

**AT A CROSSROADS: LGBT EMPLOYMENT
PROTECTIONS AND RELIGIOUS
EXEMPTIONS AFTER *BOSTOCK V. CLAYTON
COUNTY***

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I. INTRODUCTION

In January 2003, Gerald Lynn Bostock was hired by Clayton County Georgia as a Child Welfare Services Coordinator for the Juvenile Court of Clayton County.¹ Over the next ten years he received numerous commendations and was, in every respect, a model employee.² In January 2013, Gerald joined a

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¹ *Bostock v. Clayton Cty.*, 2016 U.S. Dist. LEXIS 192898, at *2–3 (N.D. Ga. Nov. 3, 2016).

² *Id.* at *3.

local gay recreational softball league and soon thereafter began receiving disparaging remarks and criticisms related to his sexual orientation from superiors at work.³ Several months later, Gerald was informed that his work was being placed under internal audit, and in June, Gerald was fired by the County.⁴

Amiee Stephens was hired as a funeral director by R.G. & G.R. Harris Funeral Homes in October 2007 and performed her duties without issue over the next six years.⁵ In July 2013, Amiee informed her employer of her plans to undergo a gender transition from male to female and of her intention to begin dressing in women's business attire.⁶ Within two weeks, Amiee's employer fired her, stating that her plans were "unacceptable."⁷

Gerald Bostock and Amiee Stephens sued their respective employers in federal court, each alleging that their termination was a violation of Title VII of the Civil Rights Act of 1964. The United States Supreme Court eventually combined their cases with another similar case and found in their favor, ruling 6–3 in *Bostock v. Clayton County* that the employment discrimination protections found in Title VII extend to LGBT individuals.⁸ The decision was particularly remarkable because the majority was ideologically diverse: two conservative justices joined with the Court's liberal bloc. Justice Gorsuch, President Trump's first Supreme Court appointee, authored the opinion.⁹

One aspect of the *Bostock* ruling that remains to be decided is whether religious organizations are subject to liability for firing or refusing to hire LGBT individuals. While not directly discussed in the opinion, Justice Gorsuch briefly addresses the tension between this ruling and the Court's previous rulings on religious freedom, concluding that "how these doctrines protecting religious liberty interact with Title VII are questions for future cases."¹⁰ This issue will ultimately be decided by the Court, but until then legal theories about this topic will find eager audiences. Legal scholars, jurists, and laypersons can make inferences from how the Court has ruled in previous religious freedom cases to determine how this issue may ultimately be resolved.¹¹ This Note seeks to take

³ *Id.*

⁴ *Id.* at *3–4.

⁵ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 596 (E.D. Mich. 2015).

⁶ *Id.*

⁷ *Id.* at 603.

⁸ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020).

⁹ *Id.* at 1736.

¹⁰ *Id.* at 1754. In his dissent, Justice Alito highlighted the concerns religious organizations have about the ruling, opining that the Court's decision "will trigger open conflict with faith based [*sic*] employment practices of numerous churches, synagogues, mosques, and other religious institutions." *Id.* at 1780 (Alito, J., dissenting) (quoting Brief for National Association of Evangelicals et. al. as Amici Curiae 3).

¹¹ See Alix Valenti, *LGBT Employment Rights in an Evolving Legal Landscape: The Impact of the Supreme Court's Decision in Bostock v. Clayton County, Georgia*, 33 EMPLOYEE RESPONSIBILITIES & RIGHTS J. 3, 14–15 (2020),

stock of the present landscape regarding this issue and presents one possible solution to how the tension between LGBT employment protections and religious freedom may be eased.

While *Bostock* represents a landmark case in the struggle for LGBT equality, the problem of to what extent, if at all, religious organizations should be exempt from Title VII prohibitions looms large. To provide some background on this problem, Part II of this note examines the history of LGBT employment protections in the United States. Part III discusses the various ways this issue may be addressed through legislative action. It details actions that Congress may take at the federal level to address this issue and also examines what actions state legislatures may pursue. Part IV discusses the proper path federal courts should take to provide a satisfactory and just solution to this problem. It concludes that the federal judiciary should apply the ministerial exception to religious organizations while simultaneously ensuring that secular organizations are in full compliance with Title VII.

