THE SECTION 702 EXEMPTION, TITLE VII, AND THE CATHOLIC CHURCH: WHAT EMPLOYMENT DISCRIMINATION CLAIMS MAY BE BROUGHT?

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I. INTRODUCTION

Can a Catholic school fire a teacher for becoming pregnant out of wedlock? Can a Catholic hospital fire a doctor due to his or her sexual orientation? Congress has partially answered these questions through its passage of Title VII of the Civil Rights Act of 1964 and Title VII's § 702. Title VII and the § 702 exemption seek to balance the competing interests of limiting employment discrimination and preserving religious freedom. However, while some courts have interpreted the § 702 exemption broadly, others have interpreted the exemption narrowly.[1] For

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1. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171 (2012); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir.

example, the Fourth Circuit Court in *Rayburn v. General Conference of Seventh-Day Adventists* interpreted the § 702 exemption narrowly, reasoning that the exemption should apply only to those employees performing "religious activities" and only to claims of religious discrimination.[2] Taking a different approach, the U.S. Court of Appeals for the Third Circuit in *Little v. Wuerl* reasoned that Congress sought to allow religious institutions to "create and maintain communities composed solely of individuals faithful to their doctrinal practices" regardless of whether they were hired for a religious or a secular purpose.[3] These two cases demonstrate how different courts can interpret Title VII. These interpretations have tremendous effects on religious institutions as well as individuals who are employed or seek to be employed by them. This Note examines the different ways that courts interpret the § 702 exemption and then proposes a new test to resolve many issues and the confusion created by the courts' differences.[4] It concludes by applying this test and examining the test's effectiveness.[5]

II. BACKGROUND

A. Title VII of the Civil Rights Act of 1964 and the Section 702 Exemption

Title VII of the Civil Rights Act of 1964 ("Title VII") makes it illegal to discriminate in the workplace based on race, national origin, sex, or religion.[6] Specifically, Title VII states that it is unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[7] Congress enacted Title VII in order to "eliminate all forms of unjustified discrimination in employment."[8] However, Title VII appears to conflict with the purpose of the Free Exercise Clause of the First Amendment,

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2000); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

2. *See generally Rayburn*, 772 F.2d 1164.

3. *Little*, 929 F.2d at 951.

4. *See infra* Part III.D.

5. *See infra* Part III.E.

6. 42 U.S.C. § 2000e-2(a) (2006).

7. *Id.*

8. Scott D. McClure, Note, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587, 587 (1990).

which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[9] The conflict arises because restrictions on the hiring practices of religious institutions interferes with the institutions' right to practice their religions.[10] Without being free to hire or fire employees as they wish, these institutions cannot truly and freely exercise their faiths. Furthermore, interference in a religious institution's employment matters often will result in government entanglement in religious matters.[11]

With these dilemmas in mind, Congress included § 702 to Title VII of the Civil Rights Act of 1964.[12] Section 702 provides that the restrictions on employment discrimination in Title VII:

> [S]hall 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.[13]

The § 702 exemption allows religious institutions to prefer certain candidates and employees when making employment decisions.[14] The exemption also eliminates many concerns of government entanglement in religion.[15]

After the passage of § 702, some questions remain regarding the rights of religious institutions in employment matters.[16] One question is which types of religious institutions or organizations are exempt from Title VII.[17] This question, however, is beyond the scope of our inquiry. This Note will examine which types of employment discrimination claims may be brought against an exempt religious institution. For example, does § 702 allow Catholic schools to fire an unmarried teacher who becomes pregnant?[18] Can a Catholic institution fire an employee

9. U.S. CONST. amend. I.
10. *See* McClure, *supra* note 8, at 592.
11. *Id.*
12. 42 U.S.C. § 2000e–1(a) (2006).
13. *Id.*
14. *See* McClure, *supra* note 8.
15. *Id.* at 592.
16. *Id.*
17. *Id.* at 594.
18. MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 220 (4th ed. 2016).

after discovering their sexual orientation under § 702?[19] These questions are unsettled, and courts are split on the answers.

B. Interpreting the Section 702 Exemption Broadly (Cases and Rationales)

Courts interpreting the § 702 exemption broadly typically allow religious institutions to make employment decisions regardless of whether the employee performed "religious activities."[20] These courts reason that the exemption covers more claims than just religious discrimination.[21] For instance, a court interpreting the exemption broadly would likely allow a Catholic school to terminate an employee for becoming pregnant out of wedlock. This employment action is not discriminatory based on the employee's religious identification, but on her actions that run contrary to the Catholic faith.

The § 702 exemption was upheld as constitutional in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*.[22] More specifically, the Supreme Court held that the § 702 exemption "to religious organizations' secular activities does not violate the Establishment Clause."[23] In *Amos*, Mayson had been fired from his employment as a building engineer at the Deseret Gymnasium, a nonprofit and public facility that ran by a small church that was a part of the Church of Jesus Christ of Latter-day Saints.[24] Mayson was fired because he was not a member of the Mormon Church.[25] Mayson sued the Mormon Church, claiming that his termination constituted religious discrimination and was in violation of the § 703 of the Civil Rights Act of 1964.[26] Mayson and other similarly situated appellees argued that the § 702 exemption violated the Establishment Clause if it allowed religious institutions to hire or fire employees in nonreligious positions.[27] The Court noted that "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[28]

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19. *Id.*
20. *See* Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).
21. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987).
22. 483 U.S. 327 (1987).
23. *Id.* at 327.
24. *Id.* at 330.
25. *Id.*
26. *Id.*
27. *Id.* at 331.
28. *Id.* at 333.

