990s after the contentious Supreme Court decision of *Employment Division v. Smith*, attempted to restore strict scrutiny analysis for religious liberty questions.[100] As one legal commentator defined it:

> "Substantial Burden" means that one must honestly feel performing the act would be deeply wrong, not just less preferable from a religious point of view than the alternative. Thus, if we are concentrating on actual convictions, the concept is not so different from the "conscientious objection" one needed to be excused from a military draft.[101]

Claims under RFRA have been upheld by federal courts in numerous contexts and can also apply to claims raised by both for-profit and non-profit organizations.[102] As was noted by the Supreme Court in the *Hobby Lobby* case:

> Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty.[103]

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[99] 42 U.S.C. § 2000bb-1.
[100] 42 U.S.C. § 2000bb.
[101] KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? 123–24 (2016).
[102] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 692 (2014); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020).
[103] Hobby Lobby, 573 U.S. at 692.

Nevertheless, RFRA claims do have one potentially significant setback – they could potentially only apply to cases in which the Federal government is a party or in cases that deal with federal laws.[104] With regards to the application of RFRA claims to Title VII, it is very likely that the same legal reasoning that applies in *Hobby Lobby* would also apply to Title VII.[105] With Title VII, it is clear that a federal law places a burden on sincere religious belief. Religious businesses should be able to bring RFRA claims against the state to enjoin the application of Title VII; however, there are likely several potential problems with a widespread use of this strategy.

First, some legal commentators have suggested that although RFRA would apply when the federal government is a party (such as EEOC), it would not apply if the action were brought by individuals in their private capacity.[106] This objection was potentially answered in part by a cryptic section of Justice Gorsuch's opinion in *Bostock* when he noted that "RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."[107] Given that Title VII claims by individuals alone are still based on federal law, it is likely that RFRA would still apply, though it should be noted that the Supreme Court has never addressed this question directly. However, this standard would still leave open the potential for cases to be brought at the state level against religious businesses under state law which would be immune from challenge under RFRA.[108]

The second problem with utilizing a RFRA claim is that religious rights are not absolute. Even if a law places a substantial burden on an individual's free exercise, it is still possible to sustain the law if there is a compelling interest and the law is narrowly tailored to achieve that interest.[109] After *Bostock*'s ruling, combatting discrimination on the basis of SOGI will likely be considered a compelling governmental interest by most courts.[110] As a result, the question of success for religious plaintiffs will entirely turn on

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[104] City of Boerne v. Flores, 521 U.S. 507 (1997) (ruling that RFRA claims only apply to federal actions and not to state actions because Congress lacked authority to contravene the Supreme Court and bind states under the 14th Amendment).
[105] Laura Paulk & Shelly Grunsted, *Born Free: Toward an Expansive Definition of Sex*, 25 MICH. J. GENDER & L. 1, 44-45 (2018).
[106] Pandya & Mccormick, *supra* note 73.
[107] *Bostock*, 140 S. Ct. at 1754.
[108] *See, e.g.*, Rose Gilroy et al., *Transgender Rights and Issues*, 22 GEO. J. GENDER & L. 417, 434-35 (2021) (arguing that states such as California and Colorado have much higher protections for SOGI in their anti-discrimination law and provide greater protections than Title VII); City of Boerne, 521 U.S. at 534-35.
[109] *See, e.g.*, R.G. & G.R. Harris Funeral Home v. E.E.O.C., 884 F.3d 560, 589-90, 592-93 (6th Cir. 2015) (holding that while there was a valid RFRA claim, Title VII did not place a substantial burden on religious belief and the law was narrowly tailored to achieve the state's legitimate interest).
[110] *Id.* at 589–90, 592–93.

whether the law in question is narrowly tailored.[111] This will be left entirely to the discretion of the court, as shown by the differing rulings on the plaintiff's RFRA claims in *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes* at the trial and appellate level. Thus, the outcome of the religious balancing test will likely be determined by the political bias of the judge that presides over the case. Since that RFRA claims may come to be disfavored in some courts due to the subjective nature of the balancing test, some scholars on the religious right have advocated for extending the definition of religious organization in Title VII to include for-profit businesses.[112]

C. Potential Solution 3: Utilizing a Fulton*-Style First Amendment Challenge to Create a Religious Exemption to Title VII for Businesses*

While RFRA may provide certain religious employers relief, the recent Supreme Court case *Fulton v. City of Philadelphia* provides a novel framework for presenting religious exemption claims.[113] In *Fulton*, the Supreme Court directly dealt with the question of a religious exception to a nondiscrimination law that placed a significant burden on a religious organization's belief.[114] At question in the case was whether a religious non-profit, namely Catholic Social Services of Philadelphia, could refrain from providing foster care certification to homosexual couples due to a religious conviction that marriage is a sacred bond between a man and a woman.[115] A unanimous court ruled that the nondiscrimination law placed a substantial burden on the religious exercise of the Catholic charity and failed strict scrutiny.[116] The application of strict scrutiny in *Fulton* was due to the nondiscrimination law being neither neutral nor generally applicable. The Court held that the nondiscrimination law could not be construed as neutral or generally applicable because the law provided a system of individualized exceptions from a generally applicable law while failing to provide an exception for religious free exercise.[117] Thus, strict scrutiny applied, and the law in question failed strict scrutiny.