II. HISTORY OF LGBT EMPLOYMENT PROTECTIONS

The history of employment protections for LGBT individuals is, like many aspects of American history, a story of federalism. The governmental landscape pre-*Bostock* was a patchwork of state statutes, municipal ordinances, and executive orders from governors and mayors. This Part will examine the various state and local employment discrimination protections that existed pre-*Bostock*.

The first salvo in the fight for LGBT employment protections was not fired at the state level, but was, in the true spirit of American federalism, a municipal regulation. In February 1972, New York City Mayor John Lindsay issued an executive order banning discrimination [in city employment] based on sexual orientation.¹² While Congress refused to move on the issue for decades, the District of Columbia passed an extensive human rights measure in 1973 that made sexual orientation a protected classification in the areas of employment, housing, public accommodation, real estate, and credit practices.¹³

On April 23, 1975, Pennsylvania became the first state to ban discrimination [in all state employment] based on sexual orientation. Then Democratic Governor Milton Shapp signed Executive Order 1975-5 committing his administration to work towards “ending discrimination against persons because

https://www.researchgate.net/publication/345458780_LGBT_Employment_Rights_in_an_Evolving_Legal_Landscape_the_Impact_of_the_Supreme_Court's_Decision_in_Bostock_v_Clayton_County_Georgia [https://perma.cc/WXT2-AB8X].

¹² WILLIAM ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 130 (Harv. Univ. Press 1999).

¹³ *Id.*; see Eva Freund, *Remarks for the Rainbow History Project*, GAY & LESBIAN ACTIVISTS ALLIANCE (Apr. 15, 2004), <http://www.glaa.org/archive/2004/title34history0415.shtml> [https://perma.cc/BPA9-H3VZ].

of their sexual or affectional orientation.”¹⁴ The next major breakthrough occurred in Wisconsin in 1981 when it became the first state to enact legislation prohibiting discrimination [in **all** employment] based on sexual orientation.¹⁵ At the time of the *Bostock* decision, twenty-two states had legislation prohibiting LGBT employment discrimination.¹⁶

III. LEGISLATIVE SOLUTIONS TO THE CONFLICTS BETWEEN TITLE VII AND RELIGIOUS EXEMPTIONS

The application of Title VII’s prohibition of employment discrimination to LGBT individuals is almost certain to give rise to challenges from religious organizations that fundamentally object to hiring LGBT individuals.¹⁷ Such challenges have a long history of jurisprudence in the United States.¹⁸ Attempts by state legislatures and Congress to create religious exemptions to Title VII and other civil rights legislation are an important part of this jurisprudence. This Part will explore the various steps that Congress and state legislatures have taken to forge a legislative balance between Title VII and religious exemptions.

A. Federal Legislation

Prior to the *Bostock* decision, various congressional members made several pushes to enact legislation that would have expanded Title VII protections to explicitly include LGBT individuals.¹⁹ The first major vehicle for federal legislative change that was introduced was the Employment Non-Discrimination Act (ENDA).²⁰ The ENDA was, in many ways, a simple

¹⁴ Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS ACTION FUND (Jun. 2012) https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf [<https://perma.cc/SM6J-J7US>]; see *Center History*, CTR. FOR LGBT HEALTH RES., UNIV. OF PITT., <https://pre.lgbthlres.pitt.edu/center-history/> [<https://perma.cc/7AJP-W7TL>].

¹⁵ See William B. Turner, *The Gay Rights State: Wisconsin’s Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN’S L.J. 91, 92–94 (2007).

¹⁶ Devon Sherrell, Comment, “*A Fresh Look*”: Title VII’s New Promise for LGBT Discrimination Protection Post-Hively, 68 EMORY L.J. 1101, 1103–04 (2019).

¹⁷ See Valenti, *supra* note 11, at 14–15; Sherrell, *supra* note 16, at 1106.