While the *Amos* Court recognized that the government permitting some religious actions could lead to an "unlawful fostering of religion," it reasoned that this was not such a case.[29] Rejecting the appellees' argument that the § 702 exemption allowed the government to advance a religion, the Court responded that a law is not unconstitutional merely because it allows a religion to carry out its purpose.[30] A law is unconstitutional, the Court explained, when it is the government itself which advances a religion.[31] The Court rejected the appellees argument that the § 702 exemption violated the Equal Protection Clause, stating, "§ 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[32]

Finally, the Court in *Amos* reasoned that the § 702 exemption does not unconstitutionally entangle religion and government.[33] In fact, the Court stated the exemption effectively prevented an unconstitutional entanglement of church and state because it does not require courts to make intrusive inquiries into religious activities and beliefs.[34] This belief is echoed by Justice Brennan's concurrence.[35] Brennan stated that a case-by-case review of all religious activities "would both produce excessive government entanglement with religion and create the danger of chilling religious activity."[36] He added that the potential for litigation could alter religious institutions' "process of self-definition" if their employment practices were strictly scrutinized.[37] The Court's decision in *Amos* is not the only federal case that grants religious institutions wide discretion in employment practices under the § 702 exemption. In *Little v. Wuerl*, the Third Circuit rejected a claim by a teacher that her firing from a Catholic school was unlawful under Title VII of the Civil Rights Act of 1964.[38]

29. *Id.* at 334–35.

30. *Id.* at 337.

31. *Id.*

32. *Id.* at 339.

33. *Id.* ("It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.").

34. *Id.*

35. *Id.* at 340–46.

36. *Id.*

37. *Id.* at 342 (Justice Brennan elaborated on self-definition stating "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well").

38. Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).

Susan Long Little was a Protestant elementary school teacher at a Catholic school.[39] The school hired Little knowing that she was a Protestant.[40] Although she was not required to teach her students religion, Little was required to attend Catholic ceremonies and events with her students to instill Catholic values within them.[41] Little's employment contract was renewed yearly and contained a "Cardinal's Clause," which stated, in part, that the "[e]mployer has the right to dismiss a teacher for serious public immorality, public scandal, or public rejection of the official teachings, doctrine or laws of the Roman Catholic Church, thereby terminating any and all rights that the Teacher may have hereunder. . . ."[42] Little started working for the school in 1977.[43] She divorced her first husband and remarried in 1986.[44] Little was granted a leave of absence for the 1986–87 school year and her contract was not renewed for the 1987–88 school year.[45] The termination was a result of her remarriage, which was against the Catholic Code of Canon Law.[46] The school refused to rehire Little, and the pastor, who lead the parish and school, stated that it was because he considered Little's actions to be "a serious contradiction of the Church's teachings and laws on the indissolubility of Christian marriage."[47] Little sued the school, claiming she was the victim of unlawful religious discrimination.[48]

The Third Circuit affirmed the district court's ruling that the school was exempt from Little's claim under the § 702 exemption.[49] The court reasoned that if it reviewed the school's decision, "it would be forced to determine what constitutes 'the official teachings, doctrine or laws of the Roman Catholic Church' and whether plaintiff has 'rejected' them."[50] As a result, the court held that this would create an unconstitutional entanglement of church and state.[51] The court concluded that applying

39. *Id.* at 945.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. 929 F.2d 944, 946 (3d Cir. 1991).
45. *Id.* at 945–46.
46. *Id.* at 946.
47. *Id.*
48. *Id.* at 945.
49. *Id.*
50. *Id.* at 948 (3d Cir. 1991).
51. *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)) ("The Supreme Court has recognized that the establishment clause limits government interference in the relationship between parochial schools and their teachers. The Court has prohibited state aid to parochial schools because the regulation necessary to assure that the aid would

Title VII's anti-discrimination provisions to the school's decision would present conflicts with the Establishment and Free Exercise Clauses, and, therefore, would only be considered "if Congress clearly intended that result."[52] Here, the court reasoned that Congress sought to allow religious institutions to "create and maintain communities composed solely of individuals faithful to their doctrinal practices" regardless of whether they were hired for a religious or secular purpose.[53] Therefore, the Third Circuit read the exemption broadly and held that a religious institution may hire with a preference for individuals whose beliefs and activities align with their particular faith.[54] Finally, the court held that the school was able to fire Little for her conduct because the school was covered by the section 702 exemption.[55]

In *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, the Supreme Court held that a "called" teacher was barred from bringing suit against her employer, a church, under the Establishment and Free Exercise Clauses of the First Amendment.[56] Cheryl Perich was a "called" teacher at Hosanna–Tabor Evangelical Lutheran Church and School, meaning that she was regarded as having been called to her vocation by God.[57] This position also required Perich to complete certain academic requirements, including theological courses.[58] Perich accepted the position as "called" teacher, as opposed to simply a "lay teacher," and was designated a commissioned minister.[59]

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promote only secular education would result in excessive government supervision of religious education."). The Third Circuit stated that, "[i]n this case, the inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship less fit for scrutiny by secular courts. Even if the employer ultimately prevails, the process of review itself might be excessive entanglement." *Id.* at 948.

52. *Little*, 929 F.2d at 949.

53. *Id.* at 951.

54. *Id.*

55. *Id.*

56. *See generally* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171 (2012). *Hosanna-Tabor* stands for the principle that religious institutions are granted greater autonomy in the employment practices of those performing "religious activities," especially ministers. For a greater discussion on the "ministerial exception," see Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 44 (2011) (arguing in defense of the ministerial exception due to its importance for matters of religious freedom and autonomy of religious institutions). *Hosanna-Tabor* also demonstrates the importance of allowing religious institutions great deference in their dealings with clergy and will be examined in the test created in this Note in Part III.D.

57. *Hosanna-Tabor*, 565 U.S. 171 at 177–78.

58. *Id.* at 177.

59. *Id.* at 178.

