VII DIVIDED BY FOUR: THE FOUR-WAY CIRCUIT SPLIT OVER THE TITLE VII "RELGIOUS ORGANIZATION" EXEMPTION

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I. INTRODUCTION

English Puritans originally colonized the United States in their quest for freedom from religious persecution in England.[1] One hundred fifty years later, America's Founding Fathers carefully drafted the Constitution and its Bill of Rights to protect the individual's right to

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1. FRANK LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 1 (Princeton Univ. Press, 2013).

practice religion without government interference.[2] Since its inception, America has shown concern and respect for the freedom to practice religion without fearing persecution or punishment.[3]

The First Amendment grants American citizens two specific rights regarding the practice of religion via the Establishment Clause and the Free Exercise Clause.[4] Specifically, the Establishment Clause precludes Congress from enacting any law that establishes an official religion or establishes anti-religious law,[5] while the Free Exercise Clause prohibits Congress from enacting any laws that prevent the exercise of any particular religion.[6]

Religion is a deeply personal and integral part of many people's lives.[7] Religion can influence decisions on a day-to-day basis and guide behavior.[8] Given the significant position that religion has in American life, it is of little surprise that areas the Religious Clauses govern, such as the appropriate amount of separation between church and state, have long been controversial, and as such have seen much litigation.[9] The Supreme Court has decided numerous cases involving the Religious Clauses,[10] and these decisions are often met with great divisiveness across the United States.[11]

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2. *Id.* at 3.

3. *Id.*

4. U.S. CONST. amend. I.

5. *Id.*

6. *Id.*

7. *See America's Changing Religious Landscape*, PEWFORUM.org, http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ (last visited Feb. 22, 2016) (while this article discusses the decrease in Americans that consider themselves religious, data shows that over 70% of Americans consider themselves affiliated with a religious group or belief).

8. *Religion in Everyday Life*, PEW RES. CTR., 8 (Apr. 12, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/11/2016/04/Religion-in-Everyday-Life-FINAL.pdf.

9. Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 2 (1961).

10. Recent Supreme Court decisions involving the Religion Clauses include *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171 (2012), (holding that the First Amendment contains a ministerial exception, which applies to staff of religious congregations); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (holding that the contraceptive amendment of the Affordable Care Act violated the Religious Freedom Restoration Act); and *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (discussing the fundamental right to freedom of religion and its impact on the Court's holding that Equal Protection requires that states recognize the validity of same-sex marriages).

11. Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. CIV. RTS. & CIV. LIBERTY L. REV. 1, 1–2 (2015).

The Supreme Court has not given section 702 the attention that it has paid to other First Amendment issues. Section 702 is part of Title VII of the Civil Rights Act of 1964.[12] Title VII serves to prohibit discrimination in employment on a variety of bases, including race, sex, and religion. Section 702, also known as 42 U.S.C. §2000e-1, affords an employer who qualifies as a "religious organization" protection against liability for discrimination against an employee on the basis of religious beliefs.[13] Without the Court's guidance, the federal circuits must create their own tests to determine whether an organization qualifies as religious in nature[14] and can thus enjoy the exemption from the Civil Rights Act's prohibitions on discrimination in employment.[15]

Without Supreme Court precedent to establish the appropriate test for determining what qualifies as a religious organization, the federal circuits have split and developed several tests.[16] There is a four-way circuit split over the proper section 702 test for determining "religious organizations."[17] Each of the four tests that the circuits employ objectively seeks the same outcome, which is to determine whether an organization qualifies as "religious" and, thus, is protected under section 702 from religious discrimination litigation.[18] However, the difference between the tests is not what outcome each is seeking, but the degree to which the particular circuit(s) examines various factors and which of those factors they view as important or determinative.[19] The consequence of a circuit split in general is that the same federal law will be applied differently based on the jurisdiction in which a suit is brought,[20] which makes this particular circuit split dangerous.

This Note proposes a solution to the circuit split. First, it sets out the background of the Civil Rights movement and the events that led to the creation of the Civil Rights Act. Then it analyzes the pertinent case law

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12. 42 U.S.C. § 2000e-1(a) (1964).

13. *Id.*

14. Roger W. Dyer, Jr., *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split Over Proper Test* Spencer v. World Vision, Inc., No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam), 76 MO. L. REV. 545, 545 (2010).

15. § 2000e-1(a).

16. Dyer, *supra* note 14, at 546–47.

17. *Id.*

18. *Id.* at 554.

19. *Id.* at 554–60.

20. Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1138–40 (2012) (discussing the impact of circuit splits on the Fourth Amendment's prohibition against unreasonable search and seizure, but the consequences of the circuit split are applicable to any constitutional issue).

that has since been promulgated in each of the circuits, as well as the tests that the various circuits use.[21] This Note will address the problem with circuit splits generally, and specifically as applied to section 702.[22] It also will discuss the advantages and disadvantages of each of the four tests available and propose a solution to the circuit split that all the circuits should adopt. Finally, this Note concludes that the Ninth Circuit's "primarily religious" test is the test that the circuits should adopt, absent a decision by the Supreme Court.[23]

II. BACKGROUND

A. Legislation and the Civil Rights Movement

1. The Constitution and Civil Rights

The Civil Rights Act of 1964 was the culmination of decades of civil rights movements for racial and gender equality across the United States.[24] Beginning with the Reconstruction Amendments[25] to the U.S. Constitution following the Civil War, there was a concerted movement among various groups of citizens and politicians to establish equal rights for disenfranchised people.[26] The Thirteenth Amendment abolished slavery.[27] The Fourteenth Amendment granted citizenship to persons of any race born in the United States,[28] established the Equal Protection

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. Juliet R. Aiken, Elizabeth D. Salmon, & Paul J. Hanges, *The Origins and Legacy of the Civil Rights Act of 1964*, 28 J. BUS. PSYCHOL. 383, 386–88 (2013).

25. *The Civil War: The Senate's Story*, SENATE.GOV, http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm (last visited Feb. 21, 2016).

26. Aiken, *supra* note 24, at 385.

27. John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 389 (2001). The amendment reads in full: "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend XIII.

