

# Ending LGBTQ Employment Discrimination by Catholic Institutions

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## INTRODUCTION

With more than seventy-four million members in the United States, the Catholic Church is the nation's largest religious denomination.<sup>1</sup> Thousands of diverse institutions are affiliated with the Church, including 6,289 K–12 schools,<sup>2</sup> 260 higher education institutions,<sup>3</sup> and 654 hospitals.<sup>4</sup> Together, these institutions employ more than one million people in the United States.<sup>5</sup> While many of these organizations relied historically on the labor of clergy and members of vowed religious communities, declining religious vocations and stricter professional licensure requirements have led to a significant reliance on lay employees (those not ordained and excluding those under religious vows).<sup>6</sup> For example, lay people now comprise 97.2% of full-time equivalent staff in Catholic K–12 schools.<sup>7</sup>

This dependence on lay employees brings many challenges, including the maintenance of a Catholic institutional identity. To maintain their religious identity, Catholic institutions often terminate employees deemed to inadequately model the Church's teachings, especially on sexual and marital issues like artificial insemination, pregnancy outside of marriage, and remarriage without a Church-granted annulment.<sup>8</sup> In recent years, the

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1. *Frequently Requested Church Statistics*, CENTER FOR APPLIED RESEARCH IN THE APOSTOLATE, <https://perma.cc/8VZA-AW7S> (estimating 74.3 million self-identified Catholics in the United States in 2017); *Religious Landscape Study*, PEW RESEARCH CENTER, <https://perma.cc/EP2S-GXH4> (finding Catholics are the largest denomination at 20.8% of the total population).

2. *Catholic School Data*, NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, <https://perma.cc/5RYF-Q496?type=image>.

3. *Catholic Higher Education FAQs*, ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, <https://perma.cc/E5S3-JQT4>.

4. *U.S. Catholic Health Care*, CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, <https://perma.cc/5FMP-Y7EF>.

5. *Catholic School Data*, *supra* note 2 (counting 152,730 full-time equivalent staff at K–12 schools); *Integrated Postsecondary Education Data System*, NATIONAL CENTER FOR EDUCATION STATISTICS, <https://perma.cc/DL5E-2UPD> (counting 164,372 employees of Catholic higher education institutions as of fall 2017 but not including employees of Catholic higher education institutions that do not participate in federal student financial aid programs); *U.S. Catholic Health Care*, *supra* note 4 (counting 530,599 full-time and 225,433 part-time employees of Catholic hospitals).

6. *See Frequently Requested Church Statistics*, *supra* note 1 (finding that from 1970 to 2017, the number of priests in the United States fell from 59,192 to 37,181 and the number of religious sisters fell from 160,931 to 45,605); E-mail from Jennifer Haselberger, J.C.L., Ph.D., former Chancellor for Canonical Affairs, Roman Catholic Archdiocese of Saint Paul and Minneapolis, to author (Mar. 3, 2019, 19:06 PST) (on file with author) (discussing the effect of stricter licensure requirements on Church employment).

7. *Catholic School Data*, *supra* note 2.

8. *E.g.*, *Dias v. Archdiocese of Cincinnati*, No. 1:11–CV–00251, 2012 WL 1068165, at \*1 (S.D. Ohio Mar. 29, 2012) (concerning a Catholic school employee terminated for using artificial insemination); *Teachers Fired After Out Of Wedlock Pregnancy Settle With Lawrence Catholic School*,

status of LGBTQ employees has become a particular flashpoint as Catholic institutions face the growing social acceptance and legal protection of same-sex relationships.<sup>9</sup> New Ways Ministry, an LGBTQ Catholic advocacy organization, has documented more than seventy workers who have been fired, forced to resign, or otherwise penalized for LGBTQ-related reasons.<sup>10</sup> This total does not include many other instances that have not become public.<sup>11</sup> These firings have sparked an impassioned debate within the Church over how it should respond to LGBTQ employees in light of existing law and the totality of Catholic teaching.<sup>12</sup>

This note examines the legal doctrines that enable Catholic institutions in the United States to discriminate against LGBTQ employees and urges these institutions to adopt an equitable policy modeled after the Catholic Church in Germany. Part I first argues that terminating LGBTQ employees contradicts the Church's call to respect LGBTQ people and undermines the Church's shifting pastoral emphasis under Pope Francis. Part II then surveys the gaps in non-discrimination laws covering sexual orientation and gender identity. Part III reviews the First Amendment ministerial exception that protects religious institutions from employment discrimination claims. Part IV examines the religious exemptions in Title VII. Part V then discusses Catholic institutions' widespread use of morals clauses in employment contracts. After detailing the narrow legal recourse created by inadequate non-discrimination law, religious exemptions, and morals clauses, Part VI advocates for Catholic institutions to adopt an equitable employment policy like the Catholic Church in Germany and identifies likely allies among diocesan bishops, religious institutes, and labor unions.

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CBS BOSTON (Dec. 16, 2013), <https://perma.cc/D3QZ-JCDT>; *Catholic school teacher fired for marriage*, UNITED PRESS INTERNATIONAL (Dec. 30, 2008), <https://perma.cc/XM3G-HRK8>.

9. See *Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical*, PEW RESEARCH CENTER (June 26, 2017), <https://perma.cc/5EXF-CEW5> (finding Americans' support for same-sex marriage rose drastically from 42% in 2010 to 62% in 2017).

10. Francis DeBernardo, *Employees of Catholic Institutions Who Have Been Fired, Forced to Resign, Had Offers Rescinded, or Had Their Jobs Threatened Because of LGBT Issues*, NEW WAYS MINISTRY (Jan. 28, 2019), <https://perma.cc/V6CE-7WGJ>.

11. Telephone Interview with Francis DeBernardo, Executive Director, New Ways Ministry (Nov. 19, 2018); Haselberger, *supra* note 6 (commenting based on her experience working for several dioceses that the number of LGBTQ-related terminations is much higher).

12. See, e.g., JAMES MARTIN, SJ, BUILDING A BRIDGE: HOW THE CATHOLIC CHURCH AND THE LGBT COMMUNITY CAN ENTER INTO A RELATIONSHIP OF RESPECT, COMPASSION, AND SENSITIVITY 46–50 (2017) (criticizing the trend of LGBTQ-related firings); The Editors, *How should the church respond when gay employees get married?*, AMERICA: THE JESUIT REVIEW (Oct. 25, 2016), <https://perma.cc/9TU9-6FYZ> (arguing for a more merciful approach to the issue).

## I. FALLING SHORT OF THE CHURCH'S PASTORAL MISSION

The Catholic Church calls its members to treat people attracted to the same sex with “respect, compassion, and sensitivity” and to avoid “[e]very sign of unjust discrimination in their regard.”<sup>13</sup> Church leaders have similarly condemned unjust discrimination based on gender identity.<sup>14</sup> These pastoral teachings are difficult to reconcile with the Church’s opposition to same-sex relationships and criticisms of transgender and gender-variant identities, but the Church’s changing pastoral approach under Pope Francis sheds light.<sup>15</sup> In his paradigm-shifting apostolic exhortation *Amoris Laetitia*, the Pope instructed the Church to reject “a cold bureaucratic morality” and to not throw moral laws like stones at people’s lives.<sup>16</sup> Instead, Pope Francis called on the Church to embrace a “merciful love, which is ever ready to understand, forgive, accompany, hope, and above all integrate.”<sup>17</sup> The Church must always uphold the full ideal of the gospel, wrote the Pope, but it must also meet people where they are, acknowledge the complexities of people’s lives, and respect the role of one’s conscience in making moral decisions.<sup>18</sup> Although his record on LGBTQ issues is mixed, Pope Francis has embodied this approach in some overtures to the LGBTQ community, including inviting a transgender man rejected by his parish to the Vatican and meeting with a gay former student and his partner.<sup>19</sup>

As discussion of LGBTQ-related terminations by Catholic institutions widens, an increasing number of Catholic leaders are acknowledging the trend violates the command to act with “respect, compassion, and sensitivity.”<sup>20</sup> Especially of concern is what appears to be a selective application of the Church’s moral standards. While no study of how Catholic institutions have enforced their discretionary authority over

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13. CATECHISM OF THE CATHOLIC CHURCH para. 2358 (2nd ed. 2016).

14. CONGREGATION FOR CATHOLIC EDUCATION, “MALE AND FEMALE HE CREATED THEM” TOWARDS A PATH OF DIALOGUE ON THE QUESTION OF GENDER THEORY IN EDUCATION para. 15–16 (Vatican Press 2019).

15. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 13, para. 2357–59 (summarizing the Church’s moral teachings on same-sex relationships); CONGREGATION FOR CATHOLIC EDUCATION, *supra* note 14 (criticizing the influence of “gender theory” in education); POPE FRANCIS, POST-SYNODAL APOSTOLIC EXHORTATION *AMORIS LAETITIA* para. 291–312 (Vatican Press 2016).

16. POPE FRANCIS, *supra* note 15, para. 312, 305.

17. *Id.* para. 312.

18. *Id.* para. 291–312.

19. See *The Many Faces of Pope Francis: A Five-Year Timeline of His LGBT Record*, NEW WAYS MINISTRY, <https://perma.cc/PB7W-VW3E> (chronicling the Pope’s statements and actions on LGBTQ issues); Ashley Gold, *Pope Francis met gay couple at Vatican embassy in US*, BBC NEWS (Oct. 2, 2015), <https://perma.cc/2A48-XY2>; Thomas C. Fox, *Report: Pope Francis meets with, hugs transgender man*, NATIONAL CATHOLIC REPORTER (Jan. 30, 2015), <https://perma.cc/2G4H-6H32>.

20. E.g., MARTIN, *supra* note 12; The Editors, *supra* note 12.

employees' conduct exists, many of those working on the issue believe these institutions police the conduct and marital status of LGBTQ employees much more closely than that of heterosexual employees.<sup>21</sup> In fact, the Catholic bishops of Germany acknowledged that Catholic institutions there were frequently terminating employees in same-sex partnerships but hardly ever disciplining heterosexual employees who improperly divorced and remarried.<sup>22</sup>

For Catholic institutions not to selectively target LGBTQ employees over heterosexuals would be exceptional given the growing scientific understanding of implicit bias—the tendency to unconsciously act on ingrained prejudice.<sup>23</sup> Implicit bias against gay, lesbian, and transgender people is widespread, causing many to quickly and unconsciously attach negative associations to them in a way untrue for heterosexuals.<sup>24</sup> One Italian study found that even the simple perception of a recorded voice as gay or lesbian led to stereotyping and discriminatory behavior.<sup>25</sup> The extent to which implicit anti-LGBTQ bias produces discriminatory behavior is understudied,<sup>26</sup> but a large body of social science demonstrates how implicit attitudes toward race and gender lead to discriminatory decision-making in the employment context.<sup>27</sup> For Catholic institutions to apply the Church's

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21. MARTIN, *supra* note 12, at 47 (“[Church organizations’] authority is applied in a highly *selective* way. Almost all the firings in recent years have focused on LGBT matters.”); The Editors, *supra* note 12 (noting “the absence of any comparable policing of marital status for heterosexual employees”); DeBernardo, *supra* note 11.

22. The Editors, *supra* note 12.

23. See generally Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

24. Erin C. Westgate et al., *Implicit Preferences for Straight People over Lesbian Women and Gay Men Weakened from 2006 to 2013*, 1 COLLABRA 1, 3 (2015) (finding participants overall showed an implicit and explicit preference for heterosexuals over gays and lesbians); Jordan R. Axt et al., *Implicit transgender attitudes independently predict gender and transgender-related beliefs* 31 (2019) (under review) (on file with author) (finding, across four studies, robust implicit and explicit preferences for non-transgender over transgender people).

25. Fabio Fasoli et al., *Gay- and Lesbian-Sounding Auditory Cues Elicit Stereotyping and Discrimination*, 46 ARCHIVES SEXUAL BEHAV. 1261, 1272–74 (2017) (finding, among other conclusions, that male participants were more likely to avoid male speakers perceived as gay).

26. According to researcher Erin C. Westgate, author of two articles on the topic, implicit attitudes toward sexual and gender minorities are understudied because many academic publishers do not find the topic of sufficient general interest. E-mail from Erin C. Westgate, Ph.D., Postdoctoral Researcher, The Ohio State University, to author (Feb. 7, 2019, 6:36 PST) (on file with author).

27. E.g., L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359, 1359–68 (2012); Greenwald & Krieger, *supra* note 23, at 961–62; Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–99 (2003); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 421–46 (2000).

moral standards equitably to LGBTQ and heterosexual employees in defiance of ubiquitous implicit bias is highly unlikely given that the Church still struggles with instances of extreme homophobia.<sup>28</sup>

The American bishops have condemned anti-LGBTQ harassment, but the termination of LGBTQ employees continues to encourage the deeply invasive and humiliating outing of employees who act cautiously to keep their sexual orientation, gender identity, or relationships private.<sup>29</sup> For example, one parish fired its cantor, Jeffrey Higgins, after a family from the parish saw Higgins and his husband at a local movie theater and then searched online for their wedding photos.<sup>30</sup> A Catholic high school placed guidance counselor Shelly Fitzgerald on indefinite leave after someone submitted her same-sex marriage certificate to the principal.<sup>31</sup> And another Catholic school fired dean of guidance and basketball coach Kate Drumgoole after an estranged family member leaked private photos of her and her wife to school officials.<sup>32</sup> As in these examples, other lay people, rather than clergy, are often the ones who seek out information about employees' private lives and demand a response from Church officials.<sup>33</sup> By acting on these exposures, Church leaders empower harassers and subject LGBTQ employees to the constant fear of their peers reporting them.