Perich's job duties included teaching students religion classes, leading students in prayer and Christian devotions, and taking students to weekly chapel services.[60] After developing narcolepsy, Perich began the 2004–2005 school year on disability leave.[61] In January 2005, Perich notified the principal that she wanted to return to work in February.[62] However, the principal stated that a lay teacher had been hired to fill Perich's position.[63] The church congregation asked Perich to resign her position as a called teacher, and Perich refused.[64] Perich was terminated soon after for "insubordination and disruptive behavior."[65] Perich filed a claim with the Equal Employment Opportunity Commission (EEOC), arguing that her termination violated the Americans with Disabilities Act (ADA).[66] The EEOC then brought suit against Hosanna-Tabor, claiming that it unlawfully fired Perich in retaliation for threatening to file an ADA lawsuit.[67]

The Court reaffirmed the "ministerial exception," "a legal doctrine which immunizes churches from employment-based claims brought by their clergy (and others with significant religious duties)."[68] The Court noted that interfering with a church's decision whether to accept or retain a minister "interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[69] This involvement would violate both the Free Exercise and Establishment Clauses of the First Amendment.[70] The Court then found that the ministerial exception applied in this case.[71] This was because, according to the Court, the church held Perich out as a minister.[72] Perich also accepted a position that required religious training and performed various religious duties.[73] Finally, Perich held herself out as a minister by accepting the call to religious service and claiming a special allowance on her taxes available to employees "in the exercise of

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*; Lund, *supra* note 56.
69. *Hosanna-Tabor*, 565 U.S. at 188.
70. *Id.*
71. *Id.* at 190.
72. *Id.* at 191.
73. *Id.*

the ministry."[74] As a result of these findings, the Court reasoned that "[b]ecause Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer."[75] The Court also rejected the argument that the church owed Perich financial compensation because this payment would operate as a penalty on the church for terminating an unwanted minister.[76] This penalty, according to the Court, is also prohibited by the First Amendment.[77]

Some courts and individuals often use the plain text and legislative history of § 702 and Title VII to present their case for a broad interpretation of the exemption. The Third Circuit in *Little v. Wuerl* noted that "Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"[78] Additionally, Congress broadened the exemption for religious institutions in 1972 to apply to non-religious activities.[79] Title VII's definition of 'religion' is "intended to broaden the prohibition against discrimination-so that religious practice as well as religious belief and affiliation would be protected."[80] Finally, the Third Circuit in *Little* states that Congress' legislative intent sought a broadened exemption (§ 702) that would allow religious institutions to "create communities faithful to their principles."[81] The plain text and legislative intent, in the Third Circuit's view, call for courts to broadly interpret the § 702 exemption.

C. Interpreting the Section 702 Exemption Narrowly (Cases and Rationales)

Conversely, many courts have taken a very different view of the § 702 exemption and Title VII claims than the those in the above cases.[82]

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74. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171, 191 (2012).

75. *Id.* at 194.

76. *Id.*

77. *Id.* While *Hosanna-Tabor* does not directly address the § 702 exemption directly, it demonstrates the broadness with which some courts allow religious institutions to engage in employment discrimination.

78. Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991).

79. *Id.* at 950.

80. *Id.*

81. *Id.*

82. *See* Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

These courts have interpreted the § 702 exemption narrowly, meaning that they interpret the provision to exempt religious institutions from discrimination claims under Title VII in relatively few cases.

A narrow interpretation of the § 702 exemption takes different forms across different courts. In *Rayburn v. General Conference of Seventh-Day Adventists*, the Fourth Circuit reasoned that the exemption should apply only to those employees performing "religious activities" and only to claims of religious discrimination.[83] In *Rayburn*, the Fourth Circuit held that the Free Exercise and Establishment Clauses of the First Amendment barred a woman's claim of sexual and racial discrimination against a church.[84] However, the court reasoned that religious institutions are not exempt from discriminating against individuals based on race, sex, or national origin under Title VII of the Civil Rights Act of 1964.[85]

In *Rayburn*, Carole Rayburn was denied a pastoral position at a Seventh-Day Adventist church.[86] Rayburn alleged this denial was because of her gender, her association with African-Americans and African-American groups, and her opposition to discrimination.[87] The positions to which Rayburn applied were both offered to and accepted by other women.[88]

The court interpreted the § 702 exemption narrowly, stating that Title VII "exempts religious institutions only to a narrow extent."[89] Therefore, in the court's view, religious institutions were only able to "base relevant hiring decisions upon religious preferences."[90] Examining the legislative history of the § 702 exemption, the court found that Congress merely intended for only religious discrimination claims to be barred and only for those working "to carry out the employer's 'religious activities.'"[91] While the court interpreted the § 702 exemption very narrowly, it concluded that the exemption applied in this case.[92]

Unlike the court in *Rayburn*, in *Boyd*, the Sixth Circuit held that the § 702 exemption applied only to religious discrimination claims but did not limit the exemption to religious activities. *Boyd*, 88 F.3d at 413. This distinction shows the lack of uniformity across courts, even those courts which interpret § 702 in similar ways, in applying the exemption.

83. *See generally Rayburn*, 772 F.2d 1164.

84. *Id.*

85. *Id.* at 1166.

86. *Id.* at 1165.

87. *Id.*

88. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1165 (4th Cir. 1985).

89. *Id.* at 1166.

90. *Id.*

91. *Id.* at 1167.

92. *Id.*

Next, the *Rayburn* court noted that a claim of employment discrimination against a religious institution must carry with it "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[93] The court found that this burden was not met in this case because the pastoral position in question was critically important to the expression of the religion's views.[94] After finding that there was not a sufficient state interest involved in Rayburn's claim and finding that the claim would give rise to "'excessive government entanglement' with religious institutions[,]" the court ruled that Rayburn's claim was barred.[95]

In *Boyd v. Harding Academy of Memphis*, the Sixth Circuit held that an unwed, pregnant preschool teacher could not bring a claim for pregnancy discrimination because she did not prove that her termination was a pretext for gender discrimination under Title VII of the Civil Rights Act of 1964.[96]

In *Boyd*, Andrea Boyd was a preschool teacher at a religious school, Harding Academy in Tennessee.[97] Harding required its teachers to be Christians.[98] The employee handbook stated that "[e]ach teacher at Harding is expected in all actions to be a Christian example for the students . . . ."[99] After learning that she was pregnant, Boyd's superiors fired her but informed Boyd that she could be rehired if she married the father.[100] At trial, the school president stated that he had fired several Harding employees, both men and women, for violating the employee handbook's prohibition on extramarital sex.[101] The school was also able to show that several of its teachers became pregnant within marriage and remained employed at the school.[102]

The court first noted that religious institutions are only exempted from religious discrimination claims under Title VII.[103] Sex discrimination claims may still be brought against religious institutions, however.[104] The court barred Boyd's sex discrimination claim because she violated the school's code of conduct, which applied equally to both