In an opinion written by Chief Justice Roberts, the majority held that a law is neither neutral nor generally applicable when: 1) the law proceeds in a manner that restricts practices because of their religious beliefs, 2) there is a system for individualized exceptions, or 3) the law prohibits religious conduct while permitting secular conduct that undermines the government's

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[111] *See, e.g.*, Sara K. Finnigan, Note, *The Conflict Between the Religious Freedom Restoration Act and Title VII of the Civil Rights Act of 1964*, 48 FLA. ST. U.L. REV. 257, 282-83 (2020) (arguing that there is no less restrictive alternative than to enforce Title VII to enjoin employment discrimination).
[112] *See, e.g.*, Bengtson, *supra* note 27, at 214–15.
[113] Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).
[114] Fulton, No. 19-123, slip op. at 4–5.
[115] *Id.* at 2–3.
[116] *Id.* at 13.
[117] *Id.* at 4–7.

asserted interests in a similar way.[118] This is especially important when applied to Title VII, because of the numerous secular and religious exceptions that already exist.[119] There is little doubt that Title VII was intended by its drafters to be a neutral law of general applicability.[120] However, much like the ordinance of Philadelphia, Title VII sets out numerous exceptions without providing a means for religious businesses to conscientiously object based on longstanding religious doctrine.[121] This goes against the third prong of the *Fulton* test; namely, providing secular exceptions to the law without providing an exception for religious businesses.[122] The most applicable secular exception in Tile VII is the exception for any employer that has less than 15 employees. This exception is clearly a secular exception because it applies regardless of the religious and ideological beliefs of the business. Moreover, granting an absolute exception could potentially undermine the government's asserted interests in anti-discrimination. Given that these exceptions exist regardless of religion, the courts should hold that Title VII is facially not neutral nor generally applicable, and apply a strict scrutiny analysis to Title VII as applied to religious employers.

Similar to RFRA claims, the question on whether religious businesses will prevail with a *Fulton*-style claim may turn on how courts interpret Title VII in a Strict Scrutiny analysis. Moreover, the defendant in *Fulton* was a religious non-profit (which would immediately qualify for a religious organization exception to Title VII) whereas courts might be hesitant to apply the *Fulton* rule to for-profit businesses. However, a *Fulton* claim could provide a significant advantage to a traditional RFRA claim, since it would apply to both federal and state laws as opposed to only applying to federal laws. In addition, *Hobby Lobby* holds that businesses can have independent religious convictions same as individuals, and the Supreme Court has previously noted, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[123] This argument is buttressed by a growing body of caselaw with regard to religious business free speech and free association which

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[118] *Id.* at 5-6.
[119] *See* the discussion of the various exceptions to Title VII in Section II above.
[120] See Miller, *supra* note 20, at § 10.
[121] *See* the discussion of the various exceptions to Title VII in Section II above.
[122] It is hypothetically possible that some courts may interpret the "religious organization" clause in Title VII as a potential means for Title VII to satisfy the religious exception requirement under the *Fulton* framework. However, this reasoning fails to recognize the extent to which religious adherents view the importance of religion in their daily lives and work. As currently interpreted, the "Religious Organization" clause in Title VII may provide protection for churches or religious non-profits; however, this potential interpretation fails with regards to religious businesses. *See generally* Phillips, *supra* note 31; *see also* Bengtson, *supra* note 27, at 214–15. Thus, Title VII as currently interpreted violates the holding of *Fulton* regarding religious exceptions specifically within the context of religious for-profit businesses.
[123] Thomas v. Review Bd. of Ind. Empl. Sec. Div., 450 U. S. 707, 714 (1981).

could be leveraged in support of a Title VII exception claim.[124] Thus, a *Fulton*-style secular exception challenge presents a unique way in which to challenge Title VII's application to religious businesses.