28. U.S. CONST. amend. XIV §1. The Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

Clause, which applies the Bill of Rights to the states,[29] and conferred upon Congress the power to enforce the amendment.[30] The Fifteenth Amendment prohibited disenfranchisement based on race.[31]

After the Civil War, Congress enacted the Civil Rights Act of 1875 in an effort to prohibit discrimination on the basis of race in public places, such as hotels and inns, and housing accommodations.[32] In *The Civil Rights Cases*, the Supreme Court struck down the Act's major provisions when it held that the Fourteenth Amendment applied only to the states, and that it empowered Congress to only act on state action.[33] The Supreme Court's decision in *Plessy v. Ferguson*, in which the Court upheld the notion that blacks and whites were "separate but equal," set back efforts to prohibit discrimination.[34]

2. Protecting Civil Rights at the Federal Level: The Civil Rights Act of 1964

World Wars I and II triggered the next major era of the Civil Rights Movement. Employers initially enlisted African Americans to take over the jobs of white men who went off to war[35] and the government later drafted them into segregated units in the military.[36] Discrimination on both fronts prompted protests and demands for reform, which eventually led to President Roosevelt's creation of the Fair Employment Practice Committee, designed in part to eliminate discrimination in employment.[37]

Roughly one-hundred years of legislation and protests resulted in the passage of the Civil Rights Act of 1964, which aimed to eliminate

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29. *Id.*

30. U.S. CONST. amend. XIV § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article").

31. U.S. CONST. amend. XV § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

32. Alfred Avins, *The Civil Rights Act of 1875 and the Civil Rights Cases Revisited: State Action, the Fourteenth Amendment, and Housing*, 14 UCLA L. REV. 5, 25 (1966–1967).

33. The Civil Rights Cases, 109 U.S. 3, 13 (1883).

34. Plessy v. Ferguson, 163 U.S. 537, 544 (1896).

35. Aiken et al., *supra* note 24, at 385.

36. *Id.*

37. Chester A. Morgan, *An Analysis of State FEPC Legislation*, 8 LAB. L.J. 469 (1957). *See generally* Aiken et al., *supra* note 24, for a discussion of the Civil Rights movement and the protests that sparked it, beginning with discrimination in jobs for African Americans during World War II and culminating in boycotts and sit-ins in the 1960s.

discrimination based on gender, religion, race, or national origin.[38] Title VII specifically prohibits employer discrimination based on the factors protected by the Act.[39] However, section 702 of Title VII provides an important exemption to the prohibition of discrimination in employment decisions to groups that qualify as religious organizations.[40] Under section 702, any groups that qualify as religious organizations are free to discriminate on the basis of religion in employment decisions.[41]

The original religious organizations exemption codified in the Civil Rights Act of 1964 read differently than the current version found in the United States Code. In its first incarnation, section 702 exempted only religious organizations' "religious activities" from Title VII employment discrimination prohibitions.[42] While the original version of the Civil Rights Act established the Equal Employment Opportunity Commission (EEOC), it failed to give the Commission any power to enforce the Civil Rights Act.[43] Congress amended the Civil Rights Act in 1972 with the passage of the Equal Employment Opportunity Act.[44] In addition to providing the EEOC with the power necessary to enforce the Civil Rights Act,[45] the amendment removed the word "religious" from the

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38. Harrison, *supra* note 27, at 384.

39. 42 U.S.C. § 2000e-2(a) (1988).

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Id.

40. 42 U.S.C. § 2000e-1(a) (1988).

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Id.

41. McClure v. Salvation Army, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553, 558 (5th Cir. 1972).

42. Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1376 (1987).

43. George P. Sape & Thomas J. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 824–25 (1971–72).

44. 42 U.S.C. § 2000e-4 (1988); *see* Sape & Hart, *supra* note 43, at 825.

45. Sape & Hart, *supra* note 43, at 825.

phrase "religious activities."[46] In its current form, section 702 exempts religious organizations from the Title VII discrimination prohibitions in employment for all activities in the organization, not only those deemed as religious activities.[47]

At least one circuit court has suggested that the reason for including the religious organization exemption in the original version of the Civil Rights Act at all was to accommodate the Free Exercise Clause of the First Amendment.[48] The Free Exercise Clause prohibits Congress from enacting any law that prevents or inhibits the free exercise of religion.[49] In *King's Garden, Inc. v. FCC*, the Court of Appeals for the District of Columbia Circuit indicated that the original exemption was necessary based on three components of the First Amendment: the Free Exercise Clause, the Free Speech Clause, and the Free Press Clause.[50] In his majority opinion, Judge Skelly Wright concluded that these three components compel the exemption to religious organizations because these organizations undoubtedly have the right to choose who represents the organization to the world.[51] However, Judge Skelly Wright ascertained that the 1972 amendment goes beyond the purview of the components of the First Amendment that justify the religious organization exemption to protect areas of religious organizations that have nothing to do with these three guarantees.[52]

Given the delicate balance required to protect both civil rights and religious liberties, it is paramount that the religious organization exemption is applied appropriately. This prompts the question: What makes a group "religious" for the purposes of the religious organization exemption?

B. What is a Religious Organization?

Neither the Civil Rights Act nor the Equal Employment Opportunity Act define the term "religious organization." Likewise, the Supreme Court has never set forth a definition.[53] Because of the lack of guidance,

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46. *Id.* at 860.

47. 42 U.S.C. § 2000e-1(a) (1988).

48. King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir. 1974).

49. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.").

50. *King's Garden, Inc.*, 498 F.2d at 56.

51. *Id.*

52. *Id.*

53. Zoë Robinson, *What is a "Religious Institution"?*, 55 B.C. L. REV. 181, 184–85 (2014).

the circuits must develop their own tests to determine whether an organization is "religious" and thus qualifies as exempt under section 702 of Title VII of the Civil Rights Act. As a result, a four-way circuit split has developed. All four tests announce their own analysis for reaching the same objective: determining whether an organization can be called "religious" for the purposes of section 702. What differs among the circuits is what criteria makes a religious organization "religious" enough to qualify for the exemption.

1. The Fourth Circuit: The Secularization Test

In *Fike v. United Methodist Child Home of Virginia, Inc.*, the Court of Appeals for the Fourth Circuit held that the United Methodist Children's Home (the "Home") was not a religious organization for the purposes of the section 702 exemption because it was religious in name only.[54] The Home hired Plaintiff, the first non-minister director, to oversee the implementation of new policies and programs that were far more secularized than the Methodist-centered origins of the Home.[55] This new direction caused the Home's reputation amongst Methodist Church members to suffer, and the Home fired Plaintiff.[56] The court held that the Home was not a religious organization because its day-to-day operations did not consist of religious programming, were not guided by religious doctrine, and were not focused on disseminating religious information.[57] While the original purpose of the Home may have been religious in nature, that purpose had secularized over time.[58] The court commented on the absence of religious substance in the daily life of the residents of the Home and that the purpose of the Home, which was to look after wayward children, was not a religious purpose in and of itself.[59] While the court did not explicitly say what the test ought to be, it concluded that an organization must be "something more than a board of trustees who are members of a church."[60] Thus, the Home had secularized over time and was no longer a religious organization.[61]

54. Fike v. United Methodist Child Home of Va., Inc., 547 F. Supp. 286, 289–90 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983).
55. *Id.* at 288–89.
56. *Id.*
57. *Id.* at 290.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