93. *Id.* at 1168.
94. *Id.*
95. *Id.* at 1169.
96. Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996).
97. *Id.* at 411.
98. *Id.*
99. *Id.*
100. *Id.* at 412.
101. *Id.*
102. *Id.*
103. *Id.* at 413.
104. *Id.*

men and women.[105] Additionally, Boyd could not show that the school's stated reason for her termination was merely a pretext for firing her based on her pregnancy.[106]

Finally, in *Cline v. Catholic Diocese of Toledo*, the Sixth Circuit held that the Diocese stated a "legitimate, nondiscriminatory reason" for failing to renew the contract of an unwed, pregnant teacher.[107] As a result, the employee was forced to show that the reason for her termination was her pregnancy and that this was only a pretext for her termination.[108]

Leigh Cline was a teacher at a Catholic elementary and high school.[109] She began working there in 1994.[110] Cline's employment contract stated that she would "by word and example . . . reflect the values of the Catholic Church."[111] Cline became visibly pregnant shortly after her marriage in 1996 and the pastor declined to extend her contract for the 1996–97 school year.[112] While the court held that summary judgment in favor of the Diocese was inappropriate, it reasoned that refusing to renew the contract could be a gender-neutral enforcement of the school's premarital sex policy and the burden was on the employee to show otherwise.[113] The court reasoned that "while Title VII exempts religious organizations for 'discrimination based on religion,' it does not exempt them 'with respect to all discrimination . . . Title VII still applies . . . to a religious institution charged with sex discrimination.'"[114] The *Cline* court was not alone in determining that religious institution could terminate an unwed, pregnant teacher.[115]

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105. *Id.* at 414.

106. *Id.* at 414–15.

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

108. *Id.* at 658.

109. *Id.* at 655.

110. *Id.*

111. *Id.* at 656.

112. *Id.*

113. *Id.* at 658 (6th Cir. 2000). However, the court stated that, "[b]ecause discrimination based on pregnancy is a clear form of discrimination based on sex, religious schools cannot discriminate based on pregnancy." *Id.* The court specifically noted the Fourth Circuit's statement in *Rayburn* that "Title VII does not confer upon religious organizations a license to make [hiring decisions] on the basis of race, sex, or national origin." *Id.* (citing Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985)).

114. *Id.* (citing Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996)).

115. *See* Ganzy v. Allen Christian Sch., 995 F. Supp. 340 (E.D.N.Y. 1998) (reasoning that religious organizations may terminate its employees, including unwed, pregnant teachers, for a "legitimate religious reason," so long as that standard is applied to men and women equally).

Some courts and individuals use the plain text and legislative history of § 702 and Title VII to present their case for a narrow interpretation of the exemption. The text of § 702 states that the exemption "shall not apply to an employer . . . with respect to the employment of individuals of a particular religion."[116] In *Boyd*, the Sixth Circuit reasoned that this provision "merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination."[117] Therefore, the exemption would not apply in other forms of discrimination, such as discrimination on the basis of race or sex.[118] Additionally, the Senate Managers' Analysis that paired with the Conference Committee Report on the 1972 amendments to Title VII stated an intent that religious institutions that are exempt under § 702 should abide by the Title VII prohibition on discrimination, except with regard to religion.[119] This analysis stated, "[s]uch organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin."[120] Finally, the Fourth Circuit reasoned in *Rayburn* that Congress intended for a narrow interpretation of the exemption.[121] The court explained that Title VII originally passed with no religious exemption in 1964 and that the "final version excluded such employers only with respect to discrimination based on religion, and then only with respect to persons hired to carry out the employer's 'religious activities.'"[122] The word "religious" was deleted in a 1972 amendment, but Congress refused to expand the scope of the exemption.[123] These rationales are commonly used in by courts and individuals arguing for a narrow exemption of § 702.

As the above cases and rationales show, there is no doubt that religious institutions enjoy some exemption from religious discrimination claims under Title VII of the Civil Rights Act of 1964.[124]

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116. 42 U.S.C. § 2000e–1(a) (2006).

117. Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996).

118. *Id.*

119. 118 CONG. REC. 7167 (1972) (presented by Senator Harrison A. Williams (D-NJ)).

120. *Id.*

121. *See* Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1167 (4th Cir. 1985).

122. *Id.*

123. *Id.*

124. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171 (2012); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

Various courts dispute how large of an exemption it is. The remainder of this Note will argue that religious institutions should be granted a wide exemption under § 702 of the Civil Rights Act, following the Supreme Court in *Amos* and the Third Circuit in *Little*.[125]

III. ANALYSIS

The analysis portion of this Note will examine public policy concerns and argue that courts should interpret the § 702 exemption of the Civil Rights Act broadly, like the Supreme Court in *Amos* and the Third Circuit in *Little*.[126] This Note will use the Catholic Church as an illustration because it employs many types of individuals across many fields. However, the analysis applied in this Note can be applied to other religious institutions as well.

There are multiple public policy concerns to consider in interpreting the § 702 exemption. On the one hand, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, national origin, sex, or religion.[127] This shows that Congress clearly desired a policy of preventing unequal treatment in employment matters due to an individual's characteristics, such as national origin.[128] In addition, applying Title VII equally to all employers, religious or not, would demonstrate that the government does not prefer religious employers to secular employers.[129] On the other hand, a broad interpretation of the § 702 exemption upholds the policies underlying the Free Exercise Clause of the First Amendment, which prevents the government from prohibiting "the free exercise" of religion.[130] The § 702 exemption prevents the government from involving itself in religious employment matters, thereby upholding the policy that the government does not "engage in nor compel religious practices."[131] While the § 702 exemption helps to allay this conflict, the struggle to balance the competing interests still remains.

