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CAN PARACHURCH ORGANIZATIONS HIRE AND FIRE ON THE BASIS OF RELIGION WITHOUT VIOLATING TITLE VII?

Thomas M. Messner*

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I. INTRODUCTION

Which of the following four problems had no clear solution in federal law until December 2004?¹

An employee is fired by his employer, a commercial manufacturing company, for disagreeing with the employer's religious views and refusing to attend mandatory devotion services.²

An employee, a professor in the divinity school of a religious university, is fired because his religious views differ from the religious views held by leaders of the divinity school.³

An employee, the building engineer of a gymnasium owned by a church but open to the public, is fired for failing to observe the employer's standards in certain religious matters, including abstinence from items such as coffee and alcohol.⁴

An employee, an evangelical Christian, is fired after her employer, a Jewish Community Center, discovers she attended a "Jews For Jesus" concert at her church.⁵

The first case is the easiest, because Title VII prohibits secular employers from discriminating on the basis of religion; the plaintiff-employee would win.⁶ The second case also involves well-established law. Title VII provides an exemption — the 702 exemption — for traditional religious organizations such as churches, synagogues, and religious educational institutions, that allows these religious employers to hire and fire employees on the basis of religion.⁷ The plaintiff-employee would lose.⁸ The third case seems more difficult, but the U.S. Supreme Court has

1. In each case, the employee sues the employer for Title VII religious discrimination. *See* Civil Rights Act of 1964, §§ 701–703, 42 U.S.C. § 2000e–2000e-2 (as amended) (West 2005).

2. *See* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 612 (9th Cir. 1988).

3. *See* Killinger v. Samford Univ., 113 F.3d 196, 198 (11th Cir. 1997).

4. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987).

5. *See* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, No. Civ.A.04-430, 2004 WL 2931268, 41-42 (E.D. Pa. Dec. 16, 2004), *reconsidered in* 2005 WL 387642 (E.D. Pa. Feb. 17, 2005), *motion for reconsideration denied by* 2005 WL 602969 (E.D. Pa. Mar. 11, 2005).

6. *See* Townley, 859 F.2d at 619.

7. 42 U.S.C. § 2000e-1.

8. *See* Killinger, 113 F.3d at 200.

ruled that the 702 exemption also applies to the secular, nonprofit activities of traditional religious organizations; the plaintiff-employee would lose.⁹

The fourth case is distinct because the employer is neither a secular employer, nor a traditional religious organization, nor the secular enterprise of a traditional religious organization. The employer in the fourth case is an independent religious organization, what this Article labels a “parachurch organization.” Parachurch organizations are not churches, nor are they owned by churches. They are independent and, by definition, they are religious.

For over forty years, it was unclear whether parachurch organizations could hire and fire on the basis of religion without violating Title VII: no one knew whether parachurch organizations qualified for the 702 exemption. In *LeBoon v. Lancaster Jewish Community Center Association*,¹⁰ however, a federal magistrate judge in Pennsylvania held, in an unpublished opinion, that a Jewish Community Center could fire an evangelical Christian employee for religious reasons without violating Title VII.¹¹ The Jewish Community Center — a parachurch organization — qualified for the 702 exemption.¹²

Observers were quick to note the *LeBoon* ruling¹³ and its significance for parachurch organizations.¹⁴ Parachurch organizations have been on a collision course with Title VII for nearly forty years due to the explosive growth of parachurch organizations in the last few decades of the twentieth century. One estimate put the number of parachurch organizations operating in the United States at nearly 30,000.¹⁵ Parachurch organizations have combined estimated annual budgets in the billions of dollars¹⁶ and serve millions of Americans every year.¹⁷ Moreover, the interest of

9. See *Amos*, 483 U.S. at 339.

10. *LeBoon*, 2004 WL 2931268.

11. *Id.* at *3.

12. *Id.* at *6. This Article uses “parachurch organizations” as a term of art that applies to all qualifying organizations without regard to their specific religion.

13. See Shannon P. Duffy, ‘*Jews for Jesus*’ Concertgoer Loses Employment Suit Against Jewish Center, Law.com, at <http://www.law.com/jsp/article.jsp?id=1103549723229> (Dec. 21, 2004).

14. Ted Olsen, *Weblog: Bad News for Fired Christian is Good News for Christian Organizations*, ChristianityToday.com, at <http://www.christianitytoday.com/ct/2004/151/21.0.html> (Dec. 21, 2004).

15. Michael S. Hamilton, *We’re in the Money!*, CHRISTIANITY TODAY, June 9, 2000, <http://www.christianitytoday.com/ct/2000/007/1.36.html>.

16. *Id.*; Tim Stafford, *Anatomy of a Giver*, CHRISTIANITY TODAY, May 19, 1997, at 20, 23.

17. See, e.g., WESLEY K. WILLMER ET AL., *THE PROSPERING PARACHURCH: ENLARGING THE BOUNDARIES OF GOD’S KINGDOM* 3 (1998) (stating that “James Dobson’s popular radio program Focus on the Family is heard by over two million listeners every weekday”). See also John

parachurch organizations in hiring employees of the same faith is often just as strong as that of traditional churches, synagogues, and mosques.

A standard contrary to the ruling in *LeBoon* would have been disastrous for parachurch organizations. This Article shows why. Section II defines and illustrates parachurch organizations. Section III outlines the content and scope of the 702 exemption. Section IV provides a comprehensive overview of the relevant federal case law, analyzes what types of organizations have and have not qualified for the 702 exemption, and includes a discussion of the *LeBoon* case. Section V discounts the method of statutory interpretation one circuit court used in narrowly construing the 702 exemption. The Article concludes with a discussion of why parachurch organizations should qualify for the 702 exemption.

II. PARACHURCH ORGANIZATIONS

A. A Survey and Brief History of Parachurch Organizations

Although parachurch organizations have existed in some form since at least the early nineteenth century,¹⁸ the term “parachurch” was probably first used in the late 1960s.¹⁹ Since then, parachurch organizations have

McCarthy & Jim Castelli, *Religion-Sponsored Social Service Providers: The Not-So-Independent Sector* 23 (The Aspen Institute, Nonprofit Sector Research Fund, Working Paper Series 1998) (stating they believe that “tens of millions” of people are served annually by religion-sponsored social service organizations — a category that is at once broader than the parachurch category but limited to only social service providers), available at http://www.nonprofitresearch.org/usr_doc/25356.pdf (last visited Mar. 19, 2006).

18. See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1549 (2004) (noting the American Bible Society and the American Board of Commissioners for Foreign Missions). Early nineteenth-century “parachurch organizations were abundant in many forms — Bible tract societies, independent educational organizations, independent missionary groups, and moral reform organizations.” Jeffrey K. Hadden, *Parachurch Organizations*, Religious Broadcasting, at <http://religiousbroadcasting.lib.virginia.edu/parachurch.html> (July 8, 1999). Apparently, there was sufficient pre-Civil-War parachurch activity for evangelicals to assemble a cohort of parachurch organizations called the Evangelical United Front. Hamilton, *supra* note 15. Furthermore, at least one commentator points to even earlier roots of the modern parachurch: “In American history, the idea that local charitable institutions not controlled by the churches should flourish goes back to the Puritans, beginning in England.” Gary North, *The Rise of the Parachurch Ministries*, TENTMAKERS (Sept./Oct. 1982), at 1, available at ftp://entrewave.com/freebooks/docs/a_pdfs/newslet/north/8209.pdf.