¹⁸ See, e.g., *Hall v. Baptist Mem’l Health Care Corp.*, 27 F. Supp. 2d 1029, 1033 (W. D. Tenn. 1998); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 651 (10th Cir. 2002).

¹⁹ See Equality Act of 1974, H.R. 14752, 93rd Cong. (1974); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013); Equality Act, H.R. 5, 117th Cong. (2021).

²⁰ Winnie Stachelberg & Crosby Burns, *10 Things to Know About the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (Apr. 24, 2013) <https://www.americanprogress.org/issues/lgbtq-rights/news/2013/04/24/61294/10-things-to-know-about-the-employment-non-discrimination-act/> [<https://perma.cc/M92X-97W6>].

expansion of the employment protections found in Title VII to LGBT workers,²¹ and it explicitly exempted religious organizations that were also exempted under Title VII.²² The ENDA never garnered enough votes to pass both chambers of Congress.²³ It came closest in 2013, when it passed the Senate 64–13, but it was never brought up for a vote in the House.²⁴

After the failure of the ENDA, congressional efforts focused on the Equality Act.²⁵ The Equality Act would add sexual orientation and gender identity to Title VII and explicitly prevent religious organizations from challenging such protections under the federal Religious Freedom Restoration Act of 1993 (RFRA).²⁶ This would be one of the first times Congress specifically limited the reach of RFRA and, as such, the Equality Act has drawn condemnation from conservatives.²⁷

If passed, the Equality Act would counter what is likely to be one of the main litigation strategies in a post-*Bostock* world.²⁸ In the 117th Congress however, the Equality Act is unlikely to garner enough votes to avoid a Republican filibuster, and conservative Democratic opposition has already arisen.²⁹ In the absence of significant federal legislation addressing the tension between religious organizations and the new Title VII protections, state legislatures might step in the fill in the gap.

B. State Legislation

While Congress may be unwilling to address the conflict between Title VII and religious organizations, state governments are more than willing. Twenty-one states have state-level RFRAs that restrict state governments' ability to

²¹ *Id.*

²² Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

²³ Stachelberg & Burns, *supra* note 20.

²⁴ Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

²⁵ Equality Act, H.R. 3185, 114th Cong. (2015).

²⁶ *Id.*

²⁷ Kelsey Dallas & Matthew Brown, *Would the Equality Act Harm Religious Freedom? Here's What You Need to Know*, DESERET NEWS (Mar. 13, 2019), <https://www.deseret.com/2019/3/13/20668346/would-the-equality-act-harm-religious-freedom-here-s-what-you-need-to-know#rep-david-cicilline-d-r-i-center-speaks-during-a-news-conference-to-introduce-the-equality-act-a-comprehensive-nondiscrimination-bill-for-lgbt-rights-at-the-capitol-on-wednesday-march-13-2019-in-washington> [https://perma.cc/G74K-WMLS]; Brad Polumbo, *Gay Conservative: Equality Act Would Crush Religious Freedom. Trump Is Right to Oppose It*, USA TODAY (May 20, 2019), <https://www.usatoday.com/story/opinion/2019/05/20/lgbtq-equality-act-fails-fair-religious-freedom-provisions-accommodation-column/3731197002/> [https://perma.cc/5F2A-R3N9].

²⁸ Sherrell, *supra* note 16, at 1106.

²⁹ Burgess Everett, *Joe Manchin Won't Support LGBTQ Protection Bill*, POLITICO (Mar. 18, 2019), <https://www.politico.com/story/2019/03/18/manchin-equality-1225670> [https://perma.cc/Q3T5-VCD9].

burden an individual's freedom of religion.³⁰ The statutes all impose similar restrictions on actions burdening the exercise of religion: the action must be the least restrictive means of furthering a compelling governmental interest.³¹ This test is essentially the same as the test that the Supreme Court uses to evaluate the constitutionality of government actions under the federal RFRA.³² These state-level RFRA are likely to be at the forefront of any litigation challenging the new Title VII employment protections.