Administrators' inconsistent use of discretion intensifies the threat facing LGBTQ employees. In several instances, administrators have signaled an employee's same-sex relationship would not affect his or her employment, only to terminate that employee later on. For example, one Catholic school hired teacher Richard Miller knowing that he was in a same-sex relationship, but later refused to renew his contract for that same reason.<sup>34</sup> Often, this shift occurs once administrators receive complaints from a hostile parent or another community member. In the case of teacher Margie Winters, school officials had known about her same-sex marriage for nearly a decade, but then abruptly fired her when one parent complained

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28. See, e.g., Brooke Sopelsa, *Priest who burned rainbow flag in 'exorcism' ceremony is removed from church*, NBC NEWS (Sep. 24, 2018), <https://perma.cc/HXM3-697B>.

29. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, MINISTRY TO PERSONS WITH A HOMOSEXUAL INCLINATION: GUIDELINES FOR PASTORAL CARE 18 (2006) ("Church policies should explicitly reject unjust discrimination and harassment of any persons, including those with a homosexual inclination. Procedures should be in place to handle complaints.")

30. Michael K. Lavers, *EXCLUSIVE: Married gay man fired from Md. church*, WASHINGTON BLADE (Dec. 23, 2015), <https://perma.cc/TR73-PWLH>.

31. Katie Cox, *Shelly Fitzgerald files EEOC charge against Roncalli High School and the Archdiocese of Indianapolis*, RTV6 INDIANAPOLIS (Jan. 14, 2019), <https://perma.cc/GM93-GMZU>.

32. Allison Pries, *Court denies Paramus Catholic bid to dismiss bias suit*, NORTHJERSEY.COM (Dec. 14, 2016), <https://perma.cc/A77G-F3KY>.

33. Haselberger, *supra* note 6.

34. Bob Shine, *Catholic jobs lost over LGBT issues on the rise*, NATIONAL CATHOLIC REPORTER (Sep. 25, 2014), <https://perma.cc/DX65-JRUM>.

following a disagreement with Winters.<sup>35</sup> The American bishops have instructed parishes to develop procedures to prevent discrimination, but LGBTQ employees continue to be caught in an ideological struggle within the Church in which assurances of job protection by administrators are often meaningless.<sup>36</sup>

Administrators argue that public nonadherence to Catholic doctrine weakens the Church's moral authority, but these firings cause tremendous damage to the Church's moral authority as prejudice toward sexual minorities steadily decreases in the larger society.<sup>37</sup> Consider the case of Roncalli High School in Indiana. Guidance counselor Shelly Fitzgerald had worked there for fifteen years and had even attended the school herself.<sup>38</sup> After an unknown person submitted her same-sex marriage certificate, the school put Fitzgerald on administrative leave and banned her from campus.<sup>39</sup> The school even barred Fitzgerald's father from helping with student retreats, which he had done for the past twenty-six years.<sup>40</sup> Morally outraged, students and their parents protested in support of Fitzgerald, launched a campaign to change the archdiocese's practices, and even appeared with Fitzgerald on *The Ellen DeGeneres Show* to receive a \$25,000 donation.<sup>41</sup> Despite this outcry, the school subsequently refused to renew the contract of a second guidance counselor in a same-sex marriage, Lynn Starkey, who had worked at the school for nearly forty years.<sup>42</sup> The damage to the Church's moral reputation caused by the school's actions is immeasurable.

The cold bureaucratic morality exemplified by Roncalli High School's banishment of two beloved, decades-long community members over their private romantic relationships also hastens the massive number of people defecting from the Catholic Church. With former Catholics comprising thirteen percent of all adults in the United States, Catholicism has experienced a greater net loss due to religious switching than any other religious tradition.<sup>43</sup> A recent study of former Catholic young adults found

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35. Lizzie Crocker, *The Fired Lesbian Teacher Fighting Back Against the Catholic Church*, THE DAILY BEAST (Aug. 6, 2015), <https://perma.cc/7KEK-JYUQ>.

36. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 29.

37. Westgate et al., *supra* note 24 (finding that from 2006 to 2013, explicit preference for heterosexuals over gays and lesbians declined by 26% and implicit preference declined by 13.4%).

38. Rob Burgess, *Q&A With Roncalli's Suspended Shelly Fitzgerald*, NUVO (Dec. 3, 2018), <https://perma.cc/FP5W-J44L>.

39. *Id.*

40. *Suspended counselor's dad unwelcome at Roncalli High School retreat*, WISH-TV (Jan. 23, 2019), <https://perma.cc/9EYM-23NP>.

41. Burgess, *supra* note 38; *Our Purpose*, SHELLY'S VOICE, <https://perma.cc/UXL6-L8AP>.

42. Carter Barrett, *Second Roncalli HS Counselor To Lose Job over Same-Sex Marriage*, WBAA (Mar. 25, 2019), <https://perma.cc/J78L-SQA7>.

43. David Masci & Gregory A. Smith, *7 facts about American Catholics*, PEW RESEARCH CENTER (Oct. 10, 2018), <https://perma.cc/4BW4-K6CD>.

that forty-five percent had left because of disagreements with Church teaching, frequently over the Church's approach to same-sex marriage and homosexuality.<sup>44</sup> Embracing a more respectful, compassionate, and sensitive approach toward LGBTQ employees is a crucial step in the Church's process of regaining moral authority and stemming this decline.

## II. LGBTQ EMPLOYMENT NON-DISCRIMINATION LAWS

Many legal obstacles stand in the way of LGBTQ employees seeking legal redress after being discriminated against by a Catholic institution. One must first determine whether any law actually prohibits discrimination on the basis of sexual orientation or gender identity. As of April 2019, twenty-one states and the District of Columbia ban employment discrimination based on sexual orientation and gender identity.<sup>45</sup> One state explicitly prohibits discrimination based on sexual orientation only, and two states include sexual orientation or gender identity in their interpretation of prohibited sex discrimination.<sup>46</sup> Despite a trend toward greater protection, forty-four percent of the nation's LGBTQ population lives in states that do not prohibit employment discrimination based on sexual orientation or gender identity.<sup>47</sup> And like Title VII of the Civil Rights Act of 1964, state non-discrimination laws generally apply only to employers of a certain size, which may preclude protection for employees of smaller institutions.<sup>48</sup>

While Title VII prohibits discrimination because of "sex," circuit courts differ on whether sex includes sexual orientation and gender identity.<sup>49</sup> Only the Second and Seventh Circuits have held Title VII's prohibition on sex discrimination includes sexual orientation.<sup>50</sup> Favorable interpretations protecting gender identity are more numerous. The Sixth and Ninth Circuits have held Title VII prohibits discrimination based on gender

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44. ST. MARY'S PRESS, GOING, GOING, GONE: THE DYNAMICS OF DISAFFILIATION IN YOUNG CATHOLICS 21–24, 43 (2017) (finding 45% of participants stated that a disagreement with the Church on a political issue was at least somewhat important to their decision to leave, with same-sex marriage, abortion, and birth control being the most common).

45. *Equality Maps: State Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/5QJJ-Z3C2>.

46. *Id.*

47. *Id.*

48. 42 U.S.C. § 2000e(b) (2012) (stating Title VII applies only to private employers with at least fifteen employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year); CAL. GOV'T CODE §§ 12926(d), 12940(j)(4)(a) (West, Westlaw through Ch. 2 of 2019 Reg. Sess.) (stating California's Fair Employment and Housing Act covers private employers with five or more employees but has no minimum employee requirement for harassment cases).

49. 42 U.S.C. § 2000e-2(a)(1) (2012).

50. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131–32 (2d Cir. 2018) (en banc), *cert. granted*, 2019 WL 1756678 (U.S. Apr. 22, 2019) (No. 17-1623); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc).

identity.<sup>51</sup> And the First, Seventh, and Eleventh Circuits have held other federal protections, such as Title IX and the Equal Protection Clause, prohibit gender identity-based discrimination, suggesting the same is true for Title VII.<sup>52</sup> Since 2012, the Equal Employment Opportunity Commission (“EEOC”) has argued that Title VII covers discrimination based on either sexual orientation or gender identity and continues to litigate charges brought by LGBTQ plaintiffs.<sup>53</sup> However, federal courts owe judicial deference to the EEOC’s interpretation of Title VII’s substantive matters only to the extent courts find the interpretation persuasive.<sup>54</sup>

The Supreme Court will soon decide three cases that address whether Title VII prohibits discrimination on the basis of sexual orientation and gender identity.<sup>55</sup> Given the current circuit split, these rulings may result in a major expansion or contraction of Title VII’s availability to LGBTQ plaintiffs. The biggest variable in these decisions is how Justice Brett Kavanaugh will rule because his record contains no LGBTQ-specific rulings that indicate his stance.<sup>56</sup> However, Justice Kavanaugh’s generally conservative record leaves little hope that he will follow his predecessor Justice Anthony Kennedy in supporting greater protections for LGBTQ people.<sup>57</sup>

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51. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018), *cert. granted*, 2019 WL 1756679 (U.S. Apr. 22, 2019) (No. 18-107); Kastl v. Maricopa Cty. Cmty. Coll. Dist., 325 Fed. App’x 492, 493 (9th Cir. 2009).

52. Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1046–54 (7th Cir. 2017) (holding a transgender student who challenged a school’s bathroom policy was likely to succeed under Title IX and the Equal Protection Clause); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding discrimination against a transgender individual because of her gender nonconformity is sex discrimination in violation of the Equal Protection Clause); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (holding a transgender plaintiff may be able to prove sex discrimination under the Equal Credit Opportunity Act based on her nonconformance with gender stereotypes).

53. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://perma.cc/QP27-U6J3>.

54. *What You Should Know about EEOC Regulations, Subregulatory Guidance and other Resource Documents*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://perma.cc/5KMZ-C78X>.

55. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018) (holding Title VII prohibits discrimination based on gender identity), *cert. granted*, 2019 WL 1756679 (U.S. Apr. 22, 2019) (No. 18-107); Zarda v. Altitude Express, Inc., 883 F.3d 100, 131–32 (2d Cir. 2018) (en banc) (holding Title VII prohibits discrimination based on sexual orientation), *cert. granted*, 2019 WL 1756678 (U.S. Apr. 22, 2019) (No. 17-1623); Bostock v. Clayton Cty. Bd. of Comm’rs, 723 Fed. App’x 964, 965 (11th Cir. 2018) (per curiam) (holding Title VII does not prohibit discrimination based on sexual orientation), *cert. granted*, 2019 WL 1756677 (U.S. Apr. 22, 2019) (No. 17-1618).

56. See Samantha Allen, *Where Does Brett Kavanaugh Stand on LGBT Rights? It’s a Mystery*, DAILY BEAST (Aug. 22, 2018), <https://perma.cc/D8C2-YEAK>.

57. See Brett M. Kavanaugh: *Wrong for LGBTQ People. Wrong for the Supreme Court.*, HUMAN RIGHTS CAMPAIGN, <https://perma.cc/WC5U-KGL6>.

## III. THE MINISTERIAL EXCEPTION

Even if non-discrimination statutes cover LGBTQ workers, religious exemptions may still protect Catholic institutions from the consequences of their employment discrimination. Since 1972, circuit courts have recognized that the First Amendment's religion clauses exempt religious organizations from employment discrimination claims brought by their ministers.<sup>58</sup> In 2012, the Supreme Court recognized this "ministerial exception" as an affirmative defense in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*<sup>59</sup> The Court ruled that the exception applied to a teacher whom the school's controlling congregation regarded as "called" to her vocation by God and who underwent religious training to become a formally commissioned minister.<sup>60</sup> Also relevant were her job duties, which included teaching religion, leading students in prayer, and conducting chapel services twice a year.<sup>61</sup> Thus, as a ministerial employee, she could not pursue her discrimination claim under the Americans with Disabilities Act.<sup>62</sup>

The Supreme Court's ruling in *Hosanna-Tabor* has generated considerable criticism for using a selective history of the First Amendment to exempt religious institutions—but not religious individuals—from generally applicable laws.<sup>63</sup> Earlier in 1990, the Court held in *Employment Division v. Smith* that the state could deny two Native Americans unemployment benefits because their termination resulted from unlawfully using peyote in a religious ceremony.<sup>64</sup> Despite the sacramental importance of peyote to them as members of the Native American Church, the Court held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability"

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58. *McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972); *see also Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168–69 (4th Cir. 1985).

59. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012).

60. *Id.* at 177, 190–91.

61. *Id.* at 192.

62. *Id.* at 194.

63. *E.g.*, Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L. J. 981, 988–94 (2013) (criticizing the Court's argument that government appointment of ministers was the key evil motivating the religion clauses and arguing courts should require religious institutions to obey neutral laws of general applicability like religious individuals); Ioanna Tourkochoriti, *Revisiting Hosanna-Tabor v. EEOC: The Road Not Taken*, 49 TULSA L. REV. 47, 70–82 (2013) (criticizing the Court's distinction between individual and institutional religious exercise rights and the Court's historical explanation of the religion clauses).

64. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 874, 890 (1990).

because making religious doctrines superior to the law would “permit every citizen to become a law unto himself.”<sup>65</sup>

The general applicability of Title VII and other non-discrimination laws cast the ministerial exception into doubt and suggested courts could hold religious employers liable for employment discrimination. But the Court in *Hosanna-Tabor* distinguished *Smith* as only regulating “outward physical acts,” whereas *Hosanna-Tabor* concerned government interference with “an internal church decision that affects the faith and mission of the church itself.”<sup>66</sup> In doing so, the Court drew a peculiar line between individual, physical religious acts subject to regulation and exempted internal church decisions, even though courts often implicate themselves in internal church decisions in other contexts, such as property disputes.<sup>67</sup> This facile distinction produces the strange result of lawfully prohibiting the religious use of peyote, which predates the United States Constitution, yet protecting religious institutions’ ability to terminate ministerial employees for entirely nonreligious reasons, like developing a brain tumor.<sup>68</sup>

For LGBTQ employees of Catholic institutions, the severity and breadth of the ministerial exception have devastating consequences. In many cases of overt sexual orientation discrimination, the exception completely eliminates legal recourse under Title VII and state law.<sup>69</sup> The Court in *Hosanna-Tabor* also created uncertainty by undermining the Sixth Circuit’s “primary duties” test but failing to provide clear guidance for lower courts to follow.<sup>70</sup> Based on the decision, lower courts often divide the ministerial exception into two inquiries: whether the employer is a

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65. *Id.* at 874, 879 (quoting *U.S. v. Lee*, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)), 879 (quoting *Reynolds v. U.S.*, 98 U.S. 145, 166–67 (1878)).

66. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012) (citing *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

67. Griffin, *supra* note 63, at 1001 (citing *Jones v. Wolf*, 443 U.S. 595, 604 (1979) as permitting courts to review church deeds, charters, constitutional provisions, and other documents as long as courts interpret them in purely secular terms).

68. See *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018) (holding the ministerial exception barred a Jewish day school teacher’s tumor-related ADA claim); *id.* at 993 (citing CAROLYN N. LONG, RELIGIOUS FREEDOM AND INDIAN RIGHTS: THE CASE OF *OREGON V. SMITH* 6–8 (2000)).

69. *E.g.*, *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, No. 1:16-cv-11576, 2017 WL 4339817, at \*7 (N.D. Ill. Sept. 29, 2017) (dismissing federal and state law discrimination claims against parish that fired its music director because of his same-sex marriage); *Collette v. Holy Family Parish*, No. 1:16-cv-02912, slip op. at 1 (N.D. Ill. Apr. 18, 2017) (granting summary judgment for Catholic Church that terminated Director of Music and Worship after he became engaged to his same-sex partner).

70. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 193–94 (2012) (holding several factors, not just an employee’s duties, determine ministerial status); Katherine Hinkle, Note, *What’s in a Name? The Definition of “Minister” in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 34 BERKELEY J. EMP. & LAB. L. 283, 332–36 (2013).

religious organization and whether the employee is a “minister.”<sup>71</sup> But the relationship between these two inquiries is unclear.<sup>72</sup> Courts approach the ministerial exception in a case-specific, fact-intensive manner and generally do not dismiss claims under Federal Rule of Civil Procedure 12(b)(6) because the factual record is usually insufficient at that stage.<sup>73</sup>

### A. Covered Organizations

The ministerial exception covers organizations whose missions are “marked by clear or obvious religious characteristics,” even if multi- or non-denominational.<sup>74</sup> Catholic parishes and dioceses easily fall under the exception.<sup>75</sup> The same is true for Catholic K–12 schools, which provide extensive religious instruction and tend to fall under diocesan control.<sup>76</sup> But the ministerial exception’s applicability is more nuanced for the wide range of other institutions affiliated with the Church, including relief services, shelters, higher education institutions, and hospitals.

The analysis for Catholic and other religious higher education institutions is complicated because, although many claim a religious identity, they vary widely in the extent of their religious character.<sup>77</sup>

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71. *E.g.*, *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 424–26 (2d Cir. 2018) (analyzing whether a hospital’s department of pastoral care was a qualifying religious institution under the ministerial exception); *Winbery v. La. Coll.*, 124 So. 3d 1212, 1215 (La. Ct. App. 2013) (“Thus, in order for Defendants to garner the protection of the ministerial exception, two findings are required: (1) that the institution in question is a church; and (2) that the plaintiffs are ministers of that church.”). *But see* *Herzog v. St. Peter Lutheran Church*, 884 F. Supp. 2d 668, 673 (N.D. Ill. 2012) (combining the defendant church and affiliated school in the analysis and skipping over the religious organization inquiry).

72. For a thorough analysis of how courts have applied the ministerial exception following *Hosanna-Tabor*, see Brian M. Murray, *A Tale of Two Inquiries: The Ministerial Exception After Hosanna-Tabor*, S.M.U. L. REV. 1123 (Winter 2015); Zoë Robinson, *What is a “Religious Institution”?*, 55 B.C. L. REV. 181 (2014).

73. *E.g.*, *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 n.3 (5th Cir. 2012) (“Given the nature of the ministerial exception, we suspect that only in the rarest of circumstances would dismissal under Rule 12(b)(6)—in other words, based solely on the pleadings—be warranted.”).

74. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 834 (6th Cir. 2015) (citing *Shalheisabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)).

75. *E.g.*, *Cannata*, 700 F.3d at 180 (applying ministerial exception to Catholic parish and diocese); *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 890 (Wis. 2012) (applying ministerial exception to Catholic parish).

76. *E.g.*, *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 206 (2d Cir. 2017) (applying ministerial exception to Catholic elementary school and the affiliated parish and archdiocese); *Ginalski v. Diocese of Gary*, No. 2:15-CV-95-PRC, 2016 WL 7100558, at \*3–8 (N.D. Ind. 2016) (applying ministerial exception to Catholic high school); *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at \*4 (S.D. Ohio Mar. 29, 2012) (plaintiff conceding defendant Catholic schools were religious institutions).

77. For an in-depth analysis of religious higher education institutions and the ministerial exception, see James A. Davids, *Religious Colleges’ Employment Rights Under the “Ministerial Exception” and When Disciplining an Employee for Sexually Related Conduct*, 21:3 TEX. REV. L. & POL. 423 (2017).

Claiming a religious identity and even some involvement by an organized church does not necessarily render a university a religious organization under the ministerial exception. For example, the Louisiana Court of Appeal held in *Winbery v. Louisiana College* that the defendant liberal arts college did not fall under the ministerial exception even though the Louisiana Baptist Convention elected the governing board of trustees and the college required all students take certain religion courses.<sup>78</sup> The court analogized to *EEOC v. Mississippi College*, which similarly held that the First Amendment did not exempt a liberal arts college from Title VII even though the Mississippi Baptist Convention owned and operated the college and the college required students to take Bible-related courses and attend chapel meetings.<sup>79</sup>

In contrast, the D.C. Circuit held that the Department of Canon Law at the Catholic University of America was a religious institution under the ministerial exemption.<sup>80</sup> The court noted that the department was the sole American entity empowered by the Vatican to grant ecclesiastical degrees in canon law and that the Vatican maintained close control.<sup>81</sup> The court further explained that a major proportion of the department's students were priests who would "in turn interpret, implement, and teach" the Church's governing law.<sup>82</sup> Under similar analyses, courts have consistently held seminaries fall under the ministerial exception.<sup>83</sup>

The status of religious hospitals is especially murky. In *Scharon v. St. Luke's Episcopal Presbyterian Hospitals*, the Eighth Circuit held the religiously affiliated hospital was a religious organization under the ministerial exception.<sup>84</sup> The court noted that four Church representatives and their nominees constituted the hospital's board of directors, that amending the hospital's articles of association required Church approval, and that the hospital provided extensive pastoral services.<sup>85</sup> The most significant hospital case following *Hosanna-Tabor* is *Penn v. New York Methodist Hospital*, which involved a discrimination claim brought by a

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78. *Winbery v. La. Coll.*, 124 So.3d 1212, 1217 (La. Ct. App. 2013).

79. *Id.*; *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 479, 488 (5th Cir. 1980).

80. *E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455, 463–65 (D.C. Cir. 1996).

81. *Id.* at 464.

82. *Id.*

83. *Klouda v. Sw. Baptist Theological Seminary*, 543 F. Supp. 2d 594, 611 (N.D. Tex. 2008) (applying ministerial exception to seminary professor); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 609–11 (Ky. 2014) (applying ministerial exception to Disciples of Christ seminary); *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587, 589–90 (Ky. 2014) (also finding Disciples of Christ seminary was a religious institution).

84. *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991).

85. *Id.*; *see also Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (holding a Jewish nursing home was a religious institution under the ministerial exception).

former chaplain.<sup>86</sup> The hospital had ended its formal relationship with the United Methodist Church, strongly suggesting the hospital fell outside of the ministerial exception.<sup>87</sup> However, the Second Circuit narrowed its analysis to examine the hospital's Department of Pastoral Care, rather than the hospital as a whole, and found the department met the religious organization criteria.<sup>88</sup> The circuit court's narrowing of the religious organization inquiry demonstrates courts' ability to shape the first inquiry of the ministerial exception to arrive at an ultimate desired result.

### B. Defining "Minister"

In contradiction to the Supreme Court's stated desire in *Hosanna-Tabor* to avoid religious issues, the ministerial exception centers the inherently theological question of who is a "minister."<sup>89</sup> In an amicus brief, the United States Conference of Catholic Bishops argued for a remarkably broad definition of minister at odds with the Church's own law and theology.<sup>90</sup> Codified in Catholic canon law is a highly centralized and hierarchical conception of ministry in which only ordained clergy are ministers and bishops control all ministry within their dioceses.<sup>91</sup> A lay minister, therefore, is oxymoronic. But the bishops overlooked this theological point to argue for the conception of ministry that would maximize their control over Church employment.<sup>92</sup> The Court, they argued, should define a minister broadly as anyone with "responsibilities for church governance, worship, teaching, or other related functions," regardless of how much time an employee actually spent on these responsibilities.<sup>93</sup>

The Court adopted a similarly broad conceptualization of a minister that includes but is not limited to the heads of religious congregations.<sup>94</sup> Explicitly rejecting a rigid formula, the Court instead considered "all the

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86. Penn v. N.Y. Methodist Hosp., 884 F.3d 416, 418 (2nd Cir. 2018).

87. *Id.*

88. *Id.* at 423–24.

89. Griffin, *supra* note 63, at 1006–10.

90. See Brief of the United States Conference of Catholic Bishops, the Church of Jesus Christ of Latter-Day Saints, the Presiding Bishop of the Episcopal Church, and the Union of Orthodox Jewish Congregations as Amicus Curiae in Support of Petitioner at 18–21, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (No. 10-553).

91. See 1983 CODE c.232–c.293 (regulating clergy, the "sacred ministers" of the Church); 1983 CODE c.756 (assigning power over the Church's ministry to the Pope and other bishops); 1983 CODE c.759 (allowing for lay people's participation in ministry only when called upon by clergy).

92. See Brief of the United States Conference of Catholic Bishops, *supra* note 90, 18–21.

93. *Id.* at 20–21.

94. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012); *Rweyemamu v. Cote*, 520 F.3d 198, 209–10 (2d Cir. 2008) (applying ministerial exception to Catholic priest); *Saunders v. Richardson*, No. 5:12-cv-511-FL, 2013 WL 4008184, at \*3–4 (E.D.N.C. Aug. 5, 2013) (applying ministerial exception to pastor at African Methodist Episcopal Church).

circumstances of [the plaintiff's] employment.”<sup>95</sup> But the Court focused on four factors: whether the employer held the employee out as a minister, whether the employee's title reflected ministerial substance and training, whether the employee held herself out as a minister, and whether the employee's job duties included “important religious functions.”<sup>96</sup> Guiding these considerations is a recognition of religious organizations' freedom to choose “who will preach their beliefs, teach their faith, and carry out their mission.”<sup>97</sup>

At the parish level, courts have not applied the ministerial exception to some church secretaries and administrative assistants whose duties were mostly secular.<sup>98</sup> Maintenance and facilities workers also likely fall outside the exception.<sup>99</sup> However, courts have found employees of individual churches and dioceses with significant religious duties to be ministers, including youth ministry workers,<sup>100</sup> a director of religious formation,<sup>101</sup> and a communications manager who served as a liaison between the Catholic Church and the Latino community.<sup>102</sup> Courts have also repeatedly found Catholic choir and music directors to be ministers, citing the spiritual significance of music in the Mass.<sup>103</sup> An Ohio appellate court also determined a co-director of a Catholic cemetery was a minister because she

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95. *Hosanna-Tabor*, 565 U.S. at 190.

96. *Id.* at 192.

97. *Id.* at 196.

98. *Morgan v. Cent. Baptist Church of Oak Ridge*, No. 3:11-CV-124-TAV-CCS, 2013 WL 12043468, at \*20 (E.D. Tenn. Dec. 5, 2013) (holding secretary for senior pastor was not a minister); *McCallum v. Billy Graham Evangelistic Ass'n*, No. 3:09CV381-RLV, 2012 WL 4756061, at \*5–6 (W.D.N.C. Oct. 5, 2012) (holding church administrative assistant was not a minister); *Patsakis v. Greek Orthodox Archdiocese*, 339 F. Supp. 2d 689, 695–97 (W.D. Pa. 2004) (holding administrative vicar for archdiocese was not a minister).

99. *Davis v. Baltimore Hebrew Congregation*, 985 F. Supp. 2d 701, 711 (D. Md. 2013) (holding facilities manager at synagogue was not covered by the ministerial exception); *Musante v. Notre Dame of Easton Church*, No. Civ.A. 301CV2352MRK, 2004 WL 721774, at \*6 (D. Conn. Mar. 30, 2004) (“Of course, the religious nature of the employer is not dispositive of the inquiry, since it is still unlikely that a church custodian would ever be considered a ministerial employee.”).

100. *Preece v. Covenant Presbyterian Church*, No. 8:13CV188, 2015 WL 1826231, at \*5 (D. Neb. Apr. 22, 2015); *Bryce v. Episcopal Church in Diocese of Colo.*, 121 F. Supp. 2d 1327, 1341–42 (D. Colo. 2000).

101. *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243–46 (10th Cir. 2010); *see also DeBruin v. St. Patrick Congregation*, 343 Wis.2d 83, 92–93 (Wis. 2012) (undisputed that Director of Faith Formation was a minister).

102. *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003).