2. The Fifth, Eleventh, and Eighth Circuits: The Sufficiently Religious Test

The Fifth, Eleventh, and Eighth Circuits adhere to the "sufficiently religious" test.[62] The premise of the "sufficiently religious" test is that the organization must be *religious enough* to be considered a "religious organization."[63] All four of the tests pronounced by the circuits seek to ensure that an organization is "religious enough" to qualify for the section 702 exemption. However, they each emphasize different factors. The Fifth Circuit did not explicitly state the test in its opinion in *Equal Employment Opportunity Comission v. Mississippi College*, but it accepted the district court's finding and suggested that the factors enumerated in the case are what made Mississippi College ("College") a religious organization.[64] In this case, Plaintiff was a former faculty member who sued the College for sexual discrimination after the college failed to offer her a full-time position.[65] In its opinion, the court concluded that the College's First Amendment rights will not be violated by its adherence to Title VII.[66] The opinion does not offer a test explicitly, but it does list the religious attributes of the College, suggesting that those specific attributes are important.[67] Among other factors, the College had a religious mission, it was owned and operated by the Mississippi Baptist Convention, it sought out faculty committed to Christian principles, its hiring policies clearly preferred church members, a vast majority of staff and students were Baptist, and the College required students to take Bible courses and attend church.[68] The court weighed these factors against the fact that the College was not itself a church and that the faculty members are distinct from those of a minister and other church faculty.[69] The court concluded that the College was "pervasively sectarian" in nature, despite its religious atmosphere, and as such, was not eligible for the religious organization exemption under section 702.[70]

The *Mississippi College* court relied on another case in the Fifth Circuit, *McClure v. Salvation Army*, which held that Congress did not

62. Dyer, *supra* note 14, at 555–57.

63. *Id.* (noting that the Fifth, Eighth, and Eleventh Circuits look at whether the characteristics of the religious organization are religious or secular).

64. E.E.O.C. v. Miss. College, 626 F.2d 477 (5th Cir. 1980).

65. *Id.* at 479.

66. *Id.* at 488.

67. *Id.* at 479.

68. *Id.*

69. *Id.* at 485.

70. *Id.* at 487.

intend for section 702 to insulate religious organizations from discrimination prohibitions in any area protected by Title VII except for religious activities.[71] Mrs. McClure was terminated from her employment as an ordained minister.[72] She sued the Salvation Army for discrimination on the basis that she was a woman and because she complained to her supervisors and the EEOC about the discrimination.[73] The court held that, despite the vague wording of the exemptions to Title VII, Congress's intent was not to regulate administration of employment between ministers and their church.[74] The court engaged in a lengthy discussion about the text of section 702 and concluded that the wording of the statute, paired with the legislative history, provide that Congress did not intend to shield religious organizations from liability for discrimination.[75] Finally, the court suggested that the amendment to section 702 was intended to limit the exemption for religious organizations to only the aspects of employment that directly relate to the religious activities of the organization.[76]

In *Killinger v. Samford University*, the Eleventh Circuit adopted the "sufficiently religious" test.[77] The court held that Samford University ("Samford") was a religious organization exempt from Title VII's employment discrimination prohibitions.[78] In *Killinger*, Plaintiff was slated to begin employment at Samford's divinity school, Beeson School of Divinity, but was eventually terminated due to a difference of religious views with the dean of the school.[79] Plaintiff sued for religious discrimination, but the Eleventh Circuit held that as a religious organization, Samford was protected by section 702.[80] The court examined various aspects of Samford's history and operation and from there, listed numerous reasons why it was a religious institution.[81] Contributing to the court's holding included the fact that Samford was founded as a religious institution by the Alabama Baptist State Convention and that the college's trustees had always been members of the Baptist Church.[82] Also, Samford received more money from the

71. McClure v. Salvation Army, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553, 558 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).
72. *Id.* at 555.
73. *Id.*
74. *Id.* at 560–61.
75. *Id.* at 558.
76. *Id.*
77. Killinger v. Samford Univ., 113 F.3d 196, 198, 200 (11th Cir. 1997).
78. *Id.*
79. *Id.* at 198.
80. *Id.* at 200.
81. *Id.* at 199.
82. *Id.*

Baptist Church than any other college in the United States, and the college required its faculty to endorse the same religious beliefs, and included this in its employment contract (along with the provision that failure to adhere to these beliefs may result in termination).[83] Finally, Samford's student handbook described itself as Christian, the college required all students to attend church, and the IRS considered Samford a religious institution for tax purposes.[84] The court found that Samford's policy, general purpose, and principles were all attributes of a religious organization,[85] and went so far as to claim that the situation in the instant case (teaching at a religious school) "is at the core of the [s]ection 702 exemption."[86]

The Eighth Circuit subscribed to the "sufficiently religious" test in *Wirth v. College of the Ozarks*, in which it held that the College of the Ozarks ("College") was a religious organization exempt under section 702 of Title VII.[87] Plaintiff sued the College after it cut his pay and eventually terminated him for beliefs he expressed on a survey distributed to members of the faculty.[88] The district court enumerated a handful of factors that contributed to the College's status as a religious organization.[89] These included that the Presbyterian Church founded the College, its charter mission statement described providing a Christian education, and the College was a member of several national evangelical organizations.[90]

3. The Ninth Circuit: The Primarily Religious Test and Spencer v. World Vision, Inc.

The Ninth Circuit has the most complex view of the religious organization test. In its most recent case, the court of appeals could not agree on the required test and each judge issued their own analysis.[91] In its first decision on the issue in *E.E.O.C. v. Townley Engineering & Manufacturing Co.*, the court held that Townley was not a religious organization for the purposes of section 702, and therefore was not

83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 200.
87. Wirth v. Coll. of the Ozarks, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998), *aff'd*, 208 F.3d 219 (8th Cir. 2000).
88. *Id.* at 1186–87.
89. *Id.* at 1187.
90. *Id.*
91. Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011).

exempt from claims of employment discrimination.[92] In this case, Plaintiff sued Townley after he was told that attendance at Townley's weekly church services was a mandatory part of his employment, his atheist beliefs notwithstanding.[93] Plaintiff brought suit after his employment discontinued, claiming that Townley constructively discharged him for his religious beliefs, despite Townley's claim that he refused to accept a transfer offer.[94] The court found that Townley was not a religious organization and thus could not require employee attendance at religious services without violating Title VII.[95] The Ninth Circuit proclaimed that each case turns on its facts and that they could not employ a black-letter test to determine whether an organization qualifies as religious for the purposes of section 702.[96] The court found that the deeply religious beliefs of Townley's owners were not enough to qualify it as a religious organization, despite the fact that Townley included Gospel portions in all of its outgoing mail, printed Bible verses on company documents, gave a portion of its profits to religious organizations, and offered religious services once a week.[97] The court weighed these factors with factors suggesting that Townley may not be a religious organization, including its status as a for-profit company, that its purpose (manufacturing mining equipment) was not a religious purpose, that it was not affiliated with a particular religion or church, and that it did not explicitly state a religious purpose in its mission.[98] In addition to its findings on Townley, the court suggested that the legislative history of the Civil Rights Act of 1964 offers insight into the strength of the relationship between the organization and religion necessary to have the exemption's protection.[99] Based on the congressional record of the amendment, the court determined that Congress always intended the scope of the exemption to be narrow.[100]

The Ninth Circuit upheld *Townley* in a subsequent case. In *E.E.O.C. v. Kamehameha Schools/Bishop Estate*, the court held that the schools at issue were not religious institutions because their "general picture" was

92. E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988).
93. *Id.* at 612.
94. *Id.*
95. *Id.* at 619.
96. *Id.* at 618.
97. *Id.* at 619.
98. *Id.*
99. *Id.* at 617 (referring to Representative Celler's comments as chairman of the Judiciary Committee and an author of the bill, stating that the organization must be "*wholly church supported*" to be protected under the exemption); *see* LEGISLATIVE HISTORY OF TITLE VII AND XI OF THE CIVIL RIGHTS ACTS OF 1964, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 3204 (1968).
100. *E.E.O.C.*, 859 F.2d at 617.