One state created a synthesis of LGBT employment protections and religious freedom safeguards.³³ Utah added sexual orientation and gender identity to state laws prohibiting discrimination in employment and public accommodation.³⁴ On the religious side, it explicitly exempted religious organizations, like universities and charities.³⁵ Designed as a bipartisan compromise, the legislation passed the Utah legislature with strong majorities and has been in effect for five years.³⁶ The compromise struck in Utah may serve as an example for both state legislatures and Congress in the post-*Bostock* era.

IV. APPLYING THE MINISTERIAL EXCEPTION POST-*BOSTOCK* TO CREATE A JUST AND EQUITABLE BALANCE

The Supreme Court recognizes a legal doctrine that carries a strong likelihood of success in Title VII litigation: the ministerial exception.³⁷ This exception, broadly defined, protects the “freedom of a religious organization to select its ministers”³⁸ and shields religious organizations from liability in employment discrimination cases.³⁹ The exception offers expansive protections to religious organizations who fire or refuse to hire an individual on religious

³⁰ See *State Religious Freedom Restoration Acts*, NCSL (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/HM4J-RHNG>].

³¹ See generally ALA. CONST. art. I, § 3.01; CONN. GEN. STAT. § 52-571B; VA. CODE ANN. § 57-2.02; MO. REV. STAT. § 1.302.

³² Sherrell, *supra* note 16, at 1122–24.

³³ Kelsey Dallas, *Five Years Ago, Utah Passed Landmark Legislation on LGBTQ and Religious Rights. Why Didn't Other States Follow Its Lead?*, DESERET NEWS (Mar. 11, 2020), <https://www.deseret.com/indepth/2020/3/11/21163307/utah-lgbtq-rights-religious-freedom-lgbt-fairness-for-all-mormon-equality-act-congress> [<https://perma.cc/9GG9-CFSX>].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181 (2012).

³⁸ *Id.* at 188.

³⁹ *Id.* at 195–96.

grounds.⁴⁰ Recent Supreme Court cases have expanded the scope of the exception beyond employees of religious organizations who formally hold the title “minister,” which sets up a potential clash with the *Bostock* ruling.⁴¹ First, this Part examines recent Supreme Court rulings on the ministerial exception that define its nature. Then, this Part applies the ministerial exception to the issue of LGBT employment protections and religious freedom to create a balanced solution. In order to resolve this tension between the Court’s rulings to promote equality and justice, both sides must strike a compromise that recognizes the rights of both LGBT workers and religious adherents.

A. Recent Supreme Court Rulings on the Ministerial Exception

The ministerial exception has existed in the lower courts for over fifty years.⁴² The Supreme Court first recognized the ministerial exception in the 2012 case *Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, which established the right of religious organizations to select their own ministers without considering federal employment discrimination statutes.⁴³ This unanimous decision by the Court was a victory for religious freedom advocates and a disappointment for opponents of the doctrine.⁴⁴

The case arose after Hosana-Tabor fired Cheryl Perich, a teacher with narcolepsy, in apparent violation of the Americans with Disabilities Act.⁴⁵ The Court looked to the First Amendment and rulings in the Courts of Appeals to

⁴⁰ See Matthew Junker, *Ending LGBTQ Employment Discrimination by Catholic Institutions*, 40 BERKELEY J. EMP. & LAB. L. 403, 413 (2019); Oliver Encarnacion, *Lawful Religious Discrimination? The Ministerial Exception’s Almighty Spillage over the Grayer Non-Ministerial Areas*, EREPOSITORY @ SETON HALL, LAW SCHOOL STUDENT SCHOLARSHIP 1,4 (2017), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1881&context=student_scholarship [<https://perma.cc/C7JA-6J5Z>]; Michael J. West, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861, 1864–65 (2017).

⁴¹ Julie Moreau, *Supreme Court’s Religious Employer Ruling Could Weaken LGBTQ Protections*, NBC NEWS (July 10, 2020), <https://www.nbcnews.com/feature/nbc-out/supreme-court-s-religious-employer-ruling-could-weaken-lgbtq-protections-n1233461> [<https://perma.cc/3QK6-63BV>].

⁴² Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 20–21 (2011).