19. WILLMER ET AL., *supra* note 17, at 12 (stating that the word parachurch “was first applied to small gatherings of Christians that took place outside institutional churches”).

been referred to as “social ministr[ies],”²⁰ “special purpose groups,”²¹ “voluntary societies,”²² “faith-based nonprofits,”²³ and “specialized institutional ministries.”²⁴ Readers may be familiar with such well known and historic parachurch organizations as the Salvation Army,²⁵ Catholic Charities, Habitat for Humanity, and Bread for the World.²⁶ Parachurch organizations like these have religiously-motivated yet primarily social objectives, whereas many early American parachurch organizations, such as the American Bible Society and the American Board of Commissioners for Foreign Missions,²⁷ had “primarily religious objectives.”²⁸

Today, parachurch organizations of both types exist in large numbers. One “informed estimate”²⁹ puts the number of evangelical Christian parachurch organizations at over 30,000.³⁰ Another estimate speculates that the combined budgets of all categories of evangelical Christian parachurch

20. Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Considerations*, 19 HASTINGS CONST. L.Q. 343, 347 (1992) (noting attempts by courts and legislatures to distinguish “a social ministry from its affiliated church or other core religious community”).

21. John A. Coleman S.J., *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 WAKE FOREST L. REV. 279, 290 (2001) (characterizing “para-church special purpose groups” as “independently incorporated and autonomous from congregations and denominations”).

22. Esbeck, *supra* note 18, at 1549 (discussing early American forms of parachurches as “voluntary societies” and “parachurch agencies” that “worked alongside churches while making no claim to be a church”).

23. Nonprofit Sector Research Fund-Projects & Findings, at http://www.nonprofitresearch.org/newsletter1531/newsletter_show.htm?doc_id=17388 (last visited Mar. 19, 2006) (summarizing report authored by Robert Wuthnow and described as “Linkages Between Religious Congregations and Nonprofit Service Organizations”).

24. Darrel W. Cox, *Why Parachurch Leaders Must Meet the Same Biblical Qualifications as Church Leaders*, at 3, The Council on Biblical Manhood and Womanhood, at <http://www.cbmw.org/resources/articles/parachurch.pdf> (last visited Mar. 19, 2006).

25. One commentator has described the Salvation Army as “a unique combination of holiness denomination and parachurch agency devoted to human services.” Hamilton, *supra* note 15.

26. See Coleman, *supra* note 21, at 290. Although Coleman characterizes the Salvation Army and Catholic Charities as “para-church organizations” and Habitat for Humanity and Bread for the World as “para-congregational organizations,” the distinction is irrelevant for present purposes.

27. Esbeck, *supra* note 18, at 1549.

28. *Id.* at 1550.

29. Hamilton, *supra* note 15.

30. *Id.* This estimate was published in 2000. A more conservative estimate, published ten years earlier, puts the number closer to 10,000. DICTIONARY OF CHRISTIANITY IN AMERICA 864 (Daniel G. Reid et al. eds., Intervarsity Press 1990).

organizations is \$22 billion.³¹ One church growth expert estimates a 1996 total parachurch budget of \$100 billion.³² These massive numbers, even if high, suggest the phenomenal growth of this “new form of religious organization.”³³

A striking feature of American parachurch organizations is that they have been almost exclusively the product of evangelical Christendom.³⁴ According to the Dictionary of Christianity in America, “[l]iberal versions of the large nondenominational parachurch organizations have . . . been almost nonexistent.”³⁵ This might be because conservative Christians were essentially forced out of the more liberal mainstream denominations in the late nineteenth and early twentieth centuries.³⁶ As evangelicals left liberal mainstream denominations, they were forced to become more entrepreneurial³⁷ and pioneering³⁸ than their liberal counterparts. The

31. Hamilton, *supra* note 15. “Church-growth expert David Barrett . . . calculates that . . . [by] 1996 . . . parachurches had outgrown churches in total budget, \$100 billion to \$94 billion.” Stafford, *supra* note 16, at 23.

32. Stafford, *supra* note 16, at 23.

33. Hadden, *supra* note 18.

34. Evangelical parachurch organizations raise more money than mainline denominations, according to one commentator:

Of the nine largest parachurch organizations in the U.S. devoted to spreading the gospel, eight are *evangelical*, with combined 1998 budgets of \$729 million. Of the seven largest communications media agencies, six are *evangelical*, with total budgets of \$625 million. In foreign ministry and missions, *evangelical* parachurch agencies raise \$1.5 billion per year, while *evangelical* denominations raise another \$1 billion. *Mainline* denominations and the independent agencies associated with them together raise less than \$500 million.

Hamilton, *supra* note 15 (emphasis added).

35. DICTIONARY OF CHRISTIANITY IN AMERICA, *supra* note 30, at 863.

36. Hamilton, *supra* note 15 (stating that evangelicals turned to parachurch models “as more and more evangelicals found themselves without voice in the major denominations”); DICTIONARY OF CHRISTIANITY IN AMERICA, *supra* note 30, at 864 (“[D]uring the 1920s when the fundamentalist-modernist controversies took place in the major denominations, conservative evangelicals came to rely even more heavily on . . . parachurch agencies . . .” And, “When the fundamentalists withdrew from their traditional denominations, most of the denominations chose to adopt more liberal policies, and fundamentalists adopted independent parachurch agencies to fulfill their missions.”); William Martin, *How the Fundamentalists Learned to Thrive*, RELIGION-ONLINE, at <http://www.religion-online.org/showarticle.asp?title=153> (last visited Mar. 19, 2006) (discussing JOEL CARPENTER, *REVIVE US AGAIN: THE REAWAKENING OF AMERICAN FUNDAMENTALISM* (1997) (“Having left or been driven out of mainline denominations, fundamentalists replaced the services and associations they had lost by turning increasingly to an elaborate network of parachurch agencies.”)).

37. More than one commentator has noted the entrepreneurial spirit of parachurch leaders. See Hamilton, *supra* note 15 (stating that “[e]vangelicals became religious entrepreneurs”); Hadden,

autonomous structure of parachurch organizations gave evangelicals a “much greater degree of flexibility for innovation than . . . [was] possible within . . . [the] established organizational hierarchy”³⁹ of the mainline denominations they left.

Indeed, not only have parachurch organizations “become the primary means of cooperative endeavor [among evangelical Christians],”⁴⁰ but at least one observer has suggested that evangelicalism actually can be defined in terms of the non-hierarchical form of parachurch organizations,⁴¹ “insofar as evangelicalism is defined at all.”⁴²

Not surprisingly then, although parachurch organizations exist in Judaism,⁴³ Islam,⁴⁴ Buddhism,⁴⁵ and various other religions⁴⁶ and

supra note 18 (stating that “[p]arachurches are often the creation of an entrepreneur [sic]”); WILLMER ET AL., *supra* note 17, at 46–49 (stating that one of the five keys to parachurch effectiveness is “approach[ing] ministry as an entrepreneur”).

38. One parachurch observer attributes heavy parachurch growth in part to “the frontier view of life”:

Four characteristics of the frontier mind we Americans inherit still serve to increase our enthusiasm for the parachurch alternative: (1) less respect for tradition and traditional social structures; (2) communalism — an attitude favoring the autonomy of one’s own community or group; (3) self-reliance and an independent spirit; (4) infatuation with almost anything new.

J. Alan Youngren, *Parachurch Proliferation: The Frontier Spirit Caught in Traffic*, CHRISTIANITY TODAY, Nov. 6, 1981, at 39.

39. Hadden, *supra* note 18. One legal scholar notes an advantage gained by the early nineteenth century parachurch organizations: “By focusing on . . . [specific social ills or specific mission objectives], the voluntary societies did not get sidetracked by doctrinal differences among the denominations.” Esbeck, *supra* note 18, at 1549.

40. DICTIONARY OF CHRISTIANITY IN AMERICA, *supra* note 30, at 864.

41. Elesha Coffman, *Don’t Touch That Dial*, CHRISTIANITY TODAY, Mar. 8, 2002, <http://www.christianitytoday.com/ct/2002/108/53.0.html>.