"primarily secular" as opposed to "primarily religious."[101] In her will, Bernice Bishop requested that most of her land be used for a Protestant school that hired Protestant teachers, and this led to the establishment of the Kamehameha Schools ("Schools").[102] Plaintiff, Carole Edgerton, brought suit against the Schools after she was overlooked for a teaching position because she was not Protestant.[103] The *Kamehameha* court endorsed the *Townley* court's view that mere affiliation with a religion is not enough to designate an institution as religious.[104] The court suggested that the proper test requires that all secular characteristics of an institution be compared with the institution's religious characteristics so the court can establish whether the "general picture" of the institution is secular or religious.[105]

The court evaluated the Schools' affiliation, purpose, faculty requirements, student body, student activities, and curriculum.[106] Considering each of these factors in turn, the court determined that the Schools were not a religious organization because they were not explicitly affiliated with any particular sect of Protestantism, nor did a religious group endorse them.[107] The Schools' purpose had shifted over the years from being religious to giving students the freedom to determine their own moral values.[108] The Schools typically required faculty to consider themselves as members of the Protestant Church, but did not require faculty to be active in their church or incorporate their religious beliefs into their classrooms.[109] The students' religion was not a factor in considering their admission to the school.[110] There were no religious clubs or activities that one would not find at a public school across the United States.[111] Finally, the court found that the religious education that the Schools offered was not sufficient itself to establish the schools as religious organizations, despite the extensive religious curriculum that the students participated in over the course of their education at the Schools.[112] The court went so far to say that the curriculum has "little to do with propagating Protestantism" due to the

101. E.E.O.C. v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 460–61 (9th Cir. 1993).
102. *Id.*
103. *Id.* at 459.
104. *Id.* at 460.
105. *Id.*
106. *Id.* at 461–63.
107. *Id.* at 461.
108. *Id.* at 462.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 463.

varied nature of the religious education received, which explored not only Protestantism, but other major religions.[113]

The Ninth Circuit's most recent case to discuss the religious organization exemption is *Spencer v. World Vision, Inc.*[114] In this case, each of the three judges on the panel for the Ninth Circuit established their own test for determining whether an organization qualifies as religious.[115] The court amended its decision to hold that Judge O'Scannlain's test is the proper test for section 702.[116] Three former employees brought suit against World Vision after it terminated them because of their religious beliefs.[117] The court held that World Vision is a religious organization.[118] In his opinion, Judge O'Scannlain endorsed the analysis of the *Townley* and *Kamehameha* courts, in which the court compared the important secular aspects with the important religious aspects of the institution and then used this analysis to determine if the primary purpose and character of the institution was religious.[119] The test that Judge O'Scannlain adopted requires a nonprofit entity to establish that it was created for a religious purpose (as seen in foundational documents), that its activities are coherent with those religious purposes and the activities work to promote them, and that it "holds itself out to the public as religious.[120]

In his concurring opinion, Judge Kleinfeld criticized Judge O'Scannlain's test as too broad,[121] and would modify the test to focus on how the organizations charge for services[122] by examining the amount of money that the institution receives for the exchange of goods or services provided.[123] Judge Kleinfield's problem with Judge O'Scannlain's nonprofit prong was that "[n]onprofit means non-taxable—it doesn't mean you don't make a profit."[124] Judge Kleinfeld suggested that instead of the "nonprofit" prong, the test should require that the exchange not be for more than "nominal amounts" if the institution is to qualify as religious.[125]

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113. *Id.* at 465.
114. Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011).
115. Spencer v. World Vision, Inc., 619 F.3d 1109 (9th Cir. 2010) *opinion amended and superseded on denial of rehearing en banc*, 633 F.3d 723 (9th Cir. 2011).
116. *Spencer*, 633 F.3d at 724.
117. *Id.* at 725 (O'Scannlian, J., concurring).
118. *Id.* at 741.
119. *Id.* at 726–27.
120. *Id.* at 741–42.
121. *Id.* at 742 (Kleinfeld, J., concurring).
122. *Id.* at 745–46 (Kleinfeld, J., concurring).
123. *Id.*
124. *Id.* at 745 (quoting the CEO of National Geographic).
125. *Id.*

The third opinion issued in this case was Judge Berzon's dissent. Judge Berzon concluded that the history of the religious organization exemption found in section 702 of Title VII suggests that Congress intended that only churches, and organizations that are so clearly religious that their religious character instructs their mission and day-to-day operations be eligible for the exemption.[126]

4. The Third and Sixth Circuits: The LeBoon *Test*

The Third Circuit promulgated the *LeBoon* test in *LeBoon v. Lancaster Jewish Community Center Association*.[127] The court held that the Lancaster Jewish Community Center ("Lancaster") was a religious organization exempt from Title VII.[128] In this case, Plaintiff was a Christian employed by Lancaster.[129] Lancaster identified itself as a Jewish organization and terminated Plaintiff's employment, and Plaintiff then sued for religious discrimination.[130] The court found that Lancaster was a religious organization[131] using analysis now referred to as the *LeBoon* test.