⁴³ *Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

⁴⁴ See generally Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965 (2007); Lauren P. Heller, Note, *Modifying the Ministerial Exception: Providing Ministers with a Remedy for Employment Discrimination Under Title VII While Maintaining First Amendment Protections of Religious Freedom*, 81 ST. JOHN’S L. REV. 663 (2007); Jessica R. Vartanian, Note, *Confessions of the Church: Discriminatory Practices by Religious Employers and Justifications for a More Narrow Ministerial Exception*, 40 U. TOL. L. REV. 1049 (2009).

⁴⁵ *Hosana-Tabor*, 565 U.S. at 178–80.

articulate a ministerial exception for religious organizations.⁴⁶ The Court declared that state involvement in religious employment decisions “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”⁴⁷

The Supreme Court did not articulate a formula to determine ministerial exception coverage, but it did lay out several factors to consider when making this determination.⁴⁸ These factors include: 1) any formal religious title granted to the employee by the religious organization; 2) whether the title indicated that the employee had undergone religious training or instruction; 3) whether the employee held themselves out as a minister; and 4) whether the employee performed “important religious functions.”⁴⁹ The Court found that Perich satisfied three of the factors: she held the title of minister, was held out as a minister, and performed religious functions as a “called” teacher.⁵⁰ Therefore, Perich was covered by the ministerial exception.⁵¹ Justices Thomas, Alito, and Kagan all authored or joined concurrences arguing for an expansive definition of minister focusing more on the employee’s duties.⁵²

The Supreme Court clarified and expanded the ministerial exception in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*.⁵³ In *Morrissey-Berru*, two Catholic teachers sued after being terminated due to age and health issues.⁵⁴ In both cases, the Ninth Circuit found that neither teacher was covered by the ministerial exception because they lacked formal titles, religious training, and ministerial backgrounds.⁵⁵

The 7–2 majority in *Morrissey-Berru* reversed the Ninth Circuit in both cases, chastising the lower court for rigidly applying the four factors outlined in *Hosana-Tabor*.⁵⁶ Instead, the Court embraced the concurrences from *Hosana-Tabor*, stating that “[w]hat matters, at bottom, is what an employee does.”⁵⁷ By further rejecting a formulistic approach, the Court broadened the scope of the exception: an employee need not bear a ministerial title or have received religious training for organizations to be shielded from liability.⁵⁸ Although the decision expanded the ministerial exception in general terms, the Justices still

⁴⁶ *Id.* at 181, 188.

⁴⁷ *Id.* at 188.

⁴⁸ *Id.* at 191–92.

⁴⁹ *Id.* at 192. These four factors were subsequently applied by lower courts in the years following *Hosana-Tabor*. See *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 173 (5th Cir. 2012); *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 423–24 (2nd Cir. 2018); *EEOC v. R.G.*, 884 F.3d 560, 582–83 (6th Cir. 2018).

⁵⁰ *Hosana-Tabor*, 565 U.S. at 191–96.

⁵¹ *Id.* at 196.

⁵² *Id.* at 196–206 (Thomas, J., concurring; Alito, J., joined by Kagan, J., concurring).

⁵³ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2053 (2020).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 2066–67.

⁵⁷ *Id.* at 2064.

⁵⁸ See *id.* at 2068; see also Moreau, *supra* note 41.

left judges and juries wanting a more concrete standard to adjudicate employment discrimination cases.⁵⁹

B. Striking a Balance Between Religious Freedom and Employment Protections

In the face of the Court's decisions, a balance must be struck between the right of individuals and institutions to practice their religion and the right of LGBT individuals to not be discriminated against. To bridge this divide, courts should apply the ministerial exception, in accordance with Supreme Court precedent, to employees of religious institutions such as churches, charities, and schools that perform "vital religious duties[.]"⁶⁰ while not shielding secular businesses, organizations, or schools from liability under Title VII. This approach balances the needs of religious organizations to practice freely with the rights of LGBT individuals to be free from discrimination in the workplace.