103. *Sterlinski v. Catholic Bishop of Chi.*, 319 F. Supp. 3d 940, 950 (N.D. Ill. 2018) (holding a Catholic parish organist was a minister even though he did not pick the music for Mass); *Demkovich v. St. Andrew the Apostle Parish, Calumet City*, No. 1:16-cv-11576, 2017 WL 4339817, at \*3 (N.D. Ill. Sept. 29, 2017) (holding the music director of a Catholic parish was a minister). *But see Archdiocese of Wash. v. Moersen*, 399 Md. 637, 655 (Md. 2007) (holding a Catholic parish organist was not a ministerial employee because he did not control the music played, lead choirs, teach hymns, or control any part of the services, and he did not need specialized knowledge of the faith or any religious training).

acted as the face of the Church when coordinating services with parishes and performing other religious functions.<sup>104</sup>

Many cases addressing the ministerial exception concern Catholic K–12 schools. Given these schools’ religious missions, courts have consistently found their principals to be ministerial employees.<sup>105</sup> But whether their teachers fall under the exception is more complicated. District courts have applied the exception to some Catholic school teachers, noting their duties of instructing students in the religion, leading them in prayer, and accompanying them at Mass.<sup>106</sup> Similarly, the Seventh Circuit held in *Grussgott v. Milwaukee Jewish Day School, Inc.* that a Jewish day school teacher was a minister because, among other reasons, she had religious training, prayed with her students, and instructed them in the faith.<sup>107</sup>

The Ninth Circuit’s recent ruling in *Biel v. St. James School* has disrupted the apparent trend of applying the ministerial exception to teachers who provide religious instruction and pray with their students in Catholic and other religious grade schools.<sup>108</sup> The court held *Biel* did not meet the first three *Hosanna-Tabor* factors because her religious training only consisted of a half-day conference and neither the school nor *Biel* herself held her out as a minister.<sup>109</sup> The court found *Biel* met the fourth factor because she taught the Catholic faith four days a week and incorporated religion into her overall classroom environment and curriculum.<sup>110</sup> But the court determined *Biel*’s religious duties were less significant than the teacher in *Hosanna-Tabor* and that satisfying just one of the four factors was insufficient to deem *Biel* a minister.<sup>111</sup>

Teachers who have no role in religious education more consistently escape the ministerial exception. In *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, the Northern District of Indiana held that a Catholic school

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104. *Fisher v. Archdiocese of Cincinnati*, 6 N.E.3d 1254, 1260–62 (Ohio Ct. App. 2014).

105. *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 206 (2d Cir. 2017); *Nolen v. Diocese of Birmingham in Ala.*, No. 5:16-cv-00238-AKK, 2017 WL 3840267, at \*4 (N.D. Ala. Sept. 1, 2017); *Ginalski v. Diocese of Gary*, No. 2:15-CV-95-PRC, 2016 WL 7100558, at \*8 (N.D. Ind. 2016).

106. *Morrissey-Berru v. Our Lady of Guadalupe School*, No. 2:16-cv-09353-SVW-AFM, 2017 WL 6527336, at \*2 (C.D. Cal. Sept. 27, 2017); *Ciurleo v. St. Regis Parish*, 214 F. Supp. 3d 647, 650–53 (E.D. Mich. 2016).

107. *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658–62 (7th Cir. 2018).

108. *See Biel v. St. James School*, 911 F.3d 603, 611 (9th Cir. 2018).

109. *Id.* at 608–09. The court found the school did not hold *Biel* out as a minister because the title on her employment contract, “Grade 5 Teacher,” was secular. *Id.* at 608, 612 (Fisher, J., dissenting). But this appears to be an exception to Catholic schools’ general inclusion of the title “minister” in employment contracts. *See Minister Contracts*, Archdiocese of Cincinnati, <https://perma.cc/2LVA-LHKP> (listing the contracts for a “Principal-Minister” and a “Teacher-Minister”); Haselberger, *supra* note 6 (noting Catholic institutions’ employment contracts now generally state the employee is considered to be engaged in ministry).

110. *Biel*, 911 F.3d at 609.

111. *Id.*

language arts teacher was not a minister because although she supervised students' prayer and religious services, she provided no religious instruction.<sup>112</sup> And in *Bohnert v. Roman Catholic Archbishop of San Francisco*, the Northern District of California held a Catholic high school biology teacher was not a minister.<sup>113</sup> While Bohnert spent one of her five class periods each day on campus ministry duties, the court determined these duties were mostly logistical rather than providing actual religious guidance.<sup>114</sup> Other Catholic school employees who have evaded the ministerial exception include a librarian,<sup>115</sup> a technology coordinator,<sup>116</sup> and a food services director.<sup>117</sup>

Application of the ministerial exception to employees of higher education institutions similarly varies according to employees' alleged religious duties. The Supreme Court of Kentucky addressed this issue in detail in two different cases brought by professors of the same seminary. In *Kirby v. Lexington Theological Seminary*, the court held the professor was a minister because he began each class with prayer, prepared students for ministry, participated in chapel services and other religious events, and occasionally preached.<sup>118</sup> But in *Kant v. Lexington Theological Seminary*, the court ruled the professor, a practicing Jewish man, was not a minister because he did not proselytize on behalf of the affiliated Disciples of Christ Church and did not play an important role in transmitting the seminary's faith to future generations.<sup>119</sup> Other cases involving religious higher education institutions have also analyzed whether employees sufficiently advance the schools' religious missions.<sup>120</sup>

In the healthcare context, courts have repeatedly held that hospital chaplains are ministerial employees.<sup>121</sup> The same was true for one health

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112. *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168, 1176–77 (N.D. Ind. 2014).

113. *Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094, 1114–15 (N.D. Cal. 2015).

114. *Id.* at 1115.

115. *Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577, 586 n.5 (D. Md. 2016).

116. *Dias v. Archdiocese of Cincinnati*, No. 1:11–CV–00251, 2012 WL 1068165, at \*8 (S.D. Ohio Mar. 29, 2012).

117. *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 10097972, at \*11 (Mass. Super. 2015).

118. *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 611–14 (Ky. 2014).

119. *Kant v. Lexington Theological Seminary*, 426 S.W.3d 587, 591–96 (Ky. 2014).

120. *Lishu Yin v. Columbia Int'l Univ.*, 335 F. Supp. 3d 803, 815–18 (D.S.C. 2018) (holding a language teacher at a Christian university was a minister); *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1145–46 (D. Or. 2017) (holding an assistant professor of exercise science was not a minister); *Sumner v. Simpson Univ.*, 27 Cal.App.5th 577, 587–89 (Cal. Ct. App. 2018) (holding the dean of a seminary was a minister).

121. *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 426 (2nd Cir. 2018); *Hollins v. Methodist Healthcare*, 474 F.3d 223, 226 (6th Cir. 2007); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362–63 (8th Cir. 1991).

care employee whose work blended secular and spiritual methods of healing.<sup>122</sup> In *Rogers v. Salvation Army*, the Eastern District of Michigan held that the plaintiff's role first as an addiction counselor and then as a spiritual counselor at a Salvation Army-run recovery center fell under the ministerial exception.<sup>123</sup> In both roles, the plaintiff prayed with clients and helped cultivate their relationship with God as part of their recovery.<sup>124</sup>

### C. Contract and Tort Claims

LGBTQ workers discriminated against by Catholic institutions also face limited redress under contract and tort law. While *Hosanna-Tabor* applied the ministerial exception to employment discrimination law, the Court did not settle whether the exception bars breach of contract claims.<sup>125</sup> However, circuit courts have repeatedly barred breach of contract claims brought by terminated ministers on the ground that deciding these claims would require excessive religious entanglement in violation of the First Amendment.<sup>126</sup> Some courts have allowed discharged plaintiffs to pass the pleading stage to show with discovery that resolution of their claims would not entangle courts in internal religious matters.<sup>127</sup> But courts often adopt a presumption of entanglement and summarily dismiss these contract claims.<sup>128</sup> Courts often do not apply the ministerial exception, however, to contract claims brought by ministers that are unrelated to termination, including, for example, backpay.<sup>129</sup>

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122. *Rogers v. Salvation Army*, No. 14–12656, 2015 WL 2186007, at \*6–7 (E.D. Mich. May 11, 2015).

123. *Id.* at \*5–7.

124. *Id.* at \*6–7.

125. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 196 (2012) (“We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.”).

126. *Lee v. Sixth Mount Zion Baptist Church of Pittsburg*, 903 F.3d 113, 122–23 (3d Cir. 2018); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 329–32 (4th Cir. 1997); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940, 941–43 (6th Cir. 1992); *Natal v. Christian & Missionary All.*, 878 F.2d 1575, 1576–77 (1st Cir. 1989).

127. *E.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 310–12 (3rd Cir. 2006) (vacating and remanding district court's dismissal of chaplain's breach of contract claim because the claim, at the outset, did not turn on an ecclesiastical inquiry); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1355, 1359–61 (D.C. Cir. 1990) (vacating and remanding district court's dismissal of pastor's breach of contract claim and noting court might be able to resolve dispute without intruding upon religious doctrine).

128. *E.g.*, *DeBruin v. St. Patrick Congregation*, 816 N.W.2d 878, 889 (Wis. 2012) (dismissing the terminated plaintiff's breach of contract claim and stating “any inquiry into the validity of a religious institution's reasons for the firing of a ministerial employee will involve consideration of ecclesiastical decision-making”). For a thorough analysis of this issue, see Andrew Donovan, *Freedom of Breach: The Ministerial Exception Applied to Contract Claims*, 63 DEPAUL L. REV. 1063 (2014).

129. *E.g.*, *Second Episcopal Dist. African Methodist Episcopal Church v. Prioleau*, 49 A.3d 812, 817–18 (D.C. 2012) (holding ministerial exception does not apply to contract claim regarding compensation); *Rodarte v. Apostolic Assembly of the Faith in Christ Jesus*, No. H–10–4181, 2012 WL

The Supreme Court also did not rule on how the ministerial exception applies to current and former employees' tort claims against religious employers.<sup>130</sup> Courts generally decide these cases based on whether they can do so using neutral principles of law without resolving religious disputes or relying on religious doctrine.<sup>131</sup> Consequently, for example, pastors' defamation claims against their churches often fail because adjudicating these claims would require entanglement in religious teachings.<sup>132</sup> Courts have denied other tort claims on similar grounds, including breach of fiduciary duty, conversion, civil conspiracy, unjust enrichment, fraud, invasion of privacy, intentional infliction of emotional distress, negligent retention, negligent supervision, outrage, and wrongful termination.<sup>133</sup> However, a court may determine a plaintiff's tort claims against a religious employer would not excessively entangle the court with religion and allow the claims to move forward.<sup>134</sup>

#### D. Waiver

LGBTQ plaintiffs are unlikely to succeed in arguing that a Catholic institution waived its ability to raise the ministerial exception as a defense. The Supreme Court held in *Hosanna-Tabor* that the ministerial exception is

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12893656, at \*4 (S.D. Tex. Feb. 29, 2012) (holding ministerial exception does not apply to a breach of a severance contract claim).

130. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 196 (2012).

131. *E.g.*, *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 452 (Tenn. 2012) (“Tennessee’s courts may address [negligent hiring, supervision, and retention claims], as long as they can do so using neutral principles of law and can refrain from resolving religious disputes and from relying on religious doctrine.”).

132. *E.g.*, *Kavanagh v. Zwilling*, 997 F. Supp. 2d 241, 254 (S.D.N.Y. 2014); *Diocese of Palm Beach, Inc. v. Gallagher*, 249 So.3d 657, 665 (Fla. Dist. Ct. App. 2018); *Dermody v. Presbyterian Church (U.S.A.)*, 530 S.W.3d 467, 475 (Ky. Ct. App. 2017).

133. *Weiter v. Kurtz*, No. 2011-CA-001058-MR, 2012 WL 6213759, at \*8 (Ky. Dec. 14, 2012) (holding First Amendment barred former parish employee’s claims for outrage and wrongful termination); *Erdman v. Chapel Hill Presbyterian Church*, 175 Wash.2d 659, 678–84 (Wash. 2012) (en banc) (holding First Amendment barred former church employee’s claims that church negligently retained and supervised senior pastor); *Sumner v. Simpson Univ.*, 27 Cal.App.5th 577, 594–96 (Cal. Ct. App. 2018) (holding ministerial exception barred claims brought by dean of seminary for defamation, invasion of privacy, and intentional infliction of emotional distress); *Smith v. White*, 7 N.E.3d 552, 565 (Ohio Ct. App. 2014) (dismissing church members’ claims against pastor for breach of fiduciary duty, conversion, civil conspiracy, unjust enrichment, fraud, breach of contract, and seeking an accounting).

134. *Bacon v. Bd. of Pensions of Evangelical Lutheran Church in Am.*, No. A15-1999, 2016 WL 3961960, at \*8 (Minn. Ct. App. July 25, 2016) (holding plaintiffs, including two pastors, could pursue claims of breach of fiduciary duty, breach of trust, fraud, and concealment against church’s board of pensions); *Shannon v. Mem’l Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 621–25 (Tex. App. 2015) (holding First Amendment did not apply to former church employee’s claim for breach of agreement, defamation, fraudulent inducement, and intentional infliction of emotional distress).

an affirmative defense rather than a jurisdictional bar.<sup>135</sup> Generally, a party must raise an affirmative defense in a timely manner, or the court considers the defense waived.<sup>136</sup> However, following *Hosanna-Tabor*, the Sixth Circuit held a religious institution could not waive the ministerial exception because the religion clauses of the Constitution categorically prohibit government from interfering with religious leadership disputes.<sup>137</sup> The Seventh Circuit also concluded prior to *Hosanna-Tabor* that a party could not waive the ministerial exception.<sup>138</sup> The Eleventh Circuit, however, has held that a religious institution may waive the defense on appeal if the institution does not adequately raise the defense in its brief.<sup>139</sup> Whether or not a party can waive the ministerial exception continues to generate considerable debate.<sup>140</sup>

### *E. Legal Alternatives*

The Supreme Court could moderate the severity and breadth of the ministerial exception by exempting religious employers from non-discrimination laws only when courts determine the employment decision is based on religious doctrine.<sup>141</sup> Although this line is difficult to determine, courts already take a similar approach in church-related property disputes and tort claims.<sup>142</sup> To avoid interfering with religious institutions' ability to choose their ministers, courts could bar reinstatement as a remedy and only grant money damages to plaintiffs unlawfully discriminated against.<sup>143</sup> Narrowing the exception in this way would not require a radical new legal theory, but only a small adjustment to the general framework established in *Employment Division v. Smith*.<sup>144</sup> Aside from cases involving doctrinal

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135. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 195 n.4 (2012) (stating the ministerial exception “operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar”).