The court established nine different factors to examine when determining whether an organization is "religious": (1) whether the organization seeks a profit or is a nonprofit entity, (2) whether the organization "produces a secular product," (3) whether the foundational documents disclose a religious mission, (4) whether the organization is owned by, affiliated with, or financially supported by a religious organization, (5) whether a religious organization is involved in management of the organization, (6) whether it promotes itself publicly as a religious organization, (7) whether there are aspects of worship incorporated into the organization's regular activity, (8) if it is an educational institution, whether religious material is part of its curriculum, and (9) whether people of the same faith comprise its membership.[132] This incorporates the holdings of *Townley*, *Kamehameha*, *Killinger*, and *Mississippi College*.[133] However, the court rejected the notion set forth in *Townley* that Congress intended the

126. *Id.* at 756–57, 765–66 (Berzon, J., dissenting).
127. LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 221 (3d Cir. 2007).
128. *Id.* at 221.
129. *Id.*
130. *Id.* at 221–22.
131. *Id.* at 221.
132. *Id.* at 226.
133. *Id.*

religious exemption to be a narrow one, focused on churches and similar organizations.[134]

In its religious organization case, the Sixth Circuit upheld the district court's finding that Baptist Memorial Health Care Corporation was a religious organization and immune to Title VII discrimination prohibitions in *Hall v. Baptist Memorial Health Care Corp.*[135] In *Hall*, Plaintiff was an employee of the College, which was a subsidiary of the Baptist Memorial Health Care Corporation.[136] Baptist Memorial terminated Plaintiff after she informed her supervisor that she was a lesbian.[137] The court endorsed the Ninth Circuit's method of weighing the secular characteristics with the religious characteristics in determining whether the organization overall is religious.[138] In its analysis, the court held that Baptist Memorial and the College qualified for the religious organization exemption.[139] The court examined the organizations that founded Baptist Memorial (foundation), the missions of both the hospital and the college, as well as their relationships with the Baptist Church (affiliation), the clear presentation of the College's religious mission to current and prospective students (mission), the religious requirements that students must comply with (curriculum), and that it was owned and operated by a Baptist organization (owners).[140]

5. What Qualifies as a "Religious Organization"?

The closest that the Supreme Court has come to deciding a religious organization case was in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos* (Amos I).[141] In *Amos*, the Court held that the section 702 exemption, as applied to nonprofit activities of religious employers, was constitutional under rational basis.[142] The Court suggested that section 702 served the legitimate purpose of preventing the government from violating a religious

134. *Id.* at 230–31.

135. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000).

136. *Id.* at 621–22.

137. *Id.* at 623.

138. *Id.* at 624 (citing E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988)).

139. *Id.*

140. *Id.* at 625.

141. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987). In this case, Plaintiff was employed by a gym operated by the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints for sixteen years. *Id.* at 330. The Church terminated his employment after Plaintiff did not obtain a certificate proclaiming him to be a member of the Church. *Id.*

142. *Id.* at 339.

organization's First Amendment rights by becoming excessively entangled and obstructing an organization's ability to pursue its religious purpose.[143]

The Supreme Court has avoided reaching the issue of what constitutes a religious organization.[144] Thus, the circuit in which a suit is brought has great influence on whether or not a particular organization will be deemed "religious" and exempt from Title VII's employment discrimination prohibitions. Because the rights that may or may not be protected by Title VII are at issue in these cases, it is paramount that the circuits apply the same test to determine whether an organization is religious, and therefore exempt. One's constitutionally guaranteed rights should not be more or less protected depending on the circuit in which they live.

III. ANALYSIS

A. The Religious Organization Test Circuit Split

With so many tests available to answer the religious organizations question across the circuits, an organization that the Sixth Circuit deems religious may not be considered religious in the Ninth Circuit. The advantages of uniformity, and conversely, the consequences of the circuits remaining fragmented, are clear.

1. The Problem with Circuit Splits in General

The court system in the United States is such that there are twelve regional circuit courts of appeals, which are below only the Supreme Court of the United States in hierarchy.[145] Thus, the federal circuit courts are highly influential and are the last stop for nearly all appeals, save those that are granted certiorari by the Supreme Court.[146] These federal circuit courts are often deciding questions of federal law, reviewed only

143. *Id.* at 329–39; *see also* Lemon v. Kurzman, 403 U.S. 602 (1971) (discussing the unconstitutionality of excessive entanglement of government and religion).

144. *See* Karen M. Crupi, *The Relationship Between Title VII and the First Amendment Religion Clauses: The Unconstitutional Schism of Corporation of the Presiding Bishop v. Amos*, 53 ALB.L. REV. 421, 426–27 (1989).

145. *See About U.S. Federal Courts*, FEDBAR.ORG, http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx (last visited Jan. 17, 2016).

146. *See About the U.S. Court of Appeals*, USCOURTS.GOV, http://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals (last visited Jan. 17, 2016).

by the Supreme Court in extreme circumstances, such as a circuit split.[147] This function of the Supreme Court suggests an overall desire to avoid circuit splits. Justice Souter and Justice Kennedy have further supported this notion by testifying before the House Committee on Appropriations that, "[w]e are a Court that is constituted and committed to give doctrinal guidance to the judicial system as a whole."[148] Thus, uniformity is undeniably a goal of the American court system.[149]

There are several reasons that strengthen the conclusion that uniformity across the circuits is ideal. First, a circuit split results in different outcomes in the application of the same rule across varying circuits.[150] Congress has been concerned with this issue in the past, requesting that the Federal Judicial Center determine the number of "unresolved conflicts" in the circuits.[151] Thus, the same case may experience an entirely different outcome in a different circuit, which can be confusing to individuals affected by that outcome. It is hard to reconcile the idea that an organization that California does not consider religious may very well be considered religious in Florida, only because the respective circuit courts employ different tests to determine whether an organization is religious.

Supreme Court justices and scholars alike have suggested that uniformity is an integral part of the "supremacy" function that the circuit courts serve.[152] Circuit splits create a disuniformity, which is particularly problematic when a single federal law governs the issue.[153] At least one scholar has suggested that this fact renders the federal circuits ill-prepared to handle questions of federal law, as they require a uniform interpretation.[154] This conflicts with the notions of unity and equality

147. Roman L. Hruska, *Commission Recommends New National Court of Appeals*, 61 A.B.A. J. 819, 821–22 (1975).

148. *Depart.s' of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the House Committee on Appropriations*, 104th Cong. 2d Sess. Pt. 6 23–24 (1996).

149. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 74–75 (1938) (overruling Swift v. Tyson, 41 U.S. 1 (1842) on the grounds that it precluded equal protection to individuals of the states because of the potential for variance among the circuits).

150. *See To Split or Not to Split*, 45 FED. LAW. 30, 60 (1998).

151. Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247, 250 (1998).

152. Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 536–37, 541–43 (2010).

153. Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 700 (1995).

154. Dragich, *supra* note 152, at 537, 541 (citing Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38 (1994), who stated that, "[b]oth the Constitution's framers and the Supreme

upon which the United States was founded. In its creation of the *Erie* doctrine, the Supreme Court noted that disuniformity might deny an individual equal protection of the laws by applying the same law differently based on jurisdiction.[155] American jurisprudence has long favored uniformity and the Founders of the Constitution and members of the Supreme Court have impressed the importance of uniformity in the development of American federal law.[156] Circuit splits may also encourage forum shopping, a phenomenon which the Supreme Court has historically discouraged.[157]

2. The Problem with the Religious Organization Test Circuit Split

The issues presented in determining whether an organization qualifies as religious for purposes of the section 702 exemption are distinctly constitutional issues, and therefore appropriate for the Supreme Court to analyze. The First Amendment guarantee of freedom of religion both protects and inhibits the section 702 exemption. The First Amendment protects the freedom to practice any religion by preventing both the establishment of a national religion and the inhibition to practice any particular religion.[158] The section 702 exemption allows for the protection of a business's First Amendment right to practice any religion while preventing an individual employee from exercising their First Amendment right to free exercise of religion. The section 702 exemption also engages the constitutional guarantee of civil rights and the equal protection of those rights.[159]

The U.S. Constitution begins with the phrase, "WE THE PEOPLE"[160] and promises the rights guaranteed within it to all Americans.[161] At least one scholar has argued that John Jay, who wrote that Americans have "uniformly been one people" who are guaranteed the same rights as every other American, regardless of jurisdiction,

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Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process").

155. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (1938).

156. *See* Dragich, *supra* note 152, at 541 (citing Henry J. Friendly, *Indiscretion About Direction*, 31 EMORY L.J. 747, 758 (1982)).

157. *Erie R.R. Co.*, 304 U.S. at 76–77; *see also* Michael S. Shenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law*, 59 N.Y.U. L. REV. 1007, 1021–22 (1984).

158. U.S. CONST. amend I.

159. Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1079 (1996).

160. U.S. CONST. pmbl.

161. Logan, *supra* note 20, at 1164.

reflects what most Americans believe to be true.[162] The Supreme Court has held that the interest in eliminating discrimination is so strong that it rationalizes an intrusion upon another's religious liberties in order to prevent the discrimination.[163] Thus, problems arise when circuits interpret constitutional rights differently, thereby allowing constitutional rights guaranteed to all people in America to vary by jurisdiction.[164]

Even more troubling, certain circuits deem the First Amendment rights of individuals inferior to the First Amendment rights of businesses. This subordinate status may be inferred from the section 702 tests employed by certain circuits. For example, an organization in the Fourth Circuit may qualify as a religious organization under the "sufficiently religious" test, but not as such in the Ninth Circuit under the "primarily religious" test because the Ninth Circuit construes the test more narrowly than the Fourth.[165] If an organization operates in multiple jurisdictions, they may be able to legally discriminate on the basis of religion in one state and not in another. From a management perspective, this becomes problematic. Another challenge occurs when an employee travels for work and stays in jurisdictions that employ different standards. Under these circumstances, the case for uniformity is particularly compelling.

Several scholars have argued that the Founders premised the establishment of the United States on secular equality, in an effort to move far away from the "divine right of kings" and the resulting oppression in England.[166] In order to create a nation of equality, the Founders placed great emphasis and importance on both the ideas of secularization and religious autonomy.[167] This can also be seen in the clauses of the First Amendment, which severely limit the power that religious institutions have relative to the government and that simultaneously protect infringement on those religious beliefs by the government.[168]

Circuit splits involving different interpretations of a federal statute create a perfect case for the Supreme Court's consideration. After all, one of the main functions of the Supreme Court is to provide guidance to the lower courts on a particular issue.[169] In fact, Alexander Hamilton discussed uniformity as one of the main goals of the American judicial

162. *Id.* at 1138 (quoting THE FEDERALIST NO. 2, at 38–39 (John Jay)).
163. Rutherford *supra* note 159, at 1016.
164. Logan, *supra* note 20, at 1144–45.
165. *See supra* Part II.
166. Rutherford, *supra* note 159, at 1060.
167. *Id.* at 1060–61.
168. *Id.* at 1063.
169. Earl M. Maltz, *Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1420 (2000).

system in the Federalist Papers.[170] Supreme Court Justices have been proponents of uniformity among the courts and have offered evidence to support the idea that the American people have voiced a desire for uniformity.[171] In *Martin v. Hunter's Lessee*, Justice Story emphasized "the importance, even the necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution."[172] In 1983, Chief Justice Berger recommended creating a National Circuit Court to decrease the Supreme Court's workload, while simultaneously resolving many inter-circuit conflicts.[173] This further confirms that circuit splits are problematic and should be addressed.

The federal government has been concerned enough about circuit splits to have spearheaded at least two studies focused on their effects. One of these studies concluded that there is a necessity for uniformity amongst the circuits.[174] Further, Congress has refused to broaden the exemption afforded to religious organizations.[175] A particularly serious concern arises when institutions take advantage of the exemption and engage in "legal" discrimination based on their religious beliefs. This allows this "legal" discrimination to be premised on or influenced by an illegal form of discrimination, such as gender or race.[176] The potential for this issue to occur is itself enough to consider how to successfully navigate the delicate balance between the organization's First Amendment rights and the individual employee's equal protection rights. The circuit courts have largely skirted the issue, and it has been suggested that this is an effort to avoid the difficulty of assessing civil liberties weighed against religious liberties.[177]

Section 702 of Title VII of the Civil Rights Act affords a substantial exemption to anti-discrimination laws for employers, provided that the employer qualifies as such. While the nature of the exemption prevents federal statutes from possibly violating an organization's First

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170. Hellman, *supra* note 153, at 698 (quoting THE FEDERALIST NO. 22, at 143–44 (Alexander Hamilton)).

171. *Id.* at 698–99.

172. *Id.* at 698 (quoting Martin v. Hunter's Lessee, 14 U.S. 304, 347–48 (1816)).

173. William Alsup & Tracy L. Salisbury, *A Comment on Chief Justice Burger's Proposal for a Temporary Panel to Resolve Intercircuit Conflicts*, 11 HASTINGS CONST. L.Q. 359, 370, 361 n.10 (1983–1984).

174. *Id.* at 360.

175. Rutherford, *supra* note 159, at 1078.

176. Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1378 (1987); *see* McClure v. Salvation Army, 460 F.2d. 533, 560 (5th Cir. 1972).

177. Okamoto, *supra* note 176, at 1392.

Amendment right to free exercise,[178] it does so while allowing for the intrusion upon an individual's right to freedom from establishment and freedom to exercise any religion that they choose.[179] The consequence of this permissible discrimination is an intrusion upon an individual's Fifth and Fourteenth Amendment rights to equal protection of the laws, including a guarantee of civil rights.[180]

All four of the tests promulgated across the circuits address the same objective, that is, to determine whether an organization is "religious" enough to be exempt from Title VII. However, when the circuits utilize these tests, even though they vary ever so slightly, they inevitably give more or less weight to factors that may be the same, similar to, or completely different from factors considered in other circuits. While the end goal is the same, the analysis differs widely among the circuits, creating opportunity for wildly different results.