1. Excluding Secular Organizations Provides Substantial Protections for Most LGBT Workers

Protecting religious freedom is an important aspect of a liberal society but developing a tolerant society that protects LGBT workers is equally important and should not be overlooked. Today in the United States, Gallup polls estimate that approximately 18 million individuals identify as LGBT.⁶¹ The exact breakdown of how many of these individuals work in the private sector is difficult to ascertain. The vast majority (71% or 107.8 million) of nonfarm payroll workers in America work in the private service industry, while 22.5 million more work in the government sector, so it is likely those trends extend to LGBT individuals as well.⁶² Given these ratios, adopting a jurisprudence that prohibits secular businesses, schools, and organizations from utilizing the

⁵⁹ See Ian Millhiser, *The Supreme Court Stripped Thousands of Teachers of Their Civil Rights*, VOX (July 8, 2020), <https://www.vox.com/2020/7/8/21317223/supreme-court-ministerial-exception-religion-morrissey-berru-samuel-alito> [<https://perma.cc/5UBA-8M7J>]; see also 140 S. Ct. at 2082 (Sotomayor, J., dissenting) (noting that the Court's decision provides little to no guidance for employment protections for school employees such as coaches, nurses, in-house lawyers, and the like who may not be involved in direct teaching).

⁶⁰ *Morrissey-Berru*, 140 S. Ct. at 2066.

⁶¹ Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx> [<https://perma.cc/Z7PP-C2H5>].

⁶² Drew Desilver, *10 Facts About American Workers*, PEW (Aug. 29, 2019), <https://www.pewresearch.org/fact-tank/2019/08/29/facts-about-american-workers/#:~:text=As%20of%20July%2C%20107.8%20million,BLS's%20most%20recent%20employment%20report> [<https://perma.cc/7H7C-QFWM>].

ministerial exception would likely extend the post-*Bostock* protections to a vast majority of LGBT workers.⁶³

The funeral home in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* that fired a transgender employee is one example of a secular business that should be barred from using the ministerial exception.⁶⁴ While the home did display Christian iconography, it also catered to families of all faiths, was not associated with a church, and chose not to display religious figures in rooms “to avoid offending people of different religions[.]”⁶⁵ Additionally, the owner did not require the employees of the funeral home to belong to a certain faith, or any faith at all.⁶⁶ While the employee was likely not considered a minister under the Court’s precedents,⁶⁷ as a secular business it should not have been allowed to utilize the ministerial exception as a rule. The various secular aspects of the home’s business model reveals that its primary purpose was not to operate as a ministry.⁶⁸ Secular businesses such as the funeral home should not be able to claim the ministerial exception when most aspects of their day-to-day operations suggest a secular purpose.

2. *Excluding Secular Businesses, Schools, & Organizations Aligns with the Court’s Precedents*

Like all common law courts, the Supreme Court maintains a healthy respect for the role precedent plays in our legal system. The Court’s decisions in *Hannah-Tabor* and *Morrissey-Berru* will guide lower courts and will influence the Court’s consideration of this issue in future cases. Both cases focused on religious schools and reviewed claims of discrimination under the ADA and the ADEA, rather than claims under Title VII.⁶⁹ In both decisions, the Court stressed the religious nature of the schools in question, highlighting the schools’ focus on giving children a “Christ-centered education”⁷⁰ and stated that “[t]he religious education and formation of students is the very reason for the existence of most private religious schools.”⁷¹ Examining the religious nature and mission

⁶³ See generally Dayana Yochim, *Pride Month: 12 Key Numbers Highlighting the Economic Status, Challenges that LGBTQ People Face*, NBC NEWS (June 22, 2020), <https://www.nbcnews.com/know-your-value/feature/pride-month-12-key-numbers-highlighting-economic-status-challenges-lgbtq-ncna1231820> [https://perma.cc/2U47-FWNC].

⁶⁴ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566–67 (6th Cir. 2018).

⁶⁵ *Id.* at 568.

⁶⁶ *Id.*

⁶⁷ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2063 (2020).

⁶⁸ See generally *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

⁶⁹ See *supra* Part IV.A.

⁷⁰ *Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 177 (2012).

⁷¹ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

of these schools is an essential part of the ministerial exception analysis; without that mission, the possibility of these schools claiming the exception is nonexistent.