42. *Id.*

43. See, e.g., Jewish Defense League (stating that “[t]he Jewish Defense League came into being to educate the Jewish people to the concept of *Ahavat Yisroel* — one Jewish people, indivisible and united, from which flows the love for and feeling of pain of all Jews”) (on file with author); Jews for Judaism (stating it has “become the Jewish community’s leading response to the multi-million dollar efforts of cults and evangelical Christians who target Jews for conversion”), <http://www.jewsforjudaism.org/web/mainpages/mission.html> (last visited Mar. 19, 2006); Jewish Prisoner Services International (stating that “[i]ts mission is to provide direct spiritual, outreach and advocacy services for Jewish prisoners and their loved ones while concurrently working in conjunction with several major Jewish organizations and social service agencies”), <http://www.jewishprisonerservices.org/about.htm> (last visited Mar. 19, 2006).

44. See, e.g., Islamic Broadcasting Network, (stating that its “main mission . . . is to share the guidance of Allah through broadcast media and the internet, to encourage the right and discourage

movements,⁴⁷ the parachurch literature has focused primarily on Christian parachurch organizations. And, there is no dearth of Christian parachurch activity.⁴⁸ Christian seminaries now offer courses in parachurch ministry.⁴⁹

the wrong, and to provide the American Muslim community with programming that will cater towards their needs"); Council on American-Islamic Relations (stating that it is a "nonprofit . . . civil rights and advocacy group" whose mission is "to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding"), <http://www.cair-net.org/default.asp?Page=About> (last visited Mar. 19, 2006).

45. See, e.g., Buddha's Light International Association World Headquarters, (stating its "hope [that] the seed of joy is sowed throughout the world" and that it "works closely with members of other Buddhist temples, colleges, scholastic organizations, lay practitioners associations, and meditation groups"), <http://www.blia.org/english/> (last visited Mar. 19, 2006); World Fellowship of Buddhist Youth (stating that its purpose is, among other things, "[t]o promote and strengthen among the younger generations observance and practice of the teachings of Lord Buddha"), http://www.wfby.org/about_objective.html (last visited Mar. 19, 2006); Buddhist Peace Fellowship (stating that its mission "is to serve as a catalyst for socially engaged Buddhism" and that its "programs, publications, and practice groups link Buddhist teachings of wisdom and compassion with progressive social change"), http://www.bpf.org/html/about_us/mission/mission.html (last visited Mar. 19, 2006).

46. See, e.g., Sambodh Society, Inc. (Hindu group declaring as its three goals: "To promote understanding of India's ancient spiritual heritage, particularly through teaching of the Upanishads, the Bhagavad Gita, the Yoga Sutras and the Vedantic philosophy of the Hindu philosopher, Sankaracharya;" "To activate the inner spiritual power of individuals via instruction in meditation;" and, "To turn this power towards active and constructive social service."), <http://www.sambodh.com/> (last visited Mar. 19, 2006); Institute for Applied Spiritual Technology (Hare Krishna group stating that "we recognize the need to apply our system of transcendental knowledge, based on the ancient Vedic teachings, to train interested seekers to become God-awakened spiritual warriors"), <http://www.ifast.net/about.aspx> (last visited Mar. 19, 2006).

47. Artists for Israel International (Messianic Jewish group group describing itself as "a major world outreach agency with a cinema media Bible, a Messianic Bible Society featuring THE ORTHODOX JEWISH BIBLE in many languages, an online advanced Biblical Studies Program, ministry to Muslims, and a Messianic Yeshiva"); Citizens Commission on Human Rights (Scientologist group describing itself as a "public benefit organization" that is "dedicated to investigating and exposing psychiatric violations of human rights"), <http://www.cchr.org/what/index.htm> (last visited Mar. 19, 2006); American Atheists (Atheist group declaring that it "is dedicated to working for the civil rights of Atheists, promoting separation of state and church, and providing information about Atheism"), <http://www.atheists.org/visitors.center/about.html> (last visited Mar. 19, 2006).

48. The president of Taylor University in Upland, Indiana, commented in 1992, "The proliferation of parachurch ministries seems to have reached the saturation point, or perhaps run up against the barrier of economic resources." Kesler, *infra* note 80, at 18, 19.

49. See, e.g., Tyndale University College & Seminary (offering a course entitled Parachurch Youth Ministry), <http://www.tyndale.ca/universitycollege/printcourse.php?cid=631> (last visited Mar. 19, 2006); Denver Seminary (offering an entire Parachurch Ministry Training Center), <http://www.denverseminary.edu/tm/trainingcenters/parachurch.php> (last visited Mar. 19, 2006).

Christian parachurch organizations exist for women,⁵⁰ men,⁵¹ youth,⁵² families,⁵³ college students,⁵⁴ homeless people,⁵⁵ military personnel,⁵⁶ prisoners,⁵⁷ truckers,⁵⁸ golfers,⁵⁹ athletes,⁶⁰ motorcyclists,⁶¹ alcoholics,⁶² and

50. See, e.g., Moms in Touch, Int'l (stating as its purpose, in part: "To provide support and encouragement to moms who carry heavy burdens for their children." And, "To pray that teachers, administrative staff, and students would come to faith in Jesus Christ."), <http://www.momsintouch.org/NewDesign/aboutus.htm> (last visited Mar. 19, 2006); Women of Faith (describing itself as an "interdenominational women's conference organization" whose objective is "[t]o see women set free to a lifestyle of God's grace"), <http://www.womenoffaith.com/About/companyoverview.asp> (last visited Mar. 19, 2006).

51. See, e.g., Promise Keepers (stating that it "is dedicated to igniting and uniting men to be passionate followers of Jesus Christ through the effective communication of the 7 Promises"), <http://www.promisekeepers.org/core10> (last visited Mar. 19, 2006); International Christian Men's Institute (helping men understand that "manhood and Christlikeness are synonymous"), <http://www.icmi.info/default.asp> (last visited Mar. 19, 2006); Christian Businessmen's Network International (describing itself as "network of business and professional leaders seeking to reach their peers with the Gospel of Jesus Christ"), <http://www.cbmcint.org/about/> (last visited Mar. 19, 2006).

52. See, e.g., Youth for Christ (stating that its mission is "to participate in the body of Christ in responsible evangelism of youth, presenting them with the person, work and teachings of Christ and discipling them into the local church"), <http://community.gospelcom.net/Brix?pageID=12575> (last visited Mar. 19, 2006); Young Life (stating as its mission: "Introducing adolescents to Jesus Christ and helping them grow in their faith."), <http://www.younglife.org/pages/ylmission.html> (last visited Mar. 19, 2006).

53. See, e.g., Focus on the Family (stating as its mission to "disseminat[e] the Gospel of Jesus Christ to as many people as possible . . . by helping to preserve traditional values and the institution of the family"), <http://www.family.org/welcome/aboutfof/a0005554.cfm> (last visited Mar. 19, 2006); Family Life (Family Life is a parachurch organization that is actually a division of another parachurch organization, Campus Crusade for Christ International whose mission is to "effectively develop godly families who change the world one home at a time"), <http://www.familylife.com/about/searchfaq.asp> (last visited Mar. 19, 2006).

54. See, e.g., Campus Crusade for Christ (stating that its campus ministry has a presence on 1029 campuses internationally and that its mission is to "win the campus today and change the world tomorrow"), <http://www.campuscrusadeforchrist.com/aboutus/index.htm> (last visited Mar. 19, 2006); Intervarsity Christian Fellowship USA (Stating that its purpose is "to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world."), <http://www.intervarsity.org/aboutus/purpose.php> (last visited Mar. 19, 2006).

55. See, e.g., Pacific Garden Mission (stating that it "desire[s] to bring each . . . [homeless person who visits the shelter] to salvation and maturity in Christ"), http://www.pgm.org/abt_faq.html (last visited Mar. 19, 2006).

56. See, e.g., Christian Military Fellowship (stating that it "is an association of believers who are committed to evangelizing the United States armed forces and discipling Christians who are in the military"), http://www.cmfhq.org/About_Us/About_Us.htm (last visited Mar. 19, 2006).