A. The Catholic Church as an Employer

The Catholic Church is an excellent analytical tool in examining the § 702 exemption because of its status as a religious institution as well as

125. *See Amos*, 483 U.S. 327; *Little*, 929 F.2d 944.
126. *See generally Amos*, 483 U.S. 327; *Little*, 929 F.2d 944.
127. 42 U.S.C. § 2000e–2(a) (2006).
128. *See* McClure, *supra* note 8, at 618.
129. *Id.* at 599.
130. U.S. CONST. amend. I.
131. *See* McClure, *supra* note 8.

an employer across many different areas of work. The Catholic Church in the United States exists as a religious institution, educational provider, health provider, and charitable institution.[132] It employs individuals in many capacities.[133] As an education provider, the Catholic Church employed 152,883 full-time individuals in 2016–2017.[134] Catholic schools, elementary and secondary, educated nearly two million students during this school year.[135] The large majority of its teachers are lay people, not clergy.[136] Catholic schools employ individuals other than teachers, such as custodians, lunch room personnel, and secretaries.[137]

The Catholic Church employs 533,152 full-time employees and 232,591 part-time workers in its hospitals.[138] These Catholic hospitals had over five million patients admitted over the course of one year, according to a 2011 annual study.[139] Catholic hospitals also had over five billion dollars in expenses during this same year.[140] While Medicare and Medicaid cover some of these expenses, there is no doubt that Catholic hospitals take some of the burden off of United States taxpayers.[141]

The Catholic Church also serves as a charitable institution.[142] Through use of its own funds and through charitable institutions like the St. Vincent de Paul Society, the Church oversees a vast network of charities.[143] In 2017, Catholic charities served over eight million people and provided services with a value of over three billion dollars.[144] Maintaining a charitable network of this size obviously is a major undertaking that requires many employees.

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132. *Careers*, ARCHDIOCESE OF DETROIT, http://www.aod.org/our-archdiocese/careers/ (last visited Feb. 2, 2019).

133. *Id.*

134. *Catholic School Data*, NAT. CATHOLIC EDUC. ASS'N (2018), http://www.ncea.org/NCE/Proclaim/Catholic_School_Data/Catholic_School_Data.aspx.

135. *Id.*

136. *Id.*

137. *See Careers*, *supra* note 132.

138. CATHOLIC HEALTH ASS'N OF THE U. S., CATHOLIC HEALTH CARE IN THE UNITED STATES 2 (Jan. 2013), https://www.chausa.org/docs/default-source/general-files/mini_profile-pdf.pdf?sfvrsn=0.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Frequently Requested Church Statistics*, CTR. FOR APPLIED RESEARCH IN THE APOSTOLATE, http://cara.georgetown.edu/frequently-requested-church-statistics/ (last visited Feb. 2, 2019).

143. *The Society of St. Vincent de Paul,* NAT'L COUNCIL OF THE UNITED STATES SOC'Y OF ST. VINCENT DE PAUL, http://www.svdpusa.org/ (last visited Feb. 2, 2019); *see also Frequently Requested Church Statistics*, *supra* note 142.

144. *See Frequently Requested Church Statistics*, *supra* note 142.

Finally, the Catholic Church employs a large number of clergy.[145] In the United States alone, the Catholic Church employs over 37,000 priests and 45,000 religious sisters.[146]

The purpose of these statistics is to show the wide reach of the Catholic Church in employment in the United States. It employs a large number of people performing both religious and non-religious activities. Due to the size of the institution, the Church has an enormous effect on the economy and individuals' lives.

B. Arguments for a Broad Interpretation of the Section 702 Exemption

A broad interpretation of the § 702 exemption, like the interpretations in *Little* and *Amos*, results in courts allowing more employment decisions of religious institutions to be exempt from discrimination claims under Title VII.[147] First, a broad interpretation of the § 702 exemption results in less government involvement in the employment matters of religious institution. Courts often are forced to determine whether an institution is sufficiently "religious" or if an employee performs primarily "religious" activities.[148] This problem is seen where courts take a narrow view of the § 702 exemption. For example, in *Rayburn*, the court held that religious institutions may only "base relevant hiring decisions upon religious preferences."[149] This determination can only be made by a court if it determines what types of preferences are actually "religious." With a broader interpretation of the § 702 exemption, this situation will arise with less frequency. Therefore, there will be fewer cases of government and religious entanglement.[150] This supports the public policy against government entanglement in religious affairs as written in the Free Exercise Clause.

Second, a broad interpretation of the § 702 exemption allows religious institutions to have greater control over who they employ, and, therefore, are better able to define and live out their values.[151] For example, under a broad exemption, a Catholic school that terminates a teacher for becoming pregnant out of wedlock likely would not have to

145. *Id.*

146. *Id.*

147. *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991).

148. Roger W. Dyer, Jr., Note, *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split Over Proper Test*, 76 MO. L. REV. 545, 562 (2010).

149. Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985).

150. Lund, *supra* note 56, at 44.

151. *Id.* at 49.

be concerned about a lawsuit. The school may be liable for wrongful termination if the pregnancy was found to be a pretense for a prohibited reason for termination, but a broad interpretation of § 702 would allow a court to grant greater deference to the school's decision. Catholic schools, as well as other religious institutions, could hire with their values in mind rather than worry about an erroneous finding by a court.[152] Justice Brennan, in his concurring opinion in *Amos*, stated that employing individuals committed to a religious mission is a "means by which a religious community defines itself."[153] Justice Brennan later reasoned that preventing a religious institution from engaging in a "process of self-definition" results in an "infringement on free exercise rights."[154]

A third argument in favor of a broad interpretation of the § 702 exemption is what Professor Christopher Lund has called "the reinstatement problem."[155] The reinstatement problem arises where a plaintiff employee claims they were wrongfully fired and seeks to regain their position.[156] This is problematic because if the plaintiff is successful, the government is essentially forcing the religious institution to employ an individual that they do not want to employ.[157] This situation both infringes on an institution's autonomy and its ability to define its own values.[158] For example, assume a worker at a Catholic charity is fired for regularly deriding Catholic values. This employee may, for instance, be distributing anti-Catholic pamphlets or frequently insulting the values of the Catholic Church in the workplace. If forced by a court to rehire this employee, the charity would be forced to employ a person who does not share their values. This could have a deleterious impact on the workplace and the charity's ability to self-define itself using Catholic values.[159]

Fourth, restricting the rights of religious institutions to hire and fire employees as they wish could severely burden the government. If Catholic schools or hospitals are forced to employ individuals who espouse or carry out anti-Catholic values, the Church may find it preferable to close that school or hospital. As the statistics above show, this could result in a major influx of students or hospital patients into

152. *Id.* at 51.

153. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 342 (1987).

154. *Id.*

155. *See* Lund, *supra* note 56, at 38.

156. *Id.*

157. *Id.*

158. *See Amos*, 483 U.S. at 342; Lund, *supra* note 56.

159. *See Amos*, 483 U.S. at 342.

public facilities.[160] This has the potential to be a massive cost to the U.S. government.

C. Arguments for a Narrow Interpretation of the Section 702 Exemption

There are also arguments in favor of a narrow interpretation of the § 702 exemption. First, is a public policy concern. A narrow interpretation would make it less likely that religious institutions could fire some employees for violating their religious tenets but allow other violators to stay. For instance, a court using a narrow interpretation would almost certainly prohibit a Catholic school from firing a teacher who becomes pregnant out of wedlock when that school also allows a teacher who openly lives with a partner out of wedlock to remain employed. This thought is in line with the *Boyd* court, which stated that religious institutions are only protected from claims of religious discrimination.[161] Therefore, under a narrow interpretation, firing employees based on sexual orientation may be prohibited, even if it conflicts with a religious institution's values. The EEOC has stated, and one federal judge has ruled, that "discrimination against lesbian, gay, bisexual and transgender individuals is discrimination on the basis of sex, which Title VII prohibits."[162] A narrow interpretation of § 702 would help ensure that fewer individuals are terminated for violations of a religious code that they do not adhere to.

Second, a narrow interpretation of the § 702 exemption would help prevent religious employers from terminating employees for unlawful reasons under a pretense of a lawful one. This was the claim made by the employee in *Boyd*.[163] While firing someone for an unlawful reason under the pretense of a lawful one is also prohibited under a broad interpretation of § 702, a narrow interpretation would lead to fewer of these cases. This interpretation is friendlier to employee rights.

Third, a narrow interpretation of § 702 prevents firing employees for religious reasons when their job does not have a religious function. Many would argue that a custodian working for a Catholic charity should not have to live his life according to Catholic values simply because he

160. *See* CATHOLIC HEALTH ASS'N, *supra* note 138; CTR. FOR APPLIED RESEARCH IN THE APOSTOLATE, *supra* note 142.

161. Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 413 (6th Cir. 1996).

162. Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees*, RELIGIOUS FREEDOM INST., https://www.religiousfreedominstitute.org/cornerstone/2016/6/30/why-the-law-does-not-and-should-not-allow-religiously-motivated-contractors-to-discriminate-against-their-lgbt-employees (last visited Feb. 10, 2018).

163. *See Boyd*, 88 F.3d at 412.

works for a Catholic institution. Forcing an employee who is not Catholic to live Catholic values, one may argue, is an infringement on that employee's rights. Allowing religious institutions to require that their employees live according to their religious codes may be too burdensome on these employees and the public at large, who could see their employment opportunities diminish. This burden may be significant due to the large size of religious employers, such as the Catholic Church.[164]

D. A New Test for Section 702

This note has shown that courts are split on how to interpret the § 702 exemption to Title VII of the Civil Rights Act of 1964.[165] It will now explain a test that courts should use to interpret this exemption. The test is six-pronged and gives strong deference to religious institutions. It is largely based on the arguments above and on problems the courts in the above cases have faced.[166] The test works as a sliding scale and the court should only rule in favor of an employee if the factors clearly weigh in favor of the employee. This test will be examined using the Catholic Church as an analytical tool because of its status as a religious institution as well as an employer across many different areas of work.[167]

The first factor is the burden on the religious institution due to court involvement in an employment matter.[168] As discussed above, with fewer cases of court involvement in religious employment practices, religious institutions will be better able to engage in a process of self-definition.[169] Additionally, a court involving itself in a religious institution's hiring

164. *See* CATHOLIC HEALTH CARE ASS'N, *supra* note 138; *Careers*, *supra* note 132; *Catholic School Data*, *supra* note 134; *Frequently Requested Church Statistics*, *supra* note 142.

165. *See* Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171(2012); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

166. *See Hosanna-Tabor*, 565 U.S. 171; *Amos*, 483 U.S. 327; *Cline*, 206 F.3d 65; *Boyd*, 88 F.3d 410; *Little*, 929 F.2d 944; *Rayburn*, 772 F.2d 1164; *supra* Part II.B–C.

167. *See* CATHOLIC HEALTH CARE ASS'N, *supra* note 138; *Careers*, *supra* note 132; *Catholic School Data*, *supra* note 134; *Frequently Requested Church Statistics*, *supra* note 142.

168. Courts should interpret "burden" broadly. When determining a religious institution's burden, a court may consider, but is not limited to, the following factors: the loss of the religious institution's process of self-definition, the financial burden of litigation, and restrictions on free practice of faith.

169. *Amos*, 483 U.S. at 342.

practices infringes on that institution's right to free exercise of its religion.[170] Alternatively, one may argue that actions taken by private citizens outside of their jobs creates no burden for a religious institution, so court involvement should not be an issue. However, granting deference to religious institutions, the right to self-definition prevails. Therefore, it is likely that, in nearly all cases, this factor will favor a finding for the religious institution.

For example, a court forcing a Catholic school to rehire a teacher who became pregnant out of wedlock harms that school's ability to display Catholic values to its students and the community at large. This harms the school's ability to share its values and engage in a process of "self-definition." Undoubtedly, it is a burden on the institution. On the other hand, if a Catholic employee becomes pregnant out of wedlock in a position where they rarely interact with others, the burden on the Church is much less. In this situation, this factor would likely favor the employee.

The second factor in this test is the burden on the employee if the court abstains from ruling in the employment matter at issue or rules in favor of the employer. The burden to the employee must be greater than merely the normal stresses and inconveniences that occur in employment termination.[171] For example, a Catholic hospital's termination of an employee for violating Catholic ethics will be considered overly burdensome if that hospital is the only reasonable employment available for the employee in the area.[172] Employees will likely argue that many circumstances, such as a poor economy or certain personal situations, such as pregnancy, will make termination overly burdensome on the employee.