Cases from both before and after *Hannah-Tabor* recognize a key element of claiming the ministerial exception: employers must show that they are a religiously affiliated institution.⁷² This focus on the religious nature and mission of the business, organization, or school in question points directly to how courts ought to rule on a case brought against a secular business by an LGBT individual. One of the cases that was consolidated into the *Bostock* opinion, *Zarda v. Altitude Express, Inc.*, highlights this distinction.⁷³ In *Zarda*, the plaintiff sued his employer, a skydiving company, after they fired him upon learning he was gay.⁷⁴ His employer was not religiously affiliated in any way and moved for summary judgment on the basis that sexual orientation was not covered under Title VII.⁷⁵ While the plaintiff did eventually win at the Supreme Court in the *Bostock* case, the secular nature of the skydiving company should have precluded it from being able to assert the ministerial exception.⁷⁶

In contrast, one district-level post-*Bostock* case exemplifies how the ministerial exception should be applied moving forward.⁷⁷ The plaintiff in *Koenke v. St. Joseph's Univ.* was a lesbian woman serving as a music director at a private, Catholic university until her resignation.⁷⁸ She alleged that she was discriminated against on the basis of her sex and her sexual orientation.⁷⁹ Importantly, both parties in *Koenke* agreed that she was a minister for purposes of her claims.⁸⁰ Under these facts, the court had no recourse but to find that plaintiff's claims were barred by the ministerial exception and granted the University's motion to dismiss.⁸¹ This case contains both elements required for

⁷² See *Hosana-Tabor*, 565 U.S. at 189–90; *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 309–10 (4th Cir. 2004) (pre-*Hosana-Tabor* case finding that “religious institution” holds a broader meaning encompassing “religious affiliated schools, hospitals, and corporations”); *Moreno v. Episcopal Diocese*, 2016 U.S. Dist. LEXIS 16543, 23–24 (E.D.N.Y. Jan. 20, 2016) (post-*Hosana-Tabor* case finding that religious corporations are religious entities for purposes of the ministerial exception).

⁷³ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

⁷⁴ *Id.* at 107.

⁷⁵ *Id.* at 109.

⁷⁶ Sadly, Donald Zarda passed away before he could see his historic case make its way to the Supreme Court and deliver a transformational victory for LGBT advocates; it is the author's hope that the Supreme Court finally granting him justice provides some comfort to his family.

⁷⁷ *Koenke v. St. Joseph's Univ.*, 2021 U.S. Dist. LEXIS 3576, at *2 (E.D. Pa. Jan. 8, 2021).

⁷⁸ *Id.* at *2.

⁷⁹ *Id.* Although her claims in this case were brought under Title IX of the Education Amendments of 1972, the ministerial exception analysis is fundamentally the same. See *id.* at *2, 11 (citing *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010)).

⁸⁰ *Id.* at *6–7 (E.D. Pa. 2021).

⁸¹ *Id.* at *8, 12.

a court to apply the ministerial exception to a plaintiff's case under the proposed standard: 1) the employer is a religious institution, and 2) the employee satisfies the *Morrissey-Berru* test for being considered a minister.⁸² This strikes a balance between respecting the rights of religious institutions and LGBT workers that can serve as a model moving forward.

3. Rejecting Extreme Ideological Solutions

One strength of this approach is its moderation: the proposed standard rejects extreme ideological solutions and crafts a durable compromise. Public opinion showcases the need for a compromise in these polarizing times: 90% of Americans agreed with the outcome of the *Bostock* decision while 80% of Americans also say that religious freedom issues are important.⁸³ With supermajorities of Americans favoring both policies, it is important for the courts to pursue a path that protects the rights of both LGBT individuals and religious Americans.