IV. CONCLUSION

American culture is experiencing conflict between traditional religious perspectives and progressive efforts for reform. As noted by one legal scholar, "[f]or the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized."[125] Although courts have historically prioritized protecting religious beliefs, modern views are increasingly indifferent to religious ideology. Opposition to religious expression is particularly visible in questions surrounding LGBTQ+ rights. As another legal commentator has noted:

> The legitimate scope of the free exercise of religion . . . is rapidly being reconceived as the right merely to privately believe and worship within family and religious spaces . . . More ominously, some advocates simply denounce religious exemptions from LGBTQ rights laws as nothing more than a license to discriminate, ignoring centuries of respect in the law for the unique place of religious institutions.[126]

Both sides of this conflict believe they are supported by legal history and doctrine, yet neither side appears willing to compromise.

While ideological debates frequently occur in the political, philosophical, and theological spheres, American businesses disproportionately experience the costs of this conflict. Increasingly, political advocacy groups coerce businesses to take particular positions in order to earn popularity, patronage, and loyalty.[127] The Supreme Court's addition of sexual orientation and gender identity to Title VII protection

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[124] *See* 303 Creative LLC v. Elenis, 6 F.4th 1160 (10th Cir. 2021), *cert. granted*, 212 L. Ed. 2d 6 (2022). *See also* Green v. Miss United States of America, LLC, 533 F. Supp. 3d 978 (D. Or. Apr. 8, 2021), *aff'd*, 52 F.4th 773 (9th Cir. 2022).

[125] Douglas Laycock, *McElroy Lecture. Sex, Atheism, and the Free Exercise of Religion*, 88 UNIV. DETROIT MERCY L. REV. 407 (2011), *quoted in* HANS-MARTIEN TEN NAPEL, CONSTITUTIONALISM, DEMOCRACY, AND RELIGIOUS FREEDOM: TO BE FULLY HUMAN 4 (2017).

[126] Stewart & Schaerr, *supra* note 74, at 139.

[127] Megy Karydes, *Millennials Want Companies to Take a Stand. Here's How to Do It Without Losing Customers*, INC.COM (May 15, 2018), https://www.inc.com/megy-karydes/why-your-business-should-take-a-stand-or-sit-down.html. *See also* Robbie Whelan et al., *Discontent With Disney Over Bill Adds to Trouble for CEO Bob Chapek*, WALL ST. J. (Mar. 18, 2022 3:28 PM), https://www.wsj.com/articles/disney-discontent-bill-trouble-ceo-bob-chapek-11647631444.

through *Bostock* has created an additional burden on the labor market, especially for businesses with religious beliefs which differ from social norms. Certain religious businesses are now unsure about their right to enforce employment decisions and provide healthcare benefits in line with their sincerely held religious beliefs.

This note has shown the historical development of Title VII to its current interpretation under *Bostock v. Clayton County*. It has argued that the best strategy to resolve this conflict of ideology under current law is to provide a means for religious businesses to receive an accommodation from Title VII and take them out of the current social upheaval. Until Title VII is amended to include religious, for-profit businesses within the protections of the "religious corporation or organization," religious businesses need to create strategies to protect themselves and their religious beliefs. Currently, raising a *Fulton*-style secular exception challenge to Title VII holds great promise for enabling a challenge to Title VII as applied to religious businesses. Given that Title VII includes an exception for businesses with less than 15 employees, it contains a secular exception that undercuts the purpose of the law. This is due to the fact there are millions of small businesses in America today, and each one of them can discriminate in employment however they desire under Title VII. Thus, Title VII should allow religious business to operate under their religious convictions in order to remain neutral with regards to religion. Alternative strategies are severely limited. A Bona Fide Occupational Qualification is unlikely to succeed based on the narrow historical interpretation of this exception. Similarly, RFRA claims remain highly subjective in circuit courts and are restricted in their usage since they only apply when the Federal Government is a party or when challenging a federal law.

While the majority of the American public support the protection of LGBTQ+ rights,[128] LGBTQ+ advocates often utilize coercive means to promote inclusive business practices. Rather than promoting a political view through coercion, an equitable resolution of this conflict would preserve business interests by maintaining a religious right to conscience, even in a for-profit business context. Given that Title VII includes numerous exceptions to its general laws, businesses that are closely-held and religious should be allowed to operate under their own beliefs. Regardless of the efficacy of religious belief, the market, not political positioning, should decide the success of a business.

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[128] *See* Justin McCarthy, *Record-High 70% in U.S. Support Same-Sex Marriage*, GALLUP (June 8, 2021), https://news.gallup.com/poll/350486/record-high-support-same-sex-marriage.aspx (reporting that support for same-sex marriage is up to 70% in the American public); *see also* Jack Thompson, *Attitudes Towards LGBT Individuals After Bostock v. Clayton County: Evidence From a Quasi Experiment*, POL. RSCH. Q., Feb. 12, 2022, 5-10, https://journals.sagepub.com/doi/pdf/10.1177/10659129211068052.