136. FED. R. CIV. PRO. 8(c) (stating that in “responding to a pleading, a party must affirmatively state any avoidance or affirmative defense”); 5F CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1278 (3d ed. Sept. 2018 Update).

137. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015).

138. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

139. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318–19 (11th Cir. 2012).

140. See, e.g., Peter J. Smith & Robert W. Tuttle, *Civil Procedure and the Ministerial Exception*, 86 FORDHAM L. REV. 1847, 1882–87 (2018); Michael J. West, Note, *Waiving the Ministerial Exception*, 103 VA. L. REV. 1861 (2017).

141. *Griffin*, *supra* note 63, at 1016–19; *Tourkochoriti*, *supra* note 63, at 53–64.

142. See, e.g., *Jones v. Wolf*, 443 U.S. 595, 602–04 (1979) (holding courts can adjudicate church property disputes using neutral principles of law if the dispute does not require the resolution of a religious controversy); *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 452 (Tenn. 2012) (“Tennessee’s courts may address [negligent hiring, supervision, and retention claims], as long as they can do so using neutral principles of law and can refrain from resolving religious disputes and from relying on religious doctrine.”).

143. *Tourkochoriti*, *supra* note 63, at 52.

144. See *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

questions, religious employers, like individuals, would be subject to neutral, generally applicable non-discrimination laws.<sup>145</sup> This shift would allow a larger number of people to hold religious institutions accountable for discrimination unrelated to religion, although it would not expand protections for LGBTQ employees of Catholic institutions because sexual ethics is such a significant part of Catholic doctrine.

Rather than narrowing the ministerial exception, Dr. Leslie C. Griffin argues the exception is completely unnecessary because the bona fide occupational qualification (“BFOQ”) defense codified in Title VII is already an adequate mechanism for achieving the proper balance between religious institutions’ freedom and the public policy goals of non-discrimination laws.<sup>146</sup> The BFOQ defense permits employers to discriminate on the basis of religion, sex, and national origin only when that characteristic is a qualification reasonably necessary to the normal operation of that enterprise.<sup>147</sup> Therefore, limiting religious employers to the BFOQ defense would create liability in cases where a discriminatory action has no religious rationale.

However, limiting religious employers to the BFOQ defense would still largely permit LGBTQ-related discrimination against ministerial-type employees. In *Chambers v. Omaha Girls Club, Inc.*, the Eighth Circuit upheld a girls club’s role model policy prohibiting unwed employees who became pregnant or caused pregnancy as a BFOQ.<sup>148</sup> Compared to this ostensibly secular girls club, a Catholic school would have a much stronger argument that role modeling the religion is a BFOQ for employees who propagate the faith. A district court in a later case did deny summary judgement for a Christian school that terminated a librarian for becoming pregnant.<sup>149</sup> The court refused to apply the BFOQ defense as a matter of law because the parties disagreed on whether the school expected the librarian to be a role model and what impact her pregnancy had on her ability to do so.<sup>150</sup> But school librarians are already unlikely to fall under the ministerial exception.<sup>151</sup> Thus, the line of whether religious role modeling is an acceptable BFOQ defense closely approximates the line dividing ministerial and non-ministerial employees. Under both frameworks, religious

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145. *See id.* at 879.

146. Griffin, *supra* note 63, at 1016–19.

147. 42 U.S.C. § 2000e-2(e) (2012).

148. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 704–05 (8th Cir. 1987).

149. *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 810 (N.D. Cal. 1992).

150. *Id.* at 808–09.

151. *See Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577, 586 n.5 (D. Md. 2016).

institutions may require employees with sufficient religious duties to role model the faith, but not employees with less direct religious roles.<sup>152</sup>

Narrowing the ministerial exception to doctrine-based decisions or limiting religious employers to the BFOQ defense would not necessarily curb LGBTQ-related terminations by Catholic institutions, but these reforms would force Catholic institutions to openly state their religious rationale for discriminatory actions. Presumably to avoid controversy and liability, Catholic institutions often cloak LGBTQ-related firings in ambiguous, non-offensive language. For example, when Catholic high school teacher Marla Krolikowski came out as a transgender woman, school officials called her “worse than gay” and terminated her three-decades-long teaching career at the school.<sup>153</sup> Rather than articulate a religious opposition to Krolikowski’s gender transition (an issue on which the Catholic Church lacks authoritative teaching<sup>154</sup>), school officials simply fired her for “insubordination,” thereby obfuscating the issue and placing the blame on her.<sup>155</sup> Requiring the school to articulate its religious rationale in a case like this would help advocates document instances of LGBTQ discrimination and crystalize the issue for public debate and mobilization.

#### IV. TITLE VII RELIGIOUS EXEMPTIONS

##### A. § 702(a)

Even if the ministerial exception does not apply, an LGBTQ plaintiff pursuing a Title VII claim against a Catholic institution may still fall under one of two religious exemptions contained in Title VII: § 702(a) and § 703(e)(2). The first provision, § 702(a), exempts “a religious corporation, association, educational institution, or society” from employment discrimination claims based on religion, regardless of whether or not the

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152. See also *E.E.O.C. v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 466–67 (9th Cir. 1993) (holding that requiring teachers of secular subjects to be Protestant was not a BFOQ).

153. Sam Roberts, *Marla Krolikowski, Transgender Teacher Fired for Insubordination, Dies at 62*, THE NEW YORK TIMES (Sept. 27, 2015), <https://perma.cc/PPS4-YNDL>.

154. In June 2019, the Congregation for Catholic Education released a document touching on transgender issues, but the document is a “practical aid” for educators, not definitive doctrine. The body that oversees doctrinal developments, the Congregation for the Doctrine of the Faith, is expected to release an authoritative document on gender-related issues in the near future. CONGREGATION FOR CATHOLIC EDUCATION, *supra* note 14; Christopher Altieri, *Cardinal Versaldi: Why we produced the gender document*, CATHOLIC HERALD (June 17, 2019), <https://perma.cc/2LYW-3RSJ>; Hannah Brockhaus, *Vatican’s doctrinal office expected to release document on gender theory*, CATHOLIC HERALD (June 17, 2019), <https://perma.cc/VJD7-SEMP>.

155. See Roberts, *supra* note 153.

employee’s duties are religious.<sup>156</sup> In addition to hiring and firing, § 702(a) may also preclude religious harassment and retaliation claims.<sup>157</sup> Because the statute provides no definition and the Supreme Court has not established a test, a four-way circuit split exists over how to define a qualifying religious organization under § 702(a).<sup>158</sup> Each test examines several factors to determine how “religious” an organization is, but the four tests include a different number of factors and weigh them differently.<sup>159</sup> Some factors include an organization’s origins, funding sources, and board of trustees composition.<sup>160</sup>

Courts have found several religious organizations fall under the § 702(a) exemption. These include the Salvation Army,<sup>161</sup> a nonprofit Christian humanitarian organization,<sup>162</sup> a support services nonprofit operated by Catholic nuns,<sup>163</sup> a retirement home run by the Presbyterian Church,<sup>164</sup> a Jewish community center,<sup>165</sup> and a Catholic hospital.<sup>166</sup> Organizations deemed insufficiently religious under § 702(a) include a children’s home that was Methodist “only in name”<sup>167</sup> and a private company that required employees to attend religious services but mentioned no religious purpose in its articles of incorporation.<sup>168</sup>

#### B. § 703(e)(2)

The second Title VII exemption, § 703(e)(2), protects the right of religious educational institutions to “hire and employ employees of a particular religion.”<sup>169</sup> An educational institution qualifies if it is “in whole

156. 42 U.S.C. § 2000e-1 (2012); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (applying § 702(a) exemption to church-owned gym); Little v. Wuerl, 929 F.2d 944, 951 (3rd Cir. 1991) (applying § 702(a) exemption to Catholic parish).

157. Kennedy v. St. Joseph’s Ministries, Inc., 657 F.3d 189, 196 (4th Cir. 2011) (holding § 702(a) defeated plaintiff’s religious harassment and retaliation claims); Saemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021, 1044 (N.D. Iowa 2006) (applying § 702(a) to religious retaliation claim).

158. Emily S. Fields, *VII Divided by Four: The Four-Way Circuit Split over the Title VII Religious Organization Exemption*, 63 WAYNE L. REV. 55, 61–62 (2017).

159. *Id.* at 57.

160. Killinger v. Samford Univ., 113 F.3d 196, 199 (11th Cir. 1997) (applying § 702(a) to a religious university).

161. Lown v. Salvation Army, Inc. 393 F. Supp. 2d 223, 246 (S.D.N.Y. 2005).

162. Spencer v. World Vision, Inc., 633 F.3d 723, 724 (9th Cir. 2011).

163. Crotteau v. St. Coletta of Wis., 200 F. Supp. 3d 804, 811 (W.D. Wis. 2016).

164. E.E.O.C. v. Presbyterian Ministries, Inc., 788 F. Supp. 1154, 1156 (W.D. Wash. 1992).

165. LeBoon v. Lancaster Jewish Cmty. Ctr., 503 F.3d 217, 226–31 (3rd Cir. 2007).

166. Saemodarae v. Mercy Health Servs., 456 F. Supp. 2d 1021, 1044 (N.D. Iowa 2006).

167. Fike v. United Methodist Children’s Home of Va., Inc., 547 F. Supp. 286, 290 (E.D. Va. 1982), *aff’d*, 709 F.2d 284 (4th Cir. 1983).

168. E.E.O.C. v. Townley Eng’g & Mfg. Co., 675 F. Supp. 566, 568 (D. Ariz. 1987), *aff’d in part*, 859 F.2d 610 (9th Cir. 1988).

169. 42 U.S.C. § 2000e-2 (2012).

or in substantial part, owned, supported, controlled, or managed by a particular religion” or if the curriculum is “directed toward the propagation of a particular religion.”<sup>170</sup> Congress passed § 703(e)(2) as a subsequent amendment to Title VII out of concern that § 702(a) would not include educational institutions aligned with a particular religion, but not fully owned or supported by that religion.<sup>171</sup> While § 702(a) requires a close nexus between the entity and religion, § 703(e)(2) requires a lesser degree of association.<sup>172</sup> Courts have considered more than fifteen factors in determining whether religious educational institutions are exempt under § 702(a) or § 703(e)(2).<sup>173</sup> Some factors typically considered include a school’s origins, mission, current affiliation with a religious body, board of trustees composition, funding from and reporting to a religious organization, and mandatory religious instruction.<sup>174</sup>

Courts have found Catholic K–12 schools<sup>175</sup> and several religious higher education institutions<sup>176</sup> fall under § 702(a). In *Killinger v. Samford University*, the Eleventh Circuit held Samford was a religious organization under both § 702(a) and § 703(e)(2).<sup>177</sup> As support, the court cited the Alabama Baptist Convention’s contribution comprising seven percent of Samford’s annual budget, Samford’s submission of annual reports to the Convention, the university’s requirement that all religion instructors sign a Baptist Statement of Faith, mandatory chapel attendance for students, the school’s stated purpose to promote “the Christian Religion throughout the world,” and recognition by the Internal Revenue Service and Department of Education as a religious educational institution.<sup>178</sup>

However, the progressive secularization of some schools with religious origins has weakened their ability to claim a religious exemption, even under the less demanding § 703(e)(2) standard. In *E.E.O.C. v. Kamehameha Schools/Bishop Estate*, the Ninth Circuit found the curriculum of a school that required all teachers to be Protestant was not actually “directed toward

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170. *Id.*

171. *LeBoon v. Lancaster Jewish Cmty. Ctr.*, 503 F.3d 217, 236–37 (3rd Cir. 2007).

172. *Id.* at 237.

173. *Davids*, *supra* note 77, at 469.

174. *Id.*

175. *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991); *Braun v. St. Pius X Parish*, 827 F. Supp. 2d 1312, 1318 (N.D. Okla. 2011).

176. *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000) (holding both § 702(a) and § 703(e)(2) applied to Christian college of health sciences); *Ginsburg v. Concordia Univ.*, No. 4:10CV3064, 2011 WL 41891, at \*6 (D. Neb. Jan. 5, 2011) (holding both § 702(a) § 703(e)(2) applied to Lutheran university); *Tsirpanlis v. Unification Theological Seminary*, No. 99 Civ. 0013(LMM), 2001 WL 64739, at \*3 (S.D.N.Y. 2001) (holding § 702(a) applied to seminary); *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1345 (N.D. Ga. 1994) (finding § 703(e)(2) applied to Christian college).

177. *Killinger v. Samford Univ.*, 113 F.3d 196, 201 (11th Cir. 1997).