57. See, e.g., Prison Fellowship (stating that it "reaches out to prisoners, ex-prisoners, and their families both as an act of service to Jesus Christ and as a contribution to restoring peace to our

sex addicts.⁶³ Christian parachurch organizations are involved in theater,⁶⁴ television,⁶⁵ radio,⁶⁶ film,⁶⁷ media consulting,⁶⁸ news,⁶⁹ aviation,⁷⁰ financial

cities and communities endangered by crime.”), http://www.pfm.org/AM/Template.cfm?Section=About_Prison_Fellowship1&CONTENTID=14397&TEMPLATE=/CM/ContentDisplay.cfm (last visited Mar. 19, 2006).

58. See, e.g., Truckers for Christ (stating that its purpose is to “provide fellowship, encouragement and support to Christian drivers and to aid in introducing non-Christian drivers to the Lord”), <http://www.truckersforchrist.org/statement.htm> (last visited Mar. 19, 2006).

59. See, e.g., Christian Golfers Ministry (stating its ministry is “designed for . . . the golfer, who desires and needs a way to share Christ with other golfers” and that golfing relationships “give perfect opportunities to share our Savior”), <http://www.golfministry.com/intro.html> (last visited Mar. 19, 2006).

60. See, e.g., Fellowship of Christian Athletes (stating that its mission is “[t]o present to athletes and coaches and all whom they influence the challenge and adventure of receiving Jesus Christ as Savior and Lord”), <http://www.fca.org/aboutfca/> (last visited Mar. 19, 2006).

61. Motorcyclists for Jesus (stating that it “is a non-profit, democratic, member driven group of Christian motorcyclists.” And, “[t]he organization’s main purpose is to lead and guide motorcyclists in the personal relationship with Jesus Christ.”), <http://www.go2mjm.com/mission.htm> (last visited Mar. 19, 2006); Christian Motorcyclists Association (stating that it is “dedicated to reaching people for Christ in the highways and byways through motorcycling”), <http://www.cmausa.org/cmausa.html> (last visited Mar. 19, 2006).

62. See, e.g., Alcoholics Victorious, (stating that its “support groups offer a safe environment [for] recovering people who recognize Jesus Christ as their ‘Higher Power’” and that it uses both the 12 Steps and the Alcoholics Victorious Creed), <http://crc.iugm.org/> (last visited Mar. 19, 2006).

63. See, e.g., RSA Ministries (stating that it is a “Christ-centered, 12-Step Recovery program for those struggling with compulsive sexual behavior”), <http://www.rsaministries.org/> (last visited Mar. 19, 2006).

64. See, e.g., Lamb’s Players Theater, <http://www.lambplayers.org/aboutus/greeting.html> (last visited Mar. 19, 2006), discussed in Carol R. Thiessen, *Lambs in Actors’ Clothing*, CHRISTIANITY TODAY, May 14, 1990, at 69, 69 (describing the Lamb’s Players as “[a]n early effort” to achieve “an idea for Christian street theater, and eventually full-blown drama performed by Christians in a professional setting”). It is not clear from the Lamb’s Players Theater web site whether the organization maintains a Christian identity or whether the organization ever maintained an explicit Christian identity.

65. See, e.g., Christian Broadcasting Network (“The mission of CBN and its affiliated organizations is to prepare the United States of America and the nations of the world for the coming of Jesus Christ and the establishment of the Kingdom of God on earth. We are achieving this end through the strategic use of mass communications, especially television and film, the Internet and New Media, radio; the distribution of cassettes, literature”), <https://www.cbn.com/about/mission/> (last visited Mar. 19, 2006).

66. See, e.g., K-LOVE Radio Network (providing a variety of Christian radio programming), http://www.klove.com/Interact/Links.aspx#On-Air_Ministries (last visited Mar. 19, 2006). K-LOVE “has stations and translators across the United States.” K-LOVE, <http://www.klove.com/Music/StationList.aspx> (last visited Mar. 19, 2006).

67. See, e.g., World Wide Pictures (“World Wide Pictures [a ministry of the Billy Graham Evangelistic Association] support[s] the ministry and calling of Billy Graham . . . by producing and

counseling,⁷¹ marriage enrichment,⁷² public policy,⁷³ evangelism,⁷⁴ legal advocacy,⁷⁵ arbitration,⁷⁶ and more.⁷⁷ Parachurch organizations serve

distributing high-quality audio-visual evangelistic presentations.”), http://www.billygraham.org/WWP_FAQ.asp (last visited Mar. 19, 2006).

68. *See, e.g.*, Mastermedia International (“Mastermedia is a nonprofit media organization committed to serving media leaders with professional consulting regarding America’s Christian market and personal counsel concerning issues of faith.”), http://www.mastermediaintl.org/guest/about/1_about.htm (last visited Mar. 19, 2006).

69. *See, e.g.*, The Christian Examiner (describing itself as an “independent Christian newspaper published in local editions . . . with 185,000 copies per month distributed to more than 5,000 locations”), <http://www.christianexaminer.com/Pages/Aboutus.html> (last visited Mar. 19, 2006).

70. JAARS (stating that it supports Bible translation efforts and related ministries through coordination and training in aviation and other support areas), <http://www.jaars.org/factsheet.shtml> (last visited Mar. 19, 2006).

71. *See, e.g.*, Crown Financial Ministries (“Equipping people worldwide to learn, apply, and teach God’s financial principles so they may know Christ more intimately, be free to serve Him, and help fund the Great Commission.”), <http://www.crown.org/AboutUs/default.asp> (last visited Mar. 19, 2006).

72. *See, e.g.*, Marriage Alive (Stating that its mission “is to identify, train and empower leaders who invest in others by building strong marriage and family relationships through the integration of Biblical truth, contemporary research, practical application and fun.”), <http://www.marriagealive.com/About/> (last visited Mar. 19, 2006).

73. *See, e.g.*, Concerned Women for America (describing itself as “the nation’s largest public policy women’s organization” whose mission is “to protect and promote Biblical values among all citizens”), <http://www.cwfa.org/about.asp> (last visited Mar. 19, 2006); Family Research Council (stating that it “champions marriage and family as the foundation of civilization . . . shapes public debate and formulates public policy . . . and promotes the Judeo-Christian worldview as the basis for a just, free, and stable society”), http://www.frc.org/get.cfm?c=HISTORY_ABOUT (last visited Mar. 19, 2006).

74. Billy Graham Evangelistic Association (stating that it “exists to support the evangelistic ministry and calling of Mr. Graham to take the message of Christ to all we can by every prudent means available to us”), http://www.bgea.org/AboutUs_Index.asp (last visited Mar. 19, 2006).

75. *See, e.g.*, American Center for Law and Justice (stating that it is “dedicated to the concept that freedom and democracy are God-given inalienable rights” and that it is “dependent upon God and the resources He provides through the time, talent, and gifts of people who share our concerns”), <http://www.aclj.org/About/default.aspx?Section=9> (last visited Mar. 19, 2006); Liberty Counsel (stating that it “is a nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family”), <http://www.lc.org/aboutus.html> (last visited Mar. 19, 2006).

76. *See, e.g.*, Peacemaker Ministries (stating that its mission is “to equip and assist Christians and their churches to respond to conflict biblically”) (emphasis omitted), <http://www.hispeace.org/html/org.htm> (last visited Mar. 19, 2006).

77. *See, e.g.*, McCarthy & Castelli, *supra* note 17, at 15 (providing examples of freestanding religion-sponsored social service delivery organizations, including, “Crisis Pregnancy Centers, day-care facilities, rehabilitation programs, health clinics, orphanages, homes for the aged, and housing programs”).

millions of American people each year.⁷⁸ The proliferation and public presence of parachurch organizations is a genuine social phenomenon.⁷⁹

B. Understanding Parachurch Organizations

A key point of tension in defining parachurch organizations is the relationship between parachurch organizations and traditional churches or denominations.⁸⁰ Although some scholars stress the inherent association between parachurches and traditional churches,⁸¹ another view is that parachurches “stand outside of the organizational structure of well-established religious bodies.”⁸² This Article understands “parachurch organizations” to be independent of more traditional religious organizations.⁸³

78. See, e.g., WILLMER ET AL., *supra* note 17, at 3 (stating that “James Dobson’s popular radio program Focus on the Family is heard by over two million listeners every weekday”). See also McCarthy & Castelli, *supra* note 17, at 23 (stating they believe that “tens of millions” of people are served annually by religion-sponsored social service organizations — a category that is at once broader than the parachurch category but limited to social service providers.)