The third factor is the burden on the public at large due to court involvement. This factor has multiple considerations. First, the court should consider the harm that would occur if it allowed the Catholic Church to continue the employment practices in question. For example, would court involvement, if it allowed the Church's requirements, significantly affect the ability of average citizens to obtain employment by forcing them to choose between employment and lawfully living a life contrary to Catholic values. Second, the court should consider the effect

170. *See Little*, 929 F.2d at 949.

171. The "normal stresses and inconveniences" refers to the standard burdens faced when one loses a job. These burdens include stress, obligation to look for other employment, and short-term lack of income.

172. Again, "reasonable employment" in this context refers to employment that is somewhat comparable to the previous type of employment. For example, a job as an accountant is not comparable with a minimum wage job at a fast food restaurant. "In the area" refers to the area within which a person could reasonably commute to work.

on the public if the Catholic Church no longer acted as an employer. For instance, if a Catholic charity was forced to change its operating procedures, such as employing people who live in accordance with its values, it may decide to restrict its operations or even close. Due to the significant and wide-ranging effect that Catholic institutions have on communities, this closure could potentially have a serious effect on the public's ability to gain employment and receive services. Alternatively, if an employment practice, such as not employing individuals at a hospital for a reason that was not important to the religious institution, created a serious health issue in the surrounding area, then this factor would likely favor the employees. If a ruling in an employment matter would cause a significant burden on the public, then this factor favors against court involvement. If a ruling would relieve a burden on the public, then this factor favors court involvement.

The fourth factor is the burden on the government. The above employment statistics show the tremendous effect that the Catholic Church has on the government both directly and indirectly.[173] In examining this factor, the court should consider the effect of public financing.[174] Religious institutions, including the Catholic Church, are often tax exempt.[175] This results in a major loss in tax revenue to the federal government. Additionally, many religious institutions, such as Catholic schools, are directly provided with government funding.[176] This funding can come in the form of school vouchers or a hospital accepting

173. *See* CATHOLIC HEALTH CARE ASS'N, *supra* note 138; *Careers*, *supra* note 132; *Catholic School Data*, *supra* note 134; *Frequently Requested Church Statistics*, *supra* note 142.

174. For a larger discussion on public financing of religious institutions and the § 702 exemption, see Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L. Q. 1 (2002) (arguing that the § 702 exemption should not apply or be restricted in situations where a religious institution accepts public funding).

175. Christine Emba, *Tax Exemptions for Religious Institutions*, WASH. POST (Sept. 14, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/09/14/primer-tax-exemptions-for-religious-institutions/?utm_term=.28bc9a009eac; *see also Tax Information for Churches and Religious Organizations*, INTERNAL REVENUE SERV., https://www.irs.gov/charities-non-profits/churches-religious-organizations (last updated June 1, 2018).

176. *See* Chris Wheeler, *Taxpayer Money is Keeping Many Catholic Schools Alive, Study Finds*, BUS. INSIDER, (Feb. 16, 2017), http://www.businessinsider.com/catholic-schools-voucher-programs-study-2017-2; Ross Douthat, *Liberals and Catholic Hospitals*, N.Y. TIMES (Feb. 2, 2012), https://douthat.blogs.nytimes.com/2012/02/02/liberals-and-catholic-hospitals/; ARCHDIOCESE OF ST. LOUIS, 2018 COMBINED FINANCIAL REPORT (2018), https://www.archstl.org/Portals/0/Documents/Finance/2018%20Annual%20Report.pdf.

Medicare or Medicaid payments from the federal government.[177] Courts should also consider the burden of taking on services provided by the Catholic Church if they were to rule in favor of an employee. If courts infringe on the Catholic Church's "process of self-definition," the Church may restrict the services it provides. The government would then have to provide additional education, healthcare, and charitable services for its citizens. This cost could be very significant.[178] Finally, the court could consider the cost and hassle to the government if its rulings cause a flood of employment cases to enter into courtrooms across the nation. On the other hand, employees could argue that a single school being forced to compensate an employee for discrimination will not have such far-reaching effects on the government and should, therefore, result in a finding in favor of the employee. If the court finds a significant burden on the government by ruling in an employment matter, this factor points against court involvement.

In using this test to interpret the § 702 exemption, the fifth factor relates to the effectiveness, or feasibility, of a possible court ruling on the employment matter at issue. If a court rules in favor of an employee in an employment matter, the court-issued remedy could create several problems. A remedy, such as reinstatement, may infringe on a religious institution's process of self-definition and its right to freely exercise its faith.[179] This is because the ruling may force a religious institution to hire an employee, possibly including clergy, who reject core tenants of the faith.[180] This situation shows that the remedy in an employment matter is not always feasible for a religious institution. However, employees will likely argue that remedies involving financial payments are often feasible because they do not create a reinstatement problem. Religious institutions would likely respond that a financial payment is a penalty for its employment decisions, which infringes on the institution's process of self-definition and right to freely exercise its faith. If the remedy in a potential court ruling is not an effective or feasible resolution to the employment matter, then this factor weighs against a court's involvement in the ruling.

The sixth and final factor involves the types of tasks that the employee performs in the normal course of employment. An employee whose job involves religious matters certainly affects a religious

177. *Id.*

178. *See* CATHOLIC HEALTH CARE ASS'N, *supra* note 138; *Catholic School Data*, *supra* note 134; *Frequently Requested Church Statistics*, *supra* note 142; *The States Society of St. Vincent de Paul*, *supra* note 143.

179. *See* Lund, *supra* note 56, at 38.

180. *Id.* at 39.

institution's process of self-definition and its ability to pass on values to others more than those employees whose jobs do not involve religious matters. For example, a Catholic priest has a greater effect on the self-definition of the Catholic Church than an accountant working for a Catholic charity. All federal circuits have a form of the ministerial exception: a "constitutional right to hire and fire the people performing significant religious duties for them, the employment discrimination laws notwithstanding."[181] The more religious activities an employee performs, the more right a religious institution should have regarding employment decisions for that employee. Therefore, the type of employee should factor into the court's decision of whether to involve itself in the employment matter.