B. The Advantages and Consequences of the Current Religious Organization Tests Promulgated by the Circuits

The exemption that section 702 of Title VII provides to qualifying organizations permits a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of its activities."[181] This statute requires the employee's work to be in connection with the carrying on of the religious organization's activities, making evident that the proper reading of the statute is a narrow one.[182] It suggests that the employee's work performance must be so affected by the employee's religion that it endangers the religious mission of the organization. The Supreme Court supported this idea in *Braunfeld v. Brown*, where the Court suggested in dicta that the freedom of religion is not immune to "legislative restrictions."[183] The *Braunfeld* Court also stated that legislation enacted with a secular goal is valid, even if it

178. *See* Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 343 (1987) (Brennan, J., concurring), in which Justice Brennan suggests that the section 702 authorization to legally discriminate based on religion in the realm of non-religious aspects of employment is violative of an individual's rights under the Establishment Clause.

179. Rutherford, *supra* note 159, at 1085.

180. *Id.* at 1080.

181. 42 U.S.C. § 2000e-1(a) (2000).

182. *See* Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (stating "abhorrence of religious persecution and intolerance is a basic part of our heritage").

183. *Id.* at 603.

indirectly burdens religious activity (absent a less burdensome means for the same goal).[184]

As previously discussed, there is a four-way circuit split over the proper test to determine if an organization is sufficiently religious for the purposes of the section 702 exemption of Title VII.[185] Each of these four tests vary in scope, ranging from narrow to broad, which undoubtedly impacts the number of organizations that qualify as religious and can therefore legally discriminate against employees on the basis of their religion. These tests all come with their own advantages and consequences.

The Fourth Circuit follows the secularization test defined in *Fike v. United Methodist Children's Home of Virginia, Inc.*[186] In its opinion, the court examines the aspects of the day-to-day activities of the Children's Home at length, and suggests whether these activities are religious or secular in nature.[187] The court emphasizes a Fifth Circuit opinion in which the court found the Salvation Army to be a religious organization based on factors that include the religious practice of its members, the original purpose of the organization, and the nature of the employee's work.[188] One scholar has even suggested that the problem with the inquiry in *Fike* is that the court did not closely examine why the United Methodist Children's Home was engaging in such acts.[189] The disadvantage in *Fike* is that the court should inquire into a number of criteria, including objective factors, to properly discern the motivation and intent of the organization.[190] The secularization test seemingly adheres to the historical development of the United States as a society built around the notion of equality, while it is also careful to protect the First Amendment rights of organizations. The greatest disadvantage of the secularization test in its current iteration is that it is vague, which leaves open the possibility for broad interpretation.

The "sufficiently religious" "test" that the Fifth, Eighth, and Eleventh Circuits have endorsed is not so much a test as it is three very similar analyses that utilize common factors to determine whether an organization is religious.[191] In *Killinger v. Samford*, the Eleventh Circuit

184. *Id.* at 607.

185. Dyer, *supra* note 14, at 546.

186. *Id.* at 554.

187. Fike v. United Methodist Children's Home of Virginia, Inc., 547 F. Supp. 286, 289–90 (E.D. Va. 1982).

188. *Id.* at 290 (citing McClure v. Salvation Army, 323 F. Supp. 1100, 1104-06 (N.D. Ga. 1971)).

189. Dyer, *supra* note 14, at 571.

190. *Id.*

191. *Id.* at 555–56.

considered a variety of aspects of the University, and justified calling the institution "religious" despite a move toward secularism in recent years because the University as a whole retained much of its religious past.[192] The court considered the University's funding sources, the religious composition of its board of trustees, the required nature of religious courses its students must take, and its origins as a religious institution.[193] Similarly, in *Wirth v. College of the Ozarks*, the Eighth Circuit looked to factors including the College's origins, the religious organizations with which it affiliates, as well as the College's original mission.[194] In *Equal Employment Opportunity Commission v. Mississippi College*, the Fifth Circuit examined similar aspects of the College.[195] Critics of the "sufficiently religious" test have suggested that the Fifth, Eighth, and Eleventh Circuits allow the weakest religious connection of the four available tests, and look for the most tenuous relation to religion to satisfy the "religious organization" requirement of the section 702 exemption.[196]

The "sufficiently religious" test is problematic because, like the Fourth Circuit's test, it is vague and only establishes a guideline for examining factors. Without establishing a pronged test, it opens up the opportunity for courts to broaden or narrow the criteria as they see fit, rather than adhering to a strict set of factors that determine the religious nature of an organization. On the other hand, despite the absence of a concrete test, the three circuits manage to examine similar aspects of each organization and scrutinize the actual nature of the organization in its present form, so this fear may be slightly exaggerated. However, it is best to have clear-cut guidelines to prevent future courts from swaying in either direction for a multitude of factors, rather than just adhering to the established principles.

The Third and Sixth Circuits adhere to a similar set of criteria as the Ninth Circuit.[197] However, the Third and Sixth Circuits use more factors, and thus have produced broader tests.[198] In fact, the Sixth Circuit found Baptist Memorial College to be a religious organization sufficient for the purposes of the section 702 exemption based on loose criteria such as the

192. Killinger v. Samford Univ., 113 F.3d 196, 199 (11th Cir. 1997).

193. *Id.*

194. Wirth v. Coll. of the Ozarks, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998), *aff'd*, 208 F.3d 219 (8th Cir. 2000) (per curiam).

195. E.E.O.C. v. Miss. Coll., 626 F.2d 477, 478–79 (5th Cir. 1980).

196. Brian M. Murray, *The Elephant in Hosana-Tabor*, 10 GEO. J. L. & PUB. POL'Y. 493, 512 (2012).

197. Dyer, *supra* note 14, at 559–60.

198. *Id.* at 559.

fact that "the atmosphere [wa]s permeated with religious overtones."[199] The court also emphasized other important factors, including that the College occasionally held prayer breakfasts and that it required students to take religious studies courses.[200] The broadness of the test that the Sixth Circuit employed is also evident in the court's discussion of the freedom from government intervention that Congress has afforded to religious organizations.[201] The Sixth Circuit neglected to discuss equality or religious freedom, which are both constitutional guarantees.[202] While the Third and Sixth Circuits' tests are clearer and more definite than the tests employed in some of the other circuits, the broadness of the factors makes room for organizations that other circuits would deem secular to be considered religious. In fact, the Ninth Circuit has suggested that the tests endorsed in the Third and Sixth Circuit's test may encourage organizations to engage in illegal hiring activity so courts will consider the organization religious.[203] Further, the Ninth Circuit posits the idea that the inquiry the Third and Sixth Circuits utilize in these cases encroaches on deciding a religious question, which would constitute government entanglement and a violation of the Establishment Clause.[204]

Finally, the Ninth Circuit uses the narrowest of the four tests[205] in *Equal Employment Opportunity Commission v. Townley Engineering & Manufacturing Co.* and *Spencer v. World Vision, Inc.*[206] The "primarily religious" test of *Townley*, the narrowest of the four tests, weighs the secular activities of the company with the company's religious attributes to determine if the company's overall purpose and character are religious in nature, or if the company just has religious attributes.[207] While Townley undoubtedly has many religious features, indicated by the gospel passages included in its mailings and on documents, and by the offering of weekly religious services, the court found that Townley's primary purpose—producing mining equipment—is secular.[208] As such, the organization is not exempt from religious discrimination statutes.[209]

199. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000).
200. *Id.*
201. *Id.*
202. *Id.*
203. Spencer v. World Vision, Inc., 633 3d 723, 730 (9th Cir. 2011).
204. *Id.* at 731.
205. Murray, *supra* note 196, at 512.
206. Dyer, *supra* note 14, at 557.
207. E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988).
208. *Id.*
209. *Id.*

The Ninth Circuit endorsed *Townley* in its decision in *Spencer v. World Vision, Inc.*[210] The court emphasized that the proper procedure in these cases is to compare the secular aspects of the organization with its religious aspects, focusing on whether the organization was founded with a religious purpose and whether it displays publicly that it is a religious institution.[211] The *Spencer* test would also automatically exclude any for-profit institutions from being considered for the religious organization exemption by requiring that an organization be a nonprofit in order to qualify.[212] This factor seems to be in sync with the principles that influenced the Establishment and Free Exercise Clauses, as well as the notions of equality and separation of church and state that the United States has long stood for. While it may harm some for-profit institutions that automatically do not qualify for the exemption due to their status, the strong interest in equality and freedom of religion that individuals are entitled to justify this rule. A nonprofit has a more religious appearance than does a for-profit institution, as religions often promote giving and charity.[213] Further, the purpose of the exemption is only to allow religious organizations to employ whomever they choose in the religious aspects of their organizations.[214] Therefore, producing a profit would not qualify as a religious aspect of the organization.

C. Resolving the Four-Way Circuit Split

The four-way circuit split regarding section 702 of Title VII is problematic and is in need of resolution. Either the circuits can come together and agree on the proper test, or the Supreme Court should grant certiorari to a religious organization case and establish the proper test in an opinion. The finality of a Supreme Court ruling on the issue insofar as the individual circuit application of the section 702 exemption is the ideal solution because the Supreme Court is equipped to handle matters of national concern, whereas the federal courts are more equipped for issues that are regional in nature.[215] Also, a Supreme Court decision on the proper test for the issue would encourage a more uniform development of the law in question, whereas the federal circuit courts of appeal are not structured in such a way as to promote uniformity.[216]

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210. Spencer v. World Vision, Inc., 633 F.3d 723, 726 (9th Cir. 2011).
211. *Id.* at 741–42 (Kleinfeld, J., concurring).
212. *Id.* at 734 (O'Scannlain, J., concurring).
213. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 344 (1987) (Brennan, J., concurring).
214. 42 U.S.C. § 2000e-1 (1982).
215. Dragich, *supra* note 152, at 587.
216. *Id.* at 539.

Further, courts should adopt the Ninth Circuit's test articulated in *Spencer v. World Vision, Inc.*, and apply it to future religious organizations questions.

The Ninth Circuit's holding in *Spencer* likely is most similar to the way in which the Supreme Court would decide a section 702 case. At least one scholar has suggested that, based on the outcome of cases that employ the *Lemon* test, the Supreme Court would be inclined to a "pervasively sectarian" approach.[217] In *Lemon v. Kurtzman*, the Supreme Court established a three-pronged test to determine whether a statute violates the Establishment Clause.[218] The first prong of the *Lemon* test requires the purpose of the statute to be secular in nature.[219] The second prong of the test requires that the action imposed by the statute has either no effect, or at most an incidental effect, on religion.[220] The final prong of the *Lemon* test requires the statute does not cause "excessive entanglement" between the government and religion.[221] If the organization's religious beliefs are so tightly woven in its core that one cannot separate the secular from the religious aspects of the company, the government may not fund any aspect of the program.[222] Thus, if an organization is so pervasively religious that government action would violate the *Lemon* test, it is sufficiently religious to qualify as exempt from the anti-discrimination provisions of the Civil Rights Act.[223]

Judge O'Scannlain's opinion in *Spencer v. World Vision, Inc.*, proposes an examination that carefully straddles the line between permissible judicial inquiry into the nature of a religious organization and an impermissible inquiry that constitutes a violation of the Establishment Clause.[224] The test Judge O'Scannlain offers is a three-step inquiry which examines the purpose, activity, and the presentation of the organization.[225] The purpose prong analyzes whether the organization was founded for religious purposes.[226] The activity prong inquires into whether the activities of the organization are in accordance

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217. Oliver S. Thomas, *The Application of Anti-Discrimination Laws to Religious Institutions: The Irresistible Force Meets the Immovable Object*, 12 NAT'L ASS'N ADMIN. L. JUDGES 83, 99, n.95 (1992).

218. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

219. *Id.* at 612.

220. Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. CIV. RTS. L.J. 351, 357 (2009–10).

221. *Id.*

222. Thomas, *supra* note 217, at 99.

223. *Id.*

224. Spencer v. World Vision, Inc., 633 F.3d 723, 734 (9th Cir. 2011) (O'Scannlain, J., concurring).

225. *Id.*

226. *Id.*

with the religious purpose, and whether it acts to promote those religious purposes.[227] The final prong examines how the organization presents itself to the public, finding an organization more likely to be religious when it "holds itself out to the public" as such.[228] The *Spencer* test also puts the burden on the institution to prove itself as religious, rather than viewing it in a light most favorable to the exemption.[229] This analysis considers the founding and core principles of America. Further, the analysis restricts legal discrimination by providing protection of civil liberties to individual employees.

IV. CONCLUSION

The four-way circuit split over the proper test for the section 702 amendment to the Civil Rights Act of 1964 leaves individuals at varying risks of legal discrimination depending on the jurisdiction in which they are employed. Not only does this conflict with the goal of uniformity across the circuits, but some of the tests used in the circuits clash with the First Amendment's Religion Clauses.

Without Supreme Court precedent on the issue of what determines whether an organization is religious, the questions of the proper test remains unanswered. This Note contends that a solution to the problem lies within the Ninth Circuit's "primarily religious" test, in which factors are weighed against one another to determine if an organization's activity is primarily religious or secular.[230] The Supreme Court should grant a religious organization case certiorari and establish that the primarily religious test is the proper test for this issue.

The primarily religious test is described as the narrowest[231] of the four tests, and this is part of what makes it the most attractive test. Its narrowness enables the courts to respect the First Amendment's Religious Clauses (the Establishment Clause and the Free Exercise Clause)[232] guaranteed to an organization, while at the same time acknowledging that individual rights are a sacrosanct part of American history and are inalienable. By adopting the primarily religious test, the Supreme Court would respect both the organization and the individual and their respective rights, as well as the rights that America was founded upon and continues to greatly respect.

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227. *Id.*
228. *Id.*
229. Murray, *supra* note 196, at 515.
230. Dyer, Jr., *supra* note 14, at 557 (quoting E.E.O.C. v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 n.14 (9th Cir. 1988)).
231. *Id.* at 558.
232. U.S. CONST. amend. I.