178. *Id.* at 199.

the propagation of a particular religion.”<sup>179</sup> Rather, the court found religion was “more a part of the general tradition of the Schools” that advanced moral values in the context of a general education.<sup>180</sup> In *Pime v. Loyola University of Chicago*, the Seventh Circuit held the Catholic Jesuit university could lawfully limit three teaching positions to Jesuits under Title VII’s bona fide occupational qualification provision.<sup>181</sup> Although Loyola did not raise § 703(e)(2), Judge Richard Posner questioned whether the university could have prevailed based on § 703(e)(2) because Loyola was “no longer a religious or sectarian school in the narrow sense.”<sup>182</sup> Of importance to Judge Posner’s analysis was Loyola’s incorporation as an ordinary nonprofit corporation, its earning of less than one percent of its income from the Jesuits, its lack of required courses in Catholic theology, its absence of a seminary, its full range of secular instruction, and its board of trustees that was only forty percent Jesuit.<sup>183</sup> The divergent outcomes in whether religious higher education institutions satisfy the Title VII religious exemptions create great uncertainty for LGBTQ employees of Catholic colleges and universities, which likely vary widely in their missions, leadership, funding, instruction, and other relevant factors.<sup>184</sup>

### C. Scope

Circuit courts interpret the Title VII exemptions to apply only to claims of discrimination based on religious preferences and not on the basis of race, sex, or national origin.<sup>185</sup> In two separate cases, the Ninth Circuit untangled religion and sex and held that the defendant religious organizations violated Title VII by compensating men and women differently even though the defendants offered evidence they based this difference on religious beliefs.<sup>186</sup> However, these two cases are exceptions to courts’ general hesitancy to examine whether a stated religious reason is just pretext for another form of discrimination. In considering a charge of discrimination based on sex, the Fifth Circuit explained that when a

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179. 42 U.S.C. § 2000e-2 (2012); *E.E.O.C. v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 465 (9th Cir. 1993).

180. *Kamehameha Sch.*, 990 F.2d at 465. The schools did not argue they were “in whole or in substantial part, owned, supported, controlled, or managed by a particular religion,” so the court did not address it. *Id.* at 464 n.13.

181. *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 353–54 (7th Cir. 1986).

182. *Id.* at 357 (Posner, J., concurring).

183. *Id.*

184. See Davids, *supra* note 77, at 469.

185. *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (“Section 2000e-1(a) does not exempt religious organizations from Title VII’s provisions barring discrimination on the basis of race, gender, or national origin.”); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006).

186. *E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1365–67 (9th Cir. 1986); *E.E.O.C. v. Pacific Press Pub. Ass’n*, 676 F.2d 1272, 1279 (9th Cir. 1982).

religious institution presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, “§ 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.”<sup>187</sup> Therefore, courts are unlikely to investigate a Catholic institution’s argument that it terminated an LGBTQ employee based on religion and not sex.

#### *D. Waiver*

LGBTQ employees and their allies often push for Catholic institutions to adopt policies prohibiting employment discrimination on the basis of sexual orientation, gender identity, and marital status.<sup>188</sup> The adoption of a non-discrimination policy is a major victory for changing employment norms and transforming attitudes towards the LGBTQ community. However, the Third and Sixth Circuits have held that neither party can waive Title VII’s religious exemptions.<sup>189</sup> And courts have prohibited waiver even if an organization declares an intention not to discriminate in an employee handbook,<sup>190</sup> purports to be an equal opportunity employer and receives federal funds,<sup>191</sup> or knowingly employs someone of a different religion.<sup>192</sup> Therefore, a Catholic institution may still be able to lawfully discriminate against LGBTQ employees even if a non-discrimination policy is in place.<sup>193</sup>

### V. MORALS CLAUSES IN EMPLOYMENT CONTRACTS

A final limitation on LGBTQ workers’ ability to seek legal redress for discrimination is the widespread use of “morals clauses” by Catholic institutions. Originally a product of the early twentieth century

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187. EEOC v. Miss. Coll., 626 F.2d 477, 485 (5th Cir. 1980); *see also* Little v. Wuerl, 929 F.2d 944, 948 (3rd Cir. 1991) (quoting *Miss. Coll.*, 626 F.2d at 485).

188. *E.g.*, *Employment Non-Discrimination*, NEW WAYS MINISTRY, <https://perma.cc/3HVR-LTLE>; Aaron Mesh, *St. Mary’s Academy Backs Down, Changes Policy on Hiring LGBT People*, WILLAMETTE WEEK (Aug. 26, 2015), <https://perma.cc/V9CT-YLRY>.

189. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 229–30, (3d Cir. 2007); *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000); *see also* *Siegel v. Truett-McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1345 (N.D. Ga. 1994) (holding parties cannot waive the Title VII exemptions).

190. *LeBoon*, 503 F.3d at 229–30.

191. *Hall*, 215 F.3d at 625.

192. *Siegel*, 13 F. Supp. 2d at 1345; *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991).

193. *See LeBoon*, 503 F.3d at 229–30 (holding a religious organization may declare an intention not to discriminate in an employee handbook without waiving the § 702(a) exemption); *Hall*, 215 F.3d at 625 (holding an entity could not waive the § 702(a) exemption even if the entity represented itself as being an equal opportunity employer).

entertainment industry, a morals clause (or “morals claws” according to many employees<sup>194</sup>) grants an employer the right to terminate or otherwise discipline an employee who contravenes a proscribed moral code of conduct.<sup>195</sup> Morals clauses requiring Catholic K–12 school employees to follow the Church’s teachings have been common in employment contracts for decades.<sup>196</sup> These clauses may be only a short paragraph, but many Catholic schools have imposed more expansive clauses that detail prohibited conduct following the *Hosanna-Tabor* decision in 2012.<sup>197</sup>

Whether or not ministerial employees’ contracts contain morals clauses is of little consequence given religious organizations’ broad ability to discriminate under the First Amendment and Title VII. However, morals clauses are very consequential for employees not covered by the ministerial exception because courts generally enforce these clauses, even if very broad, provided the parties meet the normal requirements of contract law.<sup>198</sup> For instance, in *Boyd v. Harding Academy of Memphis*, the Sixth Circuit affirmed summary judgment for a religious school that terminated a teacher for having extramarital sex in violation of its policy that each teacher “is expected in all actions to be a Christian example for the students.”<sup>199</sup> In *Cline v. Catholic Diocese of Toledo*, a Catholic school did not renew a teacher’s contract after she became pregnant outside of marriage in violation of her contract which stated “[b]y word and example, [the signer] will reflect the values of the Catholic Church.”<sup>200</sup> The Sixth Circuit held a religious school could discriminate on the basis of non-marital sex so long as the policy applied equally to men and women.<sup>201</sup>

Despite the general enforceability of morals clauses, some courts may scrutinize whether a “meeting of the minds” has actually taken place.<sup>202</sup> In *Dias v. Archdiocese of Cincinnati*, the archdiocese terminated a technology coordinator for becoming pregnant through artificial insemination in violation of her contract to “comply with and act consistently in accordance

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194. Telephone Interview with Rita Schwartz, President, National Association of Catholic School Teachers (Nov. 19, 2018).

195. For a thorough overview of morals clauses, see Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3 (2017).

196. Schwartz, *supra* note 194.

197. *Id.*; e.g., Michael D. Clark, *Catholic teacher contract specifies banned practices*, CINCINNATI ENQUIRER (Mar. 6, 2014), <https://perma.cc/XH62-D2Y7>.

198. E.g., *Galaviz v. Post-Newsweek*, 380 F. App’x 457, 460 (5th Cir. 2010) (affirming summary judgment for employer who fired news reporter based on morals clause after three domestic disputes); *Nader v. ABC Television, Inc.*, 150 F. App’x 54, 56 (2d Cir. 2005) (affirming summary judgment for television network that fired an arrested actor based on his broadly written morals clause).

199. *Boyd v. Harding Acad. of Memphis*, 88 F.3d 410, 411 (6th Cir.1996).

200. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 656 (6th Cir. 2000).

201. *Id.* at 658.

202. See generally RESTATEMENT (SECOND) OF CONTRACTS § 17 (explaining mutual assent as a requirement of a bargain).

with the stated philosophy and teaching of the Roman Catholic Church.”<sup>203</sup> Calling it “a close call,” the court denied the defendants’ motion to dismiss because a factual question existed as to whether the plaintiff, a non-Catholic, knew that artificial insemination violated Catholic teaching and would result in her termination.<sup>204</sup> The court later rejected the plaintiff’s contract claim under the “unclean hands” doctrine because, although Dias may not have known the Church prohibited artificial insemination, she knowingly breached the morals clause by continuing her long-term relationship with another woman.<sup>205</sup>

Following the court’s hesitation to enforce the broadly written morals clause in *Dias*, the Archdiocese of Cincinnati ordered some 94 principals and 2,200 teachers, regardless of their religion, to sign a new employment contract in 2014.<sup>206</sup> The new expanded morals clause read:

Such conduct or lifestyle that is in contradiction to Catholic doctrine or morals includes, but is not limited to, improper use of social media/communication, public support of or publicly living together outside marriage, public support of or sexual activity out of wedlock, public support of or homosexual lifestyle, public support of or use of abortion, public support of or use of a surrogate mother, public support of or use of in vitro fertilization or artificial insemination, public membership in organizations whose mission and message are incompatible with Catholic doctrine or morals, and/or flagrant deceit or dishonesty.<sup>207</sup>

The archdiocese’s contract also labeled each teacher, regardless of duties, as a “Teacher-Minister” who formed students through “personal witness.”<sup>208</sup> Even though the “minister” label alone is insufficient to trigger the multi-factorial ministerial designation, courts do consider whether an institution held an employee out as a minister as part of the inquiry.<sup>209</sup> Courts also consider whether the employee held him or herself out as a minister, and the voluntary entering of a “Teacher-Minister” contract may

203. *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at \*2 (S.D. Ohio Mar. 29, 2012).

204. *Id.* at \*6.

205. *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355, at \*6 (S.D. Ohio Jan. 30, 2013). The court did, however, allow the plaintiff’s Title VII pregnancy discrimination claim to go to a jury because the ministerial exception did not apply. *Id.* at \*4–6.

206. Clark, *supra* note 197.

207. ARCHDIOCESE OF CINCINNATI, CONTRACT YEAR 2014–15: TEACHER-MINISTER CONTRACT 1, <https://perma.cc/Q3S7-77AB>. The 2018–19 contract remains largely the same, though the archdiocese has replaced “public support of” with “advocacy” and “homosexual lifestyle” with the less offensive “same-sex sexual activity.” ARCHDIOCESE OF CINCINNATI, CONTRACT YEAR 2018–19: TEACHER-MINISTER CONTRACT 1, <https://perma.cc/3XQ9-6324>.

208. CONTRACT YEAR 2014–15: TEACHER-MINISTER CONTRACT, *supra* note 207.

209. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 193 (2012) (explaining plaintiff’s title as a “commissioned minister” does not automatically trigger the ministerial exception but is relevant in the analysis).

support this finding.<sup>210</sup> Since 2014, many other Catholic dioceses have followed Cincinnati's lead and pushed more expansive morals clauses on teachers, including San Francisco, Honolulu, and Cleveland, often generating considerable protest from students, teachers, and the broader community.<sup>211</sup>

## VI. PROTECTING CATHOLIC INSTITUTIONS' LGBTQ EMPLOYEES

### *A. The Problem with Discretion*

The narrow legal recourse created by inadequate non-discrimination law, religious exemptions, and morals clauses means that improving Catholic institutions' treatment of LGBTQ employees must come largely through self-correction. Among American Church leaders, calls for reform have been few and mild. Cardinal Joseph Tobin of Newark, New Jersey, who has welcomed LGBTQ Catholics in his archdiocese, has suggested the Church adopt a more compassionate case-by-case approach rather than a nationwide policy.<sup>212</sup> On the surface, preserving a purely individualized approach seems appropriate given the complexity of Catholic teaching and the wide variance in employees' life circumstances, workplaces, and local religious communities.

However, given that implicit and explicit bias toward LGBTQ employees is likely distorting administrators' discretionary decisions and resulting in inequitable discipline, calling for more self-reflective discretion is unlikely to solve the problem. To begin with, bias is very difficult to identify. Research on implicit bias toward gays and lesbians shows that people generally evaluate their own level of bias inaccurately, demonstrating the disconnect between what one claims to believe and how one acts.<sup>213</sup> Interestingly, explicit bias toward gays and lesbians has decreased at about twice the rate of implicit bias in recent years, suggesting

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210. See *id.* at 191–92.

211. Carol Pogash, *Morals Clause in Catholic Schools Roils Bay Area*, THE NEW YORK TIMES (Feb. 26, 2015), <https://perma.cc/UKC7-H8DJ>; Patrick O'Donnell, *Cleveland diocese issues more specific "morality clause" prohibitions for elementary school teachers*, CLEVELAND.COM (May 9, 2014), <https://perma.cc/P2AA-SQ9Q>; Jim Mendoza, *Catholic schools' teachers' contract scrutinized*, HAWAII NEWS NOW (Mar. 28, 2014), <https://perma.cc/S83G-FJR8>.

212. Sharon Otterman, *As Church Shifts, a Cardinal Welcomes Gays; They Embrace a 'Miracle'*, THE NEW YORK TIMES (June 13, 2017), <https://perma.cc/9QQK-865T>; Michael J. O'Loughlin, *Cardinal Joseph Tobin says it's all about listening*, AMERICA: THE JESUIT REVIEW (Oct. 18, 2016), <https://perma.cc/KL26-U8EY>.

213. See Westgate et al., *supra* note 24, at 3 (finding different results for participants' implicit preference for heterosexuals over gays and lesbians (IAT D  $M = .33$ ,  $SD = .47$ , Cohen's  $d = .70$ ) and a difference in their explicit preference ( $M = .60$ ,  $SD = 1.26$ ,  $d = .48$ )).

a persistent lag between a change in one's conscious outlook and a matching change in one's behavior.<sup>214</sup>

In addition to being difficult to pinpoint, implicit bias is also notoriously difficult to address. Contrary to the commonsense assumption that raising awareness about bias reduces it, informing people that bias is widespread can actually lead to even greater discrimination.<sup>215</sup> Research also indicates that even very mild pro-diversity messages are likely to make people in high-status groups feel threatened and respond defensively.<sup>216</sup> In one study, white men exhibited a cardiovascular response characteristic of feeling threatened after watching a mock company video that simply described the importance of diversity without even explicitly mentioning race or gender.<sup>217</sup>

These insights into how bias operates are why achieving equitable outcomes is strongly linked to reducing discretionary decision-making. For example, structured interviews with consistent questions across candidates reduce bias relative to unstructured interviews.<sup>218</sup> Many companies are finding prohibitions on salary negotiations improve pay equity because men tend to penalize women more than men for attempting to negotiate higher compensation.<sup>219</sup> And in legal decision-making, legal rules that minimize discretion reduce the influence of stereotypes relative to flexible, context-specific legal standards.<sup>220</sup> Without a clear policy, granting a small number of administrators the power to terminate employees under the vague, expansive language of morals clauses is an almost certain way for inequity to persist in Catholic institutions.