79. The phenomenon of evangelical Christian and other parachurch organizations — which are, by definition, religious organizations — should be distinguished from America’s love affair with voluntary and humanitarian associations more generally. At least one legal scholar has noted Alexis de Tocqueville’s observations about the proliferation of early American voluntary societies. See, e.g., Esbeck, *supra* note 18, at 1549 (quoting Tocqueville as saying: “Americans of all ages, all stations in life, and all types of dispositions are forever forming associations.”).

80. WILLMER ET AL., *supra* note 17, at 13 (stating that parachurch organizations are controversial precisely because the role of parachurch organizations is increasingly insubordinate to the role of local churches: “These groups . . . have taken on a life of their own.”). See Jay Kesler, Guest Editorial, *Vision Quest*, CHRISTIANITY TODAY, Oct. 5, 1992, at 18, 19 (“The cleavage and competition between church and parachurch must end, and both accountability and resources must come from a gathered, spiritually united church.”). Indeed, parachurch organizations were scrutinized at least as early as 1826, when John Leland wrote: “Religion is become the most fashionable thing among us. Moral societies, Sunday schools — tract societies — Bible societies, missionary societies, and funds to educate and make preachers, are now in the full tide of operation.” Melissa Rogers, *Traditions of Church-State Separation: Some Ways They Have Protected Religion and Advanced Religious Freedom and How They are Threatened Today*, 18 J.L. & POL. 277, 321 n.61 (2002) (citing Lyman H. Butterfield, *Elder John Leland, Jeffersonian Itinerant*, 62 PROC. OF THE AM. ANTIQUARIAN SOC’Y 234 (1952)).

81. See, e.g., Cox, *supra* note 24, at 4 (arguing that Christian leadership, including leadership within Christian parachurch organizations, “is by [its] very nature recognized and validated within the context of the local church”).

82. Hadden, *supra* note 18 (casting this quality of parachurch organizations as “[t]he defining characteristic”).

83. Institutional independence is stressed in this definition of parachurches: “[Parachurch organizations are] [v]oluntary, not-for-profit associations of Christians working outside denominational control to achieve some specific ministry or social service.” DICTIONARY OF CHRISTIANITY IN AMERICA, *supra* note 30, at 863, quoted in WILLMER ET AL., *supra* note 17, at 13.

“The defining characteristic of a parachurch [organization] is that it stands outside of the organizational structure of well-established religious bodies.”⁸⁴ Parachurch organizations are not owned or operated by churches.⁸⁵ Although religion-based social service groups are often associated with local church congregations⁸⁶ or regional/national religious denominations,⁸⁷ these groups simply do not qualify as parachurch organizations. Independence is the key institutional aspect of parachurch organizations.⁸⁸

Put similarly: “[Parachurch] work . . . [is] not-for-profit, organized Christian ministry to spiritual, mental, and physical needs, working outside denominational control.” Youngren, *supra* note 38, at 38, *quoted in* WILLMER ET AL., *supra* note 17, at 13. Another definition of parachurch organizations might understand the element of independence in this way: “[Parachurch organizations are] religious groups and organizations that are consciously religious but do not claim to be a church in the narrow sense of an organization attended by clergy and performing worship, sacramental, and sacerdotal functions.” Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 13 n.47 (1998) (including parachurch organizations within the meaning of the Greek word *ekklesia* as used in that article and defined in the footnote).

84. Hadden, *supra* note 18. *See also* WILLMER ET AL., *supra* note 17, at 21–25 (“An essential part of the definition of the parachurch is that it is separate from the traditional church.”).

85. Churches might own or operate organizations that look like parachurch organizations. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987). But, as this Article defines them, those organizations are parachurch organizations and their status under Title VII is settled. *See id.*

86. *See* McCarthy & Castelli, *supra* note 17, at 13 (discussing the organizational structure of religion-sponsored social services). McCarthy and Castelli break religion-based social service providers into three broad categories: congregations, national networks, and freestanding religious organizations. *Id.* First, congregations are “local community-based groups organized around regular religious worship.” *Id.* Second, national networks are “denominations and their social service arms such as Catholic Charities USA.” *Id.* These organizations would not be parachurch organizations as defined in this Article. National networks are also “networks of related organizations such as the YMCA.” *Id.* Inasmuch as national networks are independently organized, they could qualify as parachurch organizations as defined in this Article. Third, freestanding religious organizations are very much like parachurch organizations as parachurch organization is defined in this Article. McCarthy and Castelli define freestanding religious organization as “organizations which are incorporated separately from congregations and national networks, but have a religious basis.” McCarthy & Castelli, *supra* note 17, at 13.

87. *Id.*

88. Esbeck implicitly recognizes the independent character of parachurch organizations when he states that some “[n]onprofit organizations that are “pervasively sectarian” as that term is defined by the Supreme Court . . . may be an integral part of a church, be separately incorporated but affiliated with a church, or be a parachurch organization that nevertheless is fully identified with a particular faith perspective . . .” Esbeck, *supra* note 20, at 348.

The second key⁸⁹ characteristic of parachurch organizations is their religiosity.⁹⁰ Although the secular activities of traditional churches may qualify for the 702 exemption,⁹¹ parachurch organizations, inasmuch as they are freestanding⁹² or independent, must independently demonstrate a meaningful religious character.⁹³

The tough question is: What exactly does it mean to have a religious character? This question, after all, is precisely the question in much of the litigation over whether particular organizations qualify for the 702 exemption. To evaluate the religious character of an organization claiming the 702 exemption, courts often look for specific religious elements or qualities as evidence of a religious character.⁹⁴ Courts have observed, for example, such specific facts as a “chapel no longer [being] used for religious services,”⁹⁵ the absence of religious symbols,⁹⁶ whether religious teaching is normative or merely comparative,⁹⁷ affiliation with other

89. See, e.g., *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, No. Civ.A.04-430, 2004 WL 2931268, 41-42 (E.D. Pa. Dec. 16, 2004). If parachurch organizations were not religious, they presumably would have no interest in hiring co-religionists.

90. One observer characterizes not-for-profit as an explicit requirement of a parachurch organization. See WILLMER ET AL., *supra* note 17, at 17. But see *Pacific Hills Treatment Centers, Inc.*, <http://www.pachills.com/ABOUT.asp> (last visited Mar. 19, 2006) (organized as for-profit corporation although it offers both Christian and its traditional 12 step based recovery programs).

91. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–331 (1987) (holding that application of the 702 exemption to the “secular nonprofit activities of religious organizations” does not violate the Establishment Clause).

92. The author acknowledges McCarthy & Castelli for use of this term in this context. See McCarthy & Castelli, *supra* note 17, at 13.

93. See, e.g., *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988).

94. See, e.g., *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 461 (9th Cir. 1993) (“The ownership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools are either essentially secular, or neutral as far as religion is concerned, and we conclude the general picture of the Schools reflects a primarily secular rather than a primarily religious orientation.”) (citation omitted); *LeBoon*, 2005 WL 387642, at *3 (“[C]onsidering the balance of secular and Jewish factors, I . . . conclude that . . . the [Jewish Community Center] is primarily a religious institution.”).

95. *Fike v. United Methodist Children’s Home of Va., Inc.*, 547 F. Supp. 286, 289 (E.D. Va. 1982).

96. *Id.* at 289 (“Aside from a painting of the Bishop in the administration building, there are no religious symbols whatsoever in the cottages or anywhere else on the campus.”).