The conservative solution to this problem is the recent passage of state-level RFRA's.⁸⁴ In particular, Indiana came under fire for a state-level RFRA that was lauded by religious conservatives but criticized by LGBT activists and the business community for allegedly removing barriers to discrimination.⁸⁵ In Indiana, then-Governor Mike Pence ignited a firestorm when he signed legislation requiring the state government to prove it had a compelling reason for any infringement on the ability of a person to practice their religion. The legislation also required the state to implement the least restrictive measures possible if infringement was necessary.⁸⁶ While the law was eventually tweaked—after a major public outcry to prevent individuals and businesses

⁸² *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020).

⁸³ Elana Schor & Hannah Fingerhut, *Religious Freedom in America: Popular and Polarizing*, ASSOCIATED PRESS (Aug. 5, 2020) <https://abcnews.go.com/Politics/wireStory/religious-freedom-america-popular-polarizing-72188535> [<https://perma.cc/9HX6-MK4L>]; *Poll: Large Majorities, Including Republicans, Oppose Discrimination Against Lesbian, Gay, Bisexual, and Transgender People by Employers and Health Care Providers*, KAISER FAMILY FOUND. (June 24, 2020), <https://www.kff.org/other/press-release/poll-large-majorities-including-republicans-oppose-discrimination-against-lesbian-gay-bisexual-and-transgender-people-by-employers-and-health-care-providers/> [<https://perma.cc/9YKE-QDSA>].

⁸⁴ See *State Religious Freedom Restoration Acts*, NCSL (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [<https://perma.cc/2N8Z-4SR7>].

⁸⁵ Scott Bomboy, *Explaining the Indiana RFRA Controversy in Five Minutes*, NAT'L CONST. CTR. (Apr. 1, 2015), <https://constitutioncenter.org/blog/explaining-the-indiana-rfra-controversy-in-five-minutes> [<https://perma.cc/KZH5-SDNF>].

⁸⁶ Dwight Adams, *RFRA: Why the 'Religious Freedom Law' Signed by Mike Pence Was so Controversial*, INDYSTAR (Apr. 25, 2018), <https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002/> [<https://perma.cc/AJ3V-ZXVF>].

from circumventing civil rights laws—this attempt represents the conservative solution to the problem and goes too far in protecting employers.⁸⁷

On the other side of the ideological divide stands the liberal Equality Act, which heavily prioritizes employment protections over religious freedom.⁸⁸ The Equality Act restricts the ability of religious organizations to sue under the federal RFRA and also removes conscience protections from the Civil Rights Act.⁸⁹ While fighting LGBT discrimination is a worthwhile cause, the Equality Act goes too far in one direction by severely restricting the ability of religious institutions to “choose those who will guide it [religious institutions] on its way.”⁹⁰ This moderate compromise draws inspiration from the Utah compromise between Mormon leaders and LGBT groups to help preserve this balance.⁹¹

V. CONCLUSION

The Civil Rights Act of 1964 made a promise to the American people that regardless of their race, color, sex, religion, or national origin they would not face discrimination. This promise remained unfulfilled for millions of LGBT Americans until *Bostock v. Clayton County*, when, for the first time ever, Title VII was applied to sexual orientation and gender identity.⁹² In the aftermath of this landmark case, however, questions remain as to how these newfound protections will conflict with protections for religious freedom.

Federal courts should move to answer these questions by applying the ministerial exception to employees of religious institutions who perform “vital religious duties”⁹³ while taking extra care to not shield secular businesses, organizations, or schools from liability under Title VII. This moderate compromise would strike a solid balance between protecting LGBT workers and respecting religious freedom, which, in turn, would reaffirm the principle that America is a land of equality, tolerance, and freedom for all.

⁸⁷ See Bomboy, *supra* note 85.

⁸⁸ See *supra* Part III.A.

⁸⁹ See THE HERITAGE FOUNDATION, 11 MYTHS ABOUT H.R. 5, THE EQUALITY ACT OF 2021 1–2 (Feb. 24, 2021), https://www.heritage.org/sites/default/files/2021-02/FS_201.pdf [<https://perma.cc/BWY5-AWG8>].

⁹⁰ *Hosana-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

⁹¹ See *supra* notes 33–36 and accompanying text.

⁹² See *supra* note 8 and accompanying text.

⁹³ *Morrissey-Berru*, 140 S. Ct. at 2066.