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214. See *id.* at 6 (evaluating the change in implicit and explicit bias from 2006 to 2013).

215. Michelle M. Duguid & Melissa C. Thomas-Hunt, *Condoning stereotyping? How awareness of stereotyping prevalence impacts expression of stereotypes*, 100(2) J. APPLIED PSYCHOL. 343, 352–53 (2015) (finding that men in a competitive task whom experimenters told stereotyping was common treated their opponents in more stereotype-consistent ways than those told that stereotyping was less common).

216. Tessa L. Dover et al., *Members of high-status groups are threatened by pro-diversity organizational messages*, 62 J. EXPERIMENTAL SOC. PSYCHOL. 58, 66 (2016) (“Our findings suggest that in organizational contexts, members of high-status groups, such as whites and men, are threatened by messages that promote diversity and appreciation for all.”).

217. *Id.* at 62–65.

218. Jennifer DeNicolis Bragger et al., *The Effects of the Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 SEX ROLES 215, 223 (2002) (finding significant differences in how interviewers rated pregnant and nonpregnant job candidates in unstructured interviews but no such differences in structured interviews).

219. Rachel Feintzeig & Rachel Emma Silverman, *Haggle Over Salary? It's Not Allowed*, THE WALL STREET JOURNAL (May 26, 2015), <https://perma.cc/Z7XE-2QS3>; Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 99 (2007).

220. Erik James Girvan, *Wise Restraints?: Learning Legal Rules, Not Standards, Reduces the Effects of Stereotypes in Legal Decision-Making*, 22 PSYCHOL., PUB. POL'Y & L. 31, 41–42 (2016).

### B. The German Model

The growing research on how to effectively mitigate the impact of bias underlines the importance of structural protections for LGBTQ employees that reduce discretionary decision-making, and the Catholic Church in Germany points the way. With some 700,000 employees, the Church is the second largest employer in Germany, coming only after the state.<sup>221</sup> Under the German Constitution, churches may regulate some of their own affairs, including employment, but churches must devise their own legally enforceable rules to exercise this right.<sup>222</sup> In compliance, the German bishops published a national Church labor law, the *Grundordnung*, in 1993.<sup>223</sup>

The 2012 edition of the *Grundordnung* contains familiar language typical of morals clauses.<sup>224</sup> Article Four, titled “Loyalty Obligations,” states: “It is expected that a Catholic employee recognize and observe the principles of the Catholic doctrine on faith and morals. . . . [P]ersonal life witnessing in accordance with the principles of Catholic religious and moral teaching is required.”<sup>225</sup> This standard applies to Catholic and non-Catholic employees alike.<sup>226</sup>

Article Five, titled “Violations of Loyalty Obligations,” expands on the severity of specific violations and how employers should respond.<sup>227</sup> The Article first stipulates that Catholic employers should only use termination as a last resort when a more moderate response, such as a clarifying conversation, warning, or formal reprimand, will not adequately address the issue.<sup>228</sup> Article Five then lists the following violations as “particularly serious” for termination:

- Violations of employee obligations under Article 3 and 4, especially leaving the Church, public advocacy against fundamental principles of the Catholic Church (e.g. regarding abortion), and serious personal moral misconduct,

221. Christa Pongratz-Lippitt, *Lesbian rehired; German church revises laws*, NATIONAL CATHOLIC REPORTER (Aug. 10, 2015), <https://perma.cc/K3X9-X4RP>.

222. E-mail from Dr. Martin Fuhrmann, Head of the Legal Service Unit, The Association of German Dioceses, to author (Feb. 12, 2019, 4:27 PST) (on file with author).

223. DIE DEUTSCHE BISCHOFSKONFERENZ, GRUNDORDNUNG DES KIRCHLICHEN DIENSTES IM RAHMEN KIRCHLICHER ARBEITSVERHÄLTNISSE (Sekretariat der Deutschen Bischofskonferenz ed., 11th ed. 2008); *Id.*

224. See DIE DEUTSCHE BISCHOFSKONFERENZ, GRUNDORDNUNG DES KIRCHLICHEN DIENSTES IM RAHMEN KIRCHLICHER ARBEITSVERHÄLTNISSE 21–23 (Sekretariat der Deutschen Bischofskonferenz ed., 2012) (translation on file with author).

225. *Id.* at 21.

226. *Id.*

227. *Id.* at 21–23.

228. *Id.* at 21–22.

- Conducting a marriage that is invalid according to the beliefs and the legal system of the Church,
- Actions to be viewed canonically as a clear distancing from the Catholic Church, especially disaffiliation of faith (apostasy or heresy according to c. 1364 § 1 i. V. m. c. 751 CIC), dishonoring the Holy Eucharist (c. 1367 CIC), public blasphemy and evoking hatred and contempt against religion and Church (c. 1369 CIC), offenses against the ecclesiastical authorities and the freedom of the Church (in particular according to cc. 1373, 1374 CIC).<sup>229</sup>

Following Germany's legalization of same-sex civil partnerships in 2001, the German bishops added registering a same-sex civil partnership as a serious loyalty violation under this section, regardless of whether the employee was Catholic or not.<sup>230</sup>

But in 2015, the German bishops made a remarkable reversal after realizing Catholic institutions were not applying the *Grundordnung's* loyalty provisions even-handedly.<sup>231</sup> In a rare recognition by the Church hierarchy of LGBTQ employment discrimination, Cardinal Rainer Woelki, archbishop of Cologne, acknowledged that, unlike employees in same-sex partnerships, heterosexual employees who divorced and remarried were rarely fired.<sup>232</sup> In response, the bishops revised the *Grundordnung* to limit terminations only to the most serious cases. Article Four remains largely the same, but the bishops redrafted the "particularly serious" violations listed in Article Five:

1. For all employees:
  - a) public advocacy counter to fundamental principles of the Catholic Church (e.g. the promotion of abortion or xenophobia),
  - b) serious personal moral misconduct that according to the specific circumstances is objectively sufficient to present a significant nuisance to the ecclesial community or the professional sphere and to impair the credibility of the church,
  - c) the denigrating or mocking of Catholic beliefs, rites or customs; public blasphemy and evocation of hatred and contempt against religion and Church (cf. c. 1369 CIC); offenses against the ecclesiastical authorities and the freedom of the Church (cf. cc. 1373, 1374 CIC),
  - d) the promotion of religious and ideological beliefs that stand in contradiction to Catholic beliefs, during working hours or in an official context, particularly the promotion of other religious or philosophical communities.
2. For Catholic employees:
  - a) leaving the Catholic Church,

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229. *Id.* at 22.

230. *Id.* at 27.

231. The Editors, *supra* note 12.

232. *Id.*

- b) actions to be viewed canonically as a clear distancing from the Catholic Church, especially disaffiliation of faith (apostasy or heresy according to c. 1364 § 1 i. V. m. c. 751 CIC),
- c) the canonically illegitimate performance of a civil marriage when according to the specific circumstances such action is objectively sufficient to present a significant nuisance to the ecclesial community or the professional sphere and to impair the credibility of the church;
- d) entering into a registered civil partnership; with this loyalty violation no. 2c) is correspondingly applied.<sup>233</sup>

The key to the 2015 revision is limiting the termination of employees in same-sex partnerships (and now marriages following legalization in 2017<sup>234</sup>) to cases “objectively sufficient to present a significant nuisance.” The bishops appear to use the word “nuisance” (“Ärgernis” in German) in the legal sense, referring not to a simple annoyance, but an action that unreasonably interferes with a community’s health, morals, safety, or general welfare.<sup>235</sup> Cardinal Woelki explained this is a high standard that “limit[s] the consequences of remarriage or a same-sex union to the most serious cases [that would] compromise the church’s integrity and credibility.”<sup>236</sup> What qualifies as one of the “most serious cases” remains unclear. However, after the reform, a Catholic day care rehired an employee previously terminated for her same-sex partnership, setting an important precedent that employees who entered same-sex partnerships under ordinary circumstances do not meet the “significant nuisance” standard.<sup>237</sup> Based on this precedent, every terminated employee discussed in this note would likely be protected if they acted cautiously to not draw the Church into controversy.

The German bishops’ reform is a fitting revision of the Church’s labor practices to fulfill Pope Francis’s pastoral vision. While preserving some discretion for the Church, the reform provides a crucial floor of protection for LGBTQ employees in acknowledgment of employers’ propensity for bias and the Church’s mission of merciful inclusion. Significantly, Article Five explicitly instructs employers to apply the same “significant nuisance” standard to same-sex partnerships and canonically invalid heterosexual marriages, precluding administrators from morally differentiating between the two.<sup>238</sup> Also of note is the addition of xenophobia to the example of

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233. DIE DEUTSCHE BISCHOFSKONFERENZ, GRUNDORDNUNG DES KIRCHLICHEN DIENSTES IM RAHMEN KIRCHLICHER ARBEITSVERHÄLTNISSE 2–4 (Sekretariat der Deutschen Bischofskonferenz ed., 2015) (translation on file with author).

234. *Germany gay marriage: Couple are first to marry under new law*, BBC NEWS (Oct. 1, 2017), <https://perma.cc/SUD5-44JQ>.

235. See generally *Nuisance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

236. The Editors, *supra* note 12.

237. Pongratz-Lippitt, *supra* note 221.

238. DIE DEUTSCHE BISCHOFSKONFERENZ, *supra* note 233, at 4.

abortion as a fundamental Church principle—a nod to the Pope’s criticism of the Church for being “obsessed” with abortion, gay marriage, and contraception over caring for the poor and marginalized.<sup>239</sup>

The revised Article Five also directly addresses bias by calling on dioceses to form a central authority, either separately or jointly, that reviews morality-related terminations.<sup>240</sup> Although not required, the law instructs any institution intending to terminate an employee for an alleged breach of loyalty to seek this central office’s opinion.<sup>241</sup> The office, headed by someone with knowledge and experience in Church and secular employment law, would determine the appropriateness of termination presumably to ensure equitable treatment.<sup>242</sup> Although this office itself may exercise some bias, the distribution and formalization of decision-making power with a conscious intention to correct past discriminatory patterns will surely mitigate the major inequities produced by the previous system of unfettered discretion.

### C. Organizing for an Equitable Policy

Cardinal Woelki, who headed the *Grundordnung* revision, exclaimed, “I expect and hope this will happen everywhere,” but change in the United States is likely to be slow, piecemeal, and bottom-up.<sup>243</sup> The American bishops hinted at supporting greater procedural protections for LGBTQ employees in 2006.<sup>244</sup> But specific guidance has not followed, and there is no indication the American bishops will follow Germany and implement a national policy any time soon.

In the absence of leadership by the American Church hierarchy, grassroots organizing, especially by students and advocacy groups like New Ways Ministry, has been central to challenging individual terminations and pushing Catholic institutions to adopt more equitable policies.<sup>245</sup> For example, in 2015, St. Mary’s Academy in Portland, Oregon, reversed its decision to hire an academic adviser after she inquired about the employment consequences of marrying her same-sex partner.<sup>246</sup> But, after a day of protests by students, parents, and donors, the school publicly apologized, added sexual orientation to its equal employment policy, and

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239. *Id.* at 3; Laurie Goodstein, *Pope Says Church Is ‘Obsessed’ With Gays, Abortion and Birth Control*, THE NEW YORK TIMES (Sept. 19, 2013), <https://perma.cc/9MYM-55JQ>.

240. DIE DEUTSCHE BISCHOFSKONFERENZ, *supra* note 233, at 4.

241. *Id.*

242. *Id.*

243. Edward Pentin, *German Bishops to Allow Employees in Same-Sex Unions, Civil Remarriages to Keep Jobs*, NATIONAL CATHOLIC REGISTER (May 6, 2015), <https://perma.cc/WQ5U-XV72>.

244. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *supra* note 29.

245. *See Employment Non-Discrimination*, *supra* note 188.

246. Mesh, *supra* note 188.

affirmed itself as a “diverse community that welcomes and includes gay and lesbian students, faculty, alumnae, parents and friends, including those that are married.”<sup>247</sup>

Another major success occurred the following year in 2016 when Mercy High School in San Francisco, California, decided to accept the head of its English department as a transgender man after he informed the school of his transition.<sup>248</sup> Rather than keep the issue concealed, the administration organized a meeting with parents and provided counselors to students, parents, faculty, and staff to help them process the acceptance of the teacher as male.<sup>249</sup> Although a noted conservative on LGBTQ issues,<sup>250</sup> San Francisco Archbishop Salvatore Cordileone did not oppose Mercy High School’s decision and issued a statement acknowledging the situation’s complexity and the importance of prudential judgment.<sup>251</sup>

### 1. Diocesan Bishops

While continued mobilization around individual institutions is critical, some American prelates have demonstrated a more compassionate approach toward the LGBTQ community, making them potential allies in adopting a German-style employment policy for their dioceses. Most significant is Bishop Robert McElroy of the Diocese of San Diego, California. Bishop McElroy encouraged pastoral associate Aaron Bianco, who is in a same-sex marriage, to start an LGBTQ ministry at a Catholic Church in the city’s largest LGBTQ neighborhood.<sup>252</sup> Over time, extremists began targeting Bianco and ultimately published his home address online and broke into the Church’s office to spray-paint a homophobic slur on the wall.<sup>253</sup> Bishop McElroy passionately defended Bianco, condemned the persecution, and greatly regretted that Bianco felt forced to resign for his own safety.<sup>254</sup> Based on this rare defense of an employee in a same-sex marriage, Bishop McElroy is a likely ally for adopting a more protective employment policy for the some three thousand employees of his diocese.<sup>255</sup>

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247. *Id.*

248. Jill Tucker, *San Francisco Catholic school teacher comes out as transgender — and finds acceptance*, SAN FRANCISCO CHRONICLE (May 13, 2016), <https://perma.cc/GV3K-9WCK>.