97. *Kamehameha*, 990 F.2d at 462, 462-63 (noting that “religious studies” at the schools are “largely comparative” and that “the purpose and emphasis of the Schools have shifted over the years from providing religious instruction to equipping students with ethical principles that will enable them to make their own moral judgments”); *Fike*, 547 F. Supp. at 289-90 (stating that “instruction in theology as is conducted by the chaplain involves various perspectives and concepts, including without any normative teaching, atheism”).

religious organizations,⁹⁸ sources of funding,⁹⁹ self-descriptive literature¹⁰⁰ and mission statements,¹⁰¹ a state of faith,¹⁰² a personnel manual¹⁰³ or handbook,¹⁰⁴ and general religious tenor.¹⁰⁵ Parachurch organizations with ample religious qualities are more likely to successfully invoke the 702 exemption.¹⁰⁶

98. *Kamehameha*, 990 F.2d at 461 (“No religious organization has ever controlled or supported the Schools, and the Schools are not affiliated with any denomination of Protestants or with any organization or association of religious schools.”); *Wirth v. College of the Ozarks*, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998) (noting that the “college is a member of the coalition for Christian Colleges and Universities, a national organization of evangelical Christian institutions, and a member of the Association of Presbyterian Colleges and Universities”); *Fike*, 547 F. Supp. at 289-90 (noting that trustees had to be “confirmed by the Virginia Methodist Annual Conference” and “in good standing of the Methodist Church” but holding that “a board of trustees who are members of a church” is insufficient, by itself, “[f]or an organization to be considered ‘religious’”).

99. *Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (stating that the “largest single source of funding” for the university came from the Alabama Baptist State Convention); *LeBoon*, 2004 WL 2931268, at *4 (stating, incorrectly — as noted on reconsideration — that a majority of funding for the Jewish Community Center “during the relevant period” came from the “Lancaster Jewish Federation campaign”), *reconsidered in LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, No. Civ.A.04-430, 2005 WL 387642 (E.D. Pa. Feb. 17, 2005) (finding that 75-85% of funding — not \$75,000 to \$85,000 — came from the Lancaster Jewish Federation campaign).

100. *Kamehameha*, 990 F.2d at 462 (noting evidence of progressive secularization from a 1955 School Survey Report to a 1961 Introductory Pamphlet to the 1989-90 Course Catalog); *Fike*, 547 F. Supp. at 289-90 (giving little weight to the home’s “statement of church relatedness” that purported to “pronounce officially its ties with the Church”).

101. *LeBoon*, 2004 WL 2931268, at *4 (quoting from the mission statement and noting that it was “printed on the cover of [the Jewish Community Center’s] report on its 1998 Annual Meeting, and [was] reportedly ‘emblazoned’ on the walls of the [Jewish Community Center’s] lobby”); *Wirth*, 26 F. Supp. 2d at 1187 (quoting from the college’s charter mission).

102. *Killinger*, 113 F.3d at 199 (stating that all faculty teaching religious courses at the university had to “subscribe to the 1963 Baptist Statement of Faith and Message, which contains various ‘affirmations’ and ‘commitments’ to advancing Christianity”).

103. *EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 1156 (W.D. Wash. 1992) (noting that the personnel manual was revised to require employees “to be a member of a Christian church or to ‘espouse during working hours no other religious preference . . . than the Christian faith’”).

104. *Little v. Wuerl*, 929 F.2d 944, 946 (3d Cir. 1991) (noting that the employee handbook contained a statement that just cause for firing of teachers included entering into a marriage not recognized by the Catholic Church).

105. For instance, the *Kamehameha* court noted the following religious qualities: “Some official school activities have religious overtones. Teachers in kindergarten through eighth grade lead their classes in a daily prayer, and all boarders say grace before dinner. Athletic teams pray before games, and the School’s daily bulletin usually reprints a Bible verse.” *Kamehameha*, 990 F.2d at 462 (holding that defendant organization did not qualify for the 702 exemption).

106. *See id.* at 463, 464 (concluding that the defendant organization’s “purpose and character is primarily secular, not primarily religious” where “the religious characteristics of the Schools consist of minimal, largely comparative religious studies, scheduled prayers and services, quotation

These considerations suggest this working definition of “parachurch organization”:

A parachurch organization is an independent and nonprofit organization that is religious, as evidenced by substantial religious qualities, and is not a church or owned or operated by or affiliated with a church.

With this definition in hand, the next step is to analyze the 702 exemption.

III. THE 702 EXEMPTION

The Federal Civil Rights Act of 1964 (Title VII)¹⁰⁷ prohibits religion-based discrimination in private employment.¹⁰⁸ The prohibition of religion-based discrimination reads:

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

of Bible verses in a school publication, and the employment of nominally Protestant teachers for secular subjects”).

107. The relevant parts of the Civil Rights Act of 1964 are codified at title 42 of the U.S. Code, section 2000e. The law is often referred to as Title VII because it comes from Title VII of the original public law. *See* Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, July 2, 1964, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2005)). In the same way, what is referred to in this Article as the 702 exemption is found specifically in section 702 of Title VII of the original public law. Thus, courts and commentators sometimes refer to it as the “702 exemption” or “§ 702.” This Article refers to the exemption as the 702 exemption.

108. 42 U.S.C. § 2000e (as amended) (West 2005). The prohibition reads:

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.

42 U.S.C. §§ 2000e-2(a).

(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.¹⁰⁹

The effect of the statute is to “prohibit[] employers from using an individual's religion as a criterion for discharging or refusing to hire.”¹¹⁰

Title VII contains various exemptions,¹¹¹ including the 702 exemption.¹¹² The 702 exemption reads:

(a) Inapplicability of [the Title VII prohibition of religious discrimination] to . . . employees of religious entities.

This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work

109. 42 U.S.C. § 2000e-2 (West 2004).

110. *Pedreira v. Ky. Baptist Homes for Children*, 186 F. Supp. 2d 757, 760 (W.D. Ky. 2001).

111. The bona fide occupational qualification exemption reads:

[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise

42 U.S.C. 2000e-2(e)(1) (West 2005). The religious educational institution, or “owned or operated by,” exemption, reads:

[I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. 2000e-2(e)(2) (West 2005).

112. See *supra* note 107 (explaining why the exemption is called the 702 exemption).

connected with the carrying on by such corporation, association, educational institution, or society of its activities.¹¹³

The scope of the 702 exemption is, for the most, well-established in law.

First, the 702 exemption covers only religion-based discrimination. Discrimination based on sex, race, color, or national origin is not exempted. In an early opinion discussing the 702 exemption, one circuit court wrote, “The language and the legislative history of [the 702 exemption] compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin”¹¹⁴ In subsequent decisions, courts have affirmed and reaffirmed that the 702 exemption includes only religion-based discrimination.¹¹⁵

Second, the 702 exemption covers much more than just religious activity. As originally enacted, the scope of the 702 exemption was narrower than its current form. From 1964 until 1972, the 702 exemption extended only to the “religious activities” of religious organizations.¹¹⁶ In

113. 42 U.S.C. § 2000e-1 (West 2005).

114. *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (emphasis added). The *McClure* court applied the 702 exemption as originally enacted. *Id.* at 555 n.4. But the 1972 amendment left unchanged that the 702 exemption exempted only religion-based discrimination.

115. See *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (Christian school found liable under title VII for providing health insurance benefits only to “head of household” employees, by which school meant only single persons and married men based upon school’s interpretation of the Bible); *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272 (9th Cir. 1982) (religious publishing house found liable under title VII for denying female employee monetary allowances paid to similarly situated male employees); *EEOC v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980) (Baptist college not liable where it hired a male over a female because, in part, male was Baptist); *Elbaz v. Congregation Beth Judea, Inc.*, 812 F. Supp. 802 (N.D. Ill. 1992) (exemption does not cover discrimination based on sex or national origin); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980) (where Roman Catholic high school fired pregnant female employee for violating moral code that prohibited employees from engaging in premarital sex, court denied summary motion, holding that while imposition of moral code was permitted under the 702 exemption, nevertheless an issue of material fact existed as to whether moral code was equally applied to male and female employees); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (church was not exempt from liability under title VII when it fired a typist-receptionist for keeping a social relationship with a black man); H.R. CONF. REP., CONG. REC., at 7564 (Mar. 8, 1972) (“Such organizations remain subject to the provisions of Title VII with regard to race, color, sex, or national origin”).

116. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964). The statute read: “This title [Title VII — Equal Employment Opportunity] shall not apply . . . to a religious corporation, association, 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, or society of its *religious activities*” *Id.* (emphasis added). Why the exemption in the first place? According to one court:

1972, however, Congress amended the 702 exemption.¹¹⁷ Missing from the amended statute was the “religious activities” requirement.¹¹⁸ Whereas the original exemption applied to the “religious activities”¹¹⁹ of religious employers, the amended exemption applied to the “activities”¹²⁰ of a religious employer. This change suggests that the 1972 amendment greatly expanded the scope of the 702 exemption.¹²¹

The U.S. Supreme Court affirmed this reading of the 1972 amendment in the landmark *Amos* case.¹²² The *Amos* Court ruled that the 702 exemption was constitutional as applied to the secular nonprofit activity of a church.¹²³ The secular nonprofit activity in question was a church-operated gymnasium that was open to the public.¹²⁴ When the church fired a gymnasium employee for failing to qualify for a temple recommend,¹²⁵

[The Title VII prohibition against religion-based discrimination] posed a sharp question under the Establishment Clause . . . as to whether Congress could properly regulate the employment practices . . . of religious organizations in *matters related to their religious activities*. As a result, the original Title VII contained an exemption from the operation of Title VII’s proscriptions with respect to the employment of co-religionists *to perform work related to the employer’s religious activity*.

Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974, 976 (D. Mass. 1983) (emphasis added) (citation omitted).

117. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 104 (1972). The amending statute read:

Section 702 of the Civil Rights Act of 1964 . . . is amended to read as follows:
 “Sec. 702. This title shall not apply . . . 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. (emphasis added).

118. *Id.*

119. Civil Rights Act of 1964, 78 Stat. 241, at 255 (emphasis added).

120. Equal Employment Opportunity Act of 1972, 86 Stat. 103, 104 (emphasis added).

121. This study is not, strictly speaking, a study in legislative history. Rather, it is a study in the history of legislation. These are distinct studies. The history of legislation inquiry asks only what Congress has done. The legislative history inquiry asks why Congress did it. Both inquiries are relevant to the purposivist interpretational method. Of the two, however, only the first inquiry — history of legislation — is relevant to the textualist. *See infra* text accompanying notes 286-300 (discussing the Ninth Circuit’s use of legislative history in interpreting the 702 exemption).

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

123. *Id.* at 330.

124. *Id.*

125. “Temple recommends are issued only to individuals who observe the Church’s standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco.” *Id.* at 330 n.4.

the employee responded by suing the church for Title VII religious discrimination.¹²⁶ The Supreme Court held that the 702 exemption permitted the church to fire the employee for religious reasons, even though the employee worked in a secular capacity in a secular activity of the church.¹²⁷ As the result of *Amos* shows, the 702 exemption covers practically all nonprofit¹²⁸ activity of a qualifying religious employer.

Third, at least one federal circuit court has clarified that the 702 exemption permits both hiring and firing on the basis of religion.¹²⁹ The court stated, “[I]t is clear that religious discrimination claims are barred with respect to the entire realm of the employment arena and not just the actual hiring of individuals.”¹³⁰

Fourth, the 702 exemption may allow religious employers to require religious conformity in employees’ lifestyles, not just employees’ religious affiliation or beliefs. In *Little v. Wuerl*,¹³¹ a Protestant teacher worked for a parish-operated Roman Catholic school.¹³² When the teacher divorced her husband and subsequently remarried a Catholic without annulling her first marriage, the school did not renew the teacher’s contract.¹³³ The teacher sued the church for Title VII religious discrimination, and the church claimed the 702 exemption.¹³⁴

The church in *Little* qualified for the 702 exemption. The question was not only whether the 702 exemption permitted the church to require its employees to be affiliated with the church’s religion, but also whether the 702 exemption permitted the church to require its employees to conform their lifestyles to the tenets of the church’s religion. In this particular case, the lifestyle issue was divorce.¹³⁵ After examining the legislative history,

126. *Id.* at 331.

127. *Amos*, 483 U.S. at 338.

128. Technically, the holding was even broader because the *Amos* court did not explicitly distinguish between for-profit and nonprofit church activities, but, rather, between secular and religious church activities. Justice O’Connor noted this in her concurring opinion: “[T]he question of the constitutionality of the . . . 702 exemption as applied to for-profit activities of religious organizations remains open.” *Id.* at 349 (O’Connor, J., concurring).

129. *See Hopkins v. Women’s Div., Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174 (D.C. Cir. 2002).

130. *Id.* at 180 (emphasis added). *See also* *Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (citing *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991)). *But see* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1107 (1996) (arguing that “[d]ischarge cases pose less threat [of state intrusion] to religion than hiring cases”).

131. *Little*, 929 F.2d at 944.

132. *Id.* at 945.

133. *Id.* at 946.

134. *Id.*

135. *Id.* A church official said: “I consider [the plaintiff’s] action in publicly rejecting the doctrine and laws of the Church by marrying a Catholic without proper validation to be a serious

the court found the Title VII prohibition of religion-based discrimination did not apply to the church because the church qualified for the 702 exemption.¹³⁶ The *Little* court held, “the permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts.”¹³⁷ Although the opinion in *Little* was designed to avoid a constitutional conflict,¹³⁸ the holding nevertheless recognizes that religious employers often have as much, or more, interest in the religious conformity of their employees’ lifestyles as in their employees’ religious affiliation or beliefs.

Fifth, religious employers do not waive the 702 exemption by hiring employees that are not affiliated with the employer’s religion.¹³⁹ The *Little* court explicitly stated the 702 exemption could not be waived.¹⁴⁰ Because waiving the 702 exemption would “expand the statute’s scope” by applying Title VII to organizations to which Title VII should not be applied, the 702 exemption cannot be waived.¹⁴¹

This may mean that religious employers do not have to inquire about an employee’s religion during the hiring process. In *Presbyterian Ministries*,¹⁴² the federal district court permitted a Christian retirement home to exercise the 702 exemption even though the retirement home had not investigated the plaintiff-employee’s religious beliefs during the hiring process.¹⁴³ The plaintiff, a receptionist at the retirement home, sued for Title VII religious discrimination when the retirement home discharged her for wearing the headcovering “she was required to wear as a Muslim.”¹⁴⁴ The plaintiff argued, similarly to the plaintiff in *Little*, that the retirement home should not be able to claim the 702 exemption because the retirement home “did not limit employees to co-religionists, i.e., Christians.”¹⁴⁵ The court replied that “[m]erely because [the nursing home]

contradiction of the Church’s teachings and laws on the indissolubility of Christian marriage and the sacramental nature of the marriage bond.” *Id.*

136. The court stated, “We are . . . persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities . . . faithful to their doctrinal practices” *Little*, 929 F.2d at 951.

137. *Id.*

138. The circuit court recognized that applying Title VII to the church in this context would raise serious constitutional issues. *Id.* at 949.

139. *Id.*

140. “Once Congress stated that ‘[t]his title shall not apply’ to religiously-motivated employment decisions by religious organizations, no act by [the plaintiff] or the [church] could expand the statute’s scope.” *Id.* at 949.

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

142. *EEOC v. Presbyterian Ministries*, 788 F. Supp. 1154 (W.D. Wash. 1992).

143. *Id.* at 1155, 1157-58.

144. *Id.* at 1155.

145. *Id.* Note: These are not necessarily the words of the plaintiff.

did not actively inquire into Plaintiff's religion does not provide a mechanism for an employee to subsequently begin to assert a non-Christian religious belief in a manner deemed inappropriate by [the nursing home]."¹⁴⁶

As in *Little*, the *Presbyterian Ministries* court effectively held that religious employers do not waive the 702 exemption merely by hiring a non-co-religionist or failing to investigate actively the employee's religious affiliation during the hiring process. Consequently, religious employers are probably not required to have a "specific religious policy"¹⁴⁷ that establishes a "preference for a particular sect in hiring."¹⁴⁸

Finally, it is important to understand the relationship between the so-called "minister exception" and the 702 exemption. The minister exception provides that Title VII does not apply to the employment relationship between a minister and a church because such application would be unconstitutional under the First Amendment.¹⁴⁹ Whereas the 702 exemption is a statutory exemption from the strictures of Title VII, the minister exception is a constitutional prohibition against applying Title VII to a religious employer altogether.

In an early exposition of the minister exception, one federal circuit court said, "[T]he application of . . . Title VII to the employment relationship existing between . . . a church and its ministers would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."¹⁵⁰ Subsequently, the minister exception has been applied in the Title VII context by several courts.¹⁵¹ Although it is not always clear who qualifies as a minister under the minister exception, the analytical emphasis is often upon the employee's function rather than the employee's title.¹⁵² If the minister exception applies, then courts should not

146. *Id.* at 156.

147. *See Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (stating that the circuit court is aware of no authority for the view requiring religious employers to have specific religious policy).

148. *Killinger*, 113 F.3d at 199.

149. *See McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir. 1972).

150. *Id.* The circuit court used this language to explain why ministers were distinct from nonministerial employees: "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." *Id.* at 558-59.

151. *See, e.g., Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981).

152. *See, e.g., Shaliehsabou v. Hebrew Home of Greater Wash.*, 363 F.3d 299, 309 (holding that "the position of mashgiach" — i.e., kosher food supervisor — is ministerial because the

adjudicate Title VII discrimination claims, including claims of discrimination against gender, race, or national origin.¹⁵³

IV. WHO QUALIFIES FOR THE 702 EXEMPTION?

The scope of the 702 exemption is largely settled, but the question of who qualifies for it is not. There are at least fifteen federal cases where at issue was whether a defendant qualified for the 702 exemption.¹⁵⁴ In eight

“primary duties” of the position “included supervision and participation in religious ritual and worship” and because the “position is important to the spiritual mission of Judaism”); *Alicea-Hernandez*, 320 F.3d at 704 (holding that the position of Hispanic Communications Director for the Catholic Bishop of Chicago “served a ministerial function” because “a press secretary is responsible for conveying the message of an organization to the public as a whole” and “is often the primary communications link to the general populace”). Indeed, more than one court has forthrightly stated that the test is a functional test. *Id.* at 703 (“In determining whether an employee is considered a minister for the purposes of applying this exception, we do not look to ordination but instead to the function of the position.”); *Rayburn*, 772 F.2d. at 1168–69 (citations omitted) (stating that the “‘ministerial exception’ to Title VII first articulated in *McClure v. Salvation Army*, does not depend upon ordination but upon the function of the position.”). *But see* EEOC v. Pac. Press Publ’g Ass’n, 676 F.2d 1272 (9th Cir. 1982) (holding that editorial-secretary was not a minister); *Sw. Baptist Theological Seminary*, 651 F.2d at 277 (holding that seminary faculty were “ministers” but support staff were not); EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980) (holding that a college professor was not minister); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Iowa 1980) (high school teacher not a minister); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (holding that a church secretary was not a minister).

153. *See, e.g., Alicea-Hernandez*, 320 F.3d at 704 (barring Title VII national origin and gender discrimination claim due to minister exception); *Combs*, 173 F.3d at 343–44 (barring Title VII gender and pregnancy discrimination claim due to minister exception); *Rayburn*, 772 F.2d. at 1172 (barring Title VII gender and race discrimination claim due to minister exception).

154. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Killinger*, 196 F.3d at 196; EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458 (9th Cir. 1993); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991); EEOC v. Townley Eng’g & Mfg. Co., 859 F.2d 610 (9th Cir. 1988); EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); EEOC v. Pac. Press Publ’g Ass’n, 676 F.2d 1272 (9th Cir. 1982); *King’s Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974); *LeBoon*, 2004 WL 2931268; *Hopkins v. Women’s Div., Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174 (D.D.C. 2002); *Wirth v. College of the Ozarks*, 26 F. Supp. 2d 1185 (W.D. Mo. 1998); EEOC v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D. Wash. 1992); *Heintzelman v. St. Mary’s Med. Ctr. of Evansville, Inc.*, No. EV 87-203-C, 1989 WL 247140 (S.D. Ind. Jan. 10, 1989); *Fike v. United Methodist Children’s Home of Va., Inc.*, 547 F. Supp. 286 (E.D. Va. 1982); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266 (N.D. Ia. E.D. 1980).

of these cases, the defendant qualified for the 702 exemption.¹⁵⁵ In seven of these cases, the defendant did not qualify for the 702 exemption.¹⁵⁶

A. Cases Where Defendant Did Not Qualify for the 702 Exemption

Of seven cases in which a defendant did not qualify for the 702 exemption, four were decided in the Ninth Circuit.¹⁵⁷ A fifth case, decided in the D.C. Circuit over thirty years ago, is confusing and largely irrelevant because of the administrative law issues involved.¹⁵⁸ The sixth case, decided by a federal district court in Iowa, involved sex discrimination and, for that reason, did not trigger the 702 exemption.¹⁵⁹ In the seventh case, the 702 determination was not essential to the outcome.¹⁶⁰ An early assessment of the case law reveals that defendants litigating outside the Ninth Circuit on clean facts of religion-based employment preferences enjoy excellent odds of qualifying for the 702 exemption.

A more thorough summary of the case law shows that three of seven cases in which defendants did not qualify for the 702 exemption involved sex discrimination.¹⁶¹ Because the 702 exemption does not cover sex discrimination,¹⁶² the defendants in those cases clearly should not have qualified for the 702 exemption. A fourth case involved a commercial manufacturing company.¹⁶³ Because the 702 exemption is only for religious organizations, the secular manufacturing company clearly did not qualify for the 702 exemption even though the owners were Christians and desired their company to be “a Christian, faith-operated business.”¹⁶⁴

In the fifth case, *King's Garden*,¹⁶⁵ a relatively old decision, the defendant was a radio station licensee appealing a Federal

155. *Amos*, 483 U.S. at 327; *Killinger*, 196 F.3d at 196; *Little*, 929 F.2d at 944; *LeBoon*, No. Civ.A.04-430, 2004 WL at 2931268; *Hopkins*, 238 F. Supp. 2d at 174; *Wirth*, 26 F. Supp. 2d at 1185; *Presbyterian Ministries, Inc.*, 788 F. Supp. at 1154; *Heintzelman*, No. EV 87-203-C, 1989 WL at 247140.

156. *Kamehameha*, 990 F.2d at 460; *Townley*, 859 F.2d at 610; *Fremont Christian Sch.*, 781 F.2d at 1362; *Pac. Press Publ'g Ass'n*, 676 F.2d at 1272; *King's Garden*, 498 F.2d at 51; *Fike*, 547 F. Supp. at 286; *Dolter*, 483 F. Supp. at 266.

157. *Townley*, 859 F.2d at 610; *Fremont Christian Sch.*, 781 F.2d at 1362; *Pac. Press Publ'g Ass'n*, 676 F.2d at 1272; *Kamehameha*, 990 F.2d at 458.

158. *King's Garden*, 498 F.2d at 51.

159. *Dolter*, 483 F. Supp. at 266.

160. *Fike*, 547 F. Supp. at 290 (holding that plaintiff failed to state a claim of religious discrimination).

161. *Fremont Christian Sch.*, 781 F.2d at 1362; *Pac. Press Publ'g Ass'n*, 676 F.2d at 1272; *Dolter*, 483 F. Supp. at 266.

162. See *supra* text accompanying notes 114-15.

163. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 611 (9th Cir. 1988).

164. *Id.* at 611-12.

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

Communications Commission (FCC) determination that the radio station licensee