If courts adopt this test, will an increase in employment discrimination result? This note has shown that while no test can completely eliminate discriminatory practices, this test works to effectively curtail discrimination while also protecting religious freedom. To be within the § 702 exemption under this test, an institution must apply its policies evenly. For that reason, a Catholic school could not fire a teacher for becoming pregnant out of wedlock while continuing to employ another teacher who openly lives with his or her partner. This greatly limits cases of employment discrimination. There is no doubt, however, that this test will negatively affect some individuals. These individuals may be denied a job because of differences between religious codes and their lifestyles. This test recognizes these difficulties and asks courts to consider the burden to the employee. This test also recognizes the great importance of religious freedom and the ability of religious institutions to engage in a process of self-definition. Therefore, it provides an effective balance between the interests of employees and of the religious institutions.

E. Applying the Test to Boyd

The remainder of this note will apply the test from Part III.D to the facts from *Boyd v. Harding Academy of Memphis* to demonstrate the test's benefits. To quickly restate the facts, in *Boyd*, Andrea Boyd, a preschool teacher at a religious school was terminated from her position after revealing that she was pregnant out of wedlock.[182] The school's employee handbook stated that "[e]ach teacher at Harding is expected in all actions to be a Christian example for the students."[183] The school

181. *Id.* at 21.
182. Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410, 412 (6th Cir. 1996).
183. *Id.* at 411.

noted that it always took action when past employees engaged in sex outside of marriage.[184] Boyd claimed that her termination as a result of her pregnancy was sex discrimination.[185] The Sixth Circuit in this case held that Boyd could not bring her claim because she did not prove that her termination was a pretext for gender discrimination under Title VII of the Civil Rights Act of 1964.[186] Additionally, the court upheld the firing because she violated the school's code of conduct, which applied equally to both men and women.[187]

By implementing the six-factor test described above and giving great deference to the religious institution, a court should interpret the § 702 exemption broadly, unlike the Sixth Circuit in *Boyd*. The first factor is the burden on the religious institution due to court involvement in an employment matter. Here, the burden on the religious institution is great. Without being able to determine who its employees are, the school is not able to engage in a process of self-definition and pass on Christian values to its students. In fact, to young students, the school may appear to be condoning pregnancy outside of marriage by employing this teacher. Boyd would likely argue that her pregnancy does not necessarily affect the school's process of self-definition since every action she takes does not necessarily reflect school policies. However, she agreed to set a "Christian example" for her students under the school's employee handbook. Therefore, this factor weighs in favor of the school.

The second factor is the burden on the employee if the court abstains from ruling in the employment matter at hand. The burden to the employee must be greater than merely the normal stresses and inconveniences that occur in employment termination. In *Boyd*, the burden on the employee is not more than the normal burdens caused by termination. There is no indication that Boyd could not seek employment at a nearby school or that she was burdened in any other extraordinary way. Boyd could argue that she faces great difficulty in finding another job because she would soon need to take time off due to her pregnancy. This point would likely make this factor close. However, under this test, great deference is granted to the religious institution. Therefore, the second factor also weighs slightly in favor of the school.

The third factor is the burden to the public at large due to court involvement. Much like the second factor, employees being required to live out Christian values likely does not extraordinarily restrict the employment opportunities in the area. If the school was to restrict its

184. *Id.* at 412.
185. *Id.*
186. *Id.* at 410.
187. *Id.* at 414.

educational services as a result of a court decision, this likely would not have a significant burden on the public either. Therefore, this factor does not heavily weigh to one side.

The fourth factor is the burden on the government. Here, there is no indication that the closure of the school would have any significant effect on the government. The school employs 130 teachers, but this is not an institution, like the Catholic Church, that employs tens of thousands of employees.[188] The school likely accepts some federal funding as well as enjoys tax-exempt status. Additionally, Boyd could argue that forcing this particular school to change their hiring practices would have little to no effect on the government. Therefore, this factor weighs against the school.

The fifth factor relates to the effectiveness, or feasibility, of a possible court ruling on the employment matter at issue. This factor depends on the type of remedy that the employee is requesting. If Boyd requests her reinstatement, then this factor likely weighs in favor of the school. This is because Boyd's reinstatement would contradict the school's Christian values and undermine their process of self-definition. If Boyd is requesting a financial remedy, then this factor likely weighs in Boyd's favor. This factor is feasible and effective, since the school is able to compensate Boyd without compromising their Christian values. Without more information, this factor cannot be considered.

Finally, the sixth factor relates to the types of tasks that the employee performs in the normal course of employment. Here, the employee handbook required teachers to be a "Christian example for all students."[189] Additionally, she likely had some role in religious education of her preschool students as this was a Christian school that placed great emphasis on religion. Boyd could argue that her actions in her private life would not affect her ability to teach the curriculum and teach the values that the school requires. However, under this test, which grants great deference to religious institutions, the school can hire and fire employees based on their actions, even outside of the classroom. Therefore, this factor weighs in favor of the school.

This test grants great deference to religious institutions and a finding against an institution is only acceptable where the factors clearly weigh in favor of such a finding. That is not the case under the facts from *Boyd*. This exercise shows that the test can be applied in an easy and effective way that gives courts effective guidance in interpreting the § 702 exemption and upholding the rights of religious institutions.

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188. *Id.* at 411.
189. *Id.*

IV. CONCLUSION

Through its passage of Title VII and the § 702 exemption, Congress attempted to resolve the conflict between the limitation of employment discrimination and preserving religious liberty. Courts, however, have struggled to interpret this exemption.[190] The struggle of courts to create a clear and judiciable standard has a tremendous effect on religious institutions and their employees and prospective employees. This effect is especially significant because of the role of some religious institutions, such as the Catholic Church, as a major employer.[191] The test developed in this Note presents courts with a clear standard with which to balance the rights of religious institutions and its employees.[192] This Note also demonstrates that the test can be used effectively in employment discrimination cases.[193]

190. *See* Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171 (2012); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327 (1987); Cline v. Catholic Diocese of Toledo, 206 F.3d 651 (6th Cir. 2000); Boyd v. Harding Acad. of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996); Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

191. *See* CATHOLIC HEALTH CARE ASS'N, *supra* note 138; *Careers*, *supra* note 132; *Catholic School Data*, *supra* note 134; *Frequently Requested Church Statistics*, *supra* note 142.

192. *See supra* Part III.D.

193. *See supra* Part III.E.