249. *Id.*

250. Norimitsu Onishi, *San Francisco’s New Archbishop Worries Gay Catholics*, THE NEW YORK TIMES (Sept. 29, 2012), <https://perma.cc/MZS2-3WQS>.

251. Tucker, *supra* note 248.

252. Laurie Goodstein, *He Was a Gay Man on Staff at a Catholic Parish. Then the Threats Began Coming In.*, THE NEW YORK TIMES (Dec. 29, 2018), <https://perma.cc/7LJY-7JB2>.

253. *Id.*

254. *Id.*

255. *Human Resources*, THE ROMAN CATHOLIC DIOCESE OF SAN DIEGO, <https://perma.cc/V3BD-6KXL>.

Other Church leaders also stand out as potential allies. When asked about the termination of LGBTQ workers, Cardinal Seán O'Malley of the Archdiocese of Boston, Massachusetts, referred to the Pope's emphasis on love and mercy and stated the pattern of firings needed to be rectified.<sup>256</sup> Cardinal Joseph Tobin of Newark, New Jersey, welcomed an LGBTQ Catholic pilgrimage to his archdiocese and has signaled an openness to discussing the termination of LGBTQ workers.<sup>257</sup> And Bishop John Stowe of the Diocese of Lexington, Kentucky, participated in an LGBTQ Catholic gathering and spoke on the importance of not discriminating against LGBTQ employees.<sup>258</sup> The growing number of Church leaders like these recognizing the problem of LGBTQ-related terminations indicates the potential for organizing at the diocesan level, implementing an equitable policy in the country's 196 dioceses and archdioceses one by one.<sup>259</sup>

## 2. Religious Institutes

Another opportunity for adopting an equitable policy on a large scale is Catholic religious institutes, also known as religious orders. The members of a religious institute take religious vows and live in community with fellow members. Approximately 160 men's religious institutes (which include about 12,000 priests and 4,000 brothers) and 120 women's religious institutes (approximately 6,000 sisters) are present in the United States.<sup>260</sup> These religious communities vary widely in size, but many employ a significant number of lay people in schools, universities, hospitals, retreat centers, and other ministries. To date, the Loretto Community is the only Catholic religious institute that has adopted an LGBTQ non-discrimination policy,<sup>261</sup> but others may be willing if encouraged.

Most notable are the Jesuits, officially named the Society of Jesus, who have taken significant stands in defense of LGBTQ employees. In 2015, Jesuit-run Fordham University not only retained the head of its theology department but publicly wished him and his husband "a rich life filled with

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256. Bob Shine, *Boston's Cardinal O'Malley: LGBT Church Worker Firings "Need to be Rectified"*, NEW WAYS MINISTRY (Sep. 15, 2014), <https://perma.cc/N68T-WPLP>.

257. Otterman, *supra* note 212; O'Loughlin, *supra* note 212.

258. Patricia Lefevere, *Bishop John Stowe leads prayer at LGBT Catholic gathering*, NATIONAL CATHOLIC REPORTER (May 4, 2017), <https://perma.cc/J63G-V4HP>.

259. *Bishops and Dioceses*, THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Aug. 2018), <https://perma.cc/SCM9-TU7M>.

260. *Religious Congregations*, CONFERENCE OF MAJOR SUPERIORS OF MEN, <https://perma.cc/R2B9-ML38>; *About Us*, CONFERENCE OF MAJOR SUPERIORS OF MEN, <https://perma.cc/N8G6-DURD>; *Who We Are*, COUNCIL OF MAJOR SUPERIORS OF WOMEN RELIGIOUS, <https://perma.cc/DGT4-JS49>.

261. DeBernardo, *supra* note 11.

many blessings” after their same-sex marriage in the Episcopal Church.<sup>262</sup> When two female athletics staff members at the University of San Francisco wed in 2016, the Catholic university’s president, a Jesuit priest, promised them the legal protections due and affirmed the university as “purposefully diverse and dedicated to inclusivity.”<sup>263</sup> Also in 2016, the Jesuit publication *America* advocated for Catholic institutions to stop terminating employees in same-sex marriages.<sup>264</sup> And in 2017, the Rev. James Martin, S.J., a Jesuit priest, published his ground-breaking book, *Building a Bridge*, which called for an end to LGBTQ-related terminations.<sup>265</sup>

In another courageous move, the Jesuits announced in June 2019 that Brebeuf Jesuit Preparatory School in Indianapolis, Indiana, had refused a request by the Archbishop to terminate a teacher in a same-sex marriage.<sup>266</sup> The school’s leadership explained that terminating the teacher would not only violate their conscience, but would also set a concerning precedent for future interference by the Archdiocese in the school’s personnel decisions.<sup>267</sup> Rather than respect the school’s judgment, the Archdiocese took the unprecedented step of ending its formal recognition of Brebeuf as a Catholic school.<sup>268</sup>

Just three days after Brebeuf announced its decision, another Catholic school in Indianapolis, Cathedral High School, announced it would comply with the Archbishop’s demand to end the employment of another teacher in a same-sex marriage.<sup>269</sup> Under canon law, Brebeuf’s Jesuit sponsorship limits the Archdiocese’s control over the school, but Cathedral’s different canonical and nonprofit status would have allowed the Archdiocese to impose more severe penalties on the school for noncompliance, including removing its Catholic affiliation, its ability to celebrate the sacraments, its 501(c)(3) status, and the ability of diocesan priests to serve on the school’s Board of Directors.<sup>270</sup>

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262. J. Lester Feder, *A Catholic University Wishes Professor “Many Blessings” After He Marries His Same-Sex Partner*, BUZZFEED NEWS (July 14, 2015), <https://perma.cc/Q7R3-UTD3>.

263. Ann Killion, *USF’s Azzi, basketball’s lone out LGBT head coach, draws support*, SAN FRANCISCO CHRONICLE (Apr. 14, 2016), <https://perma.cc/YKL3-6XFN>.

264. The Editors, *supra* note 12.

265. MARTIN, *supra* note 12, at 46–50.

266. Fr. William Verbryke, S.J. et al., *Statement to the Brebeuf Jesuit Community*, BREBEUF JESUIT PREPARATORY SCHOOL (June 20, 2019), <https://perma.cc/2XH6-KLSN>; V. Rev. Brian G. Paulson, SJ, *Statement of Provincial Brian Paulson, SJ, Concerning Brebeuf Jesuit Preparatory School*, JESUITS USA MIDWEST PROVINCE (June 20, 2019), <https://perma.cc/5YR6-66PB>.

267. Verbryke et al., *supra* note 266.

268. *Id.*

269. Matt Cohoat & Rob Bridges, *Dear Cathedral Family*, CATHEDRAL HIGH SCHOOL (June 23, 2019), <https://perma.cc/9GCN-WFPT>.

270. *Id.*

While diocesan-run schools like Cathedral are bound to bishops' governance, the greater autonomy afforded to religious institutes like the Jesuits allows for bolder action in support of LGBTQ employees. The Jesuits plan to appeal the Archdiocese's decision on Brebeuf, which may ultimately bring the dispute to the Vatican's Congregation for Catholic Education.<sup>271</sup> Better guidance from the Vatican on dioceses' ability to control personnel decisions in cases like this may provide helpful clarity for implementing an equitable employment policy covering the Jesuits' eighty K–12 schools, twenty-eight colleges and universities, and many other ministries across the United States.<sup>272</sup>

### 3. Labor Unions

A third opportunity for advancing LGBTQ employee protections is the many labor unions present in Catholic institutions. Despite the inapplicability of the National Labor Relations Act to religious organizations<sup>273</sup> and the general decline of union membership nationwide,<sup>274</sup> unions currently represent employees in at least 300 Catholic K–12 schools, 38 universities, and 160 health care institutions.<sup>275</sup> In contradiction to the Church's rich pro-union theology,<sup>276</sup> bishops are often hostile to unions and organizing initiatives within their dioceses.<sup>277</sup> However, successfully established unions may provide the collective strength necessary to bargain for greater employee protections.

Lay Faculty Association Local 1261, which represents over eight hundred Catholic school teachers in New York, demonstrates a union's

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271. William Critchley-Menor, S.J., *How the Jesuits plan to appeal Indy archbishop's decision to revoke Brebeuf's Catholic status*, AMERICA: THE JESUIT REVIEW (June 24, 2019), <https://perma.cc/G2EN-K6MF>.

272. *Member Schools*, JESUIT SCHOOLS NETWORK, <https://perma.cc/GXK7-QPDE>; *Colleges and Universities*, ASSOCIATION OF JESUIT COLLEGES & UNIVERSITIES, <https://perma.cc/A9QB-G2HF>.

273. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979) (holding the NLRA does not cover lay faculty members at church-operated schools).

274. Megan Dunn & James Walker, *Union Membership In The United States*, U.S. BUREAU OF LABOR STATISTICS (Sept. 2016), <https://perma.cc/UXZ5-R6H2> (detailing the steady decline in union membership since 1983).

275. THE CATHOLIC LABOR NETWORK, *GAUDIUM ET SPES LABOR REPORT*, 2018: CATHOLIC INSTITUTIONS WITH EMPLOYEE UNIONS 3–33 (Clayton Sinyai ed., 2018), <https://perma.cc/59UN-3S8J>.

276. E.g., UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* 23–25 (1986) (summarizing the Church's theology of work and support for workers' right to unionize).

277. Schwartz, *supra* note 194; E-mail from Jennifer Haselberger, J.C.L., Ph.D., former Chancellor for Canonical Affairs, Roman Catholic Archdiocese of Saint Paul and Minneapolis, to author (Mar. 12, 2019, 6:38 PST) (on file with author) (commenting that the Archdiocese of Saint Paul and Minneapolis suppressed unions at Hill-Murray School and at the archdiocese's official publication, *The Catholic Spirit*).

power to protect LGBTQ employees.<sup>278</sup> About ten years ago, the union successfully opposed a bishop's attempt to insert a lengthy morals clause into teachers' contracts, and the issue has not come up since.<sup>279</sup> "They call them morals clauses, but we find them to be almost immoral," says teacher and union president Ciro Quattrocchi, "where do you draw the line of who is and isn't a good Catholic? We're concerned with how well these teachers model Christ in the classroom. What's going on in their personal lives isn't our business."<sup>280</sup> According to Quattrocchi, administrators' hands-off approach to teachers' personal lives has prevented any employment dispute over a same-sex relationship, "but if a dispute did arise, and he or she was an excellent teacher, the union would absolutely fight to keep the teacher."<sup>281</sup>

However, not all union leadership opposes morals clauses and the termination of employees in same-sex marriages. For Rita Schwartz, president of the National Association of Catholic School Teachers (NACST), morals clauses provide necessary parameters for teachers and maintain schools' distinct Catholic identity.<sup>282</sup> All of NACST's affiliates, which represent approximately four thousand K–12 teachers across the country, include morals clauses in their contracts.<sup>283</sup> "Catholic teachers should be witnesses, and you can't be witness if you're not keeping the teachings of the Church," says Schwartz.<sup>284</sup> When a morals issue like same-sex marriage comes up, Schwartz tries to work it out between the diocese and the teacher, but, she says, "teachers should understand what they're signing onto when they get hired."<sup>285</sup>

Whether Quattrocchi's or Schwartz's perspective predominates among other union leadership is unclear, but Lay Faculty Association Local 1261's successful exclusion of morals clauses in its contracts demonstrates unions' power to protect LGBTQ employees when under supportive leadership. The protesting of morals clauses by Catholic school teachers and their allies in dioceses all over the country shows many employees ardently seek a more compassionate approach to Catholic employment.<sup>286</sup> Organizers face the

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278. Telephone Interview with Ciro Quattrocchi, President, Lay Faculty Association Local 1261 (Nov. 21, 2018).

279. *Id.*

280. *Id.*

281. *Id.*

282. Schwartz, *supra* note 194.

283. *Id.*

284. *Id.*

285. *Id.*

286. See, e.g., *Over 350 Catholic School Teachers Call On San Francisco Archbishop To Drop Morality Clauses*, KPIX 5 CBS SF BAY AREA (Mar. 3, 2015), <https://perma.cc/29SJ-GCYZ>; Natalie Orenstein, *Parents and Teachers Protest New 'Morality Clause' at Catholic Schools in East Bay*, KQED

challenge of channeling this passion into unionization, electing supportive union leadership, and negotiating for an equitable policy in employee contracts.

#### CONCLUSION

Inadequate coverage under state and federal non-discrimination law, the gaping religious exemptions of the First Amendment and Title VII, and the broad enforceability of morals clauses in employment contracts often leave LGBTQ employees of Catholic institutions vulnerable to discrimination. This limited legal recourse means that eliminating Catholic institutions' discrimination against LGBTQ employees must come largely through a process of self-examination and self-correction. The German bishops' adoption of a nationwide policy protecting employees in same-sex relationships has modeled a way forward for Catholic institutions in the United States, and many have already taken significant steps in improving their relationships with LGBTQ employees. Supportive bishops, religious institutes, and labor unions offer opportunities for enacting an equitable employment policy on a larger scale. Continued community mobilization will be central to seizing these opportunities and fulfilling the Church's pastoral mission of embracing those long relegated to the legal, social, and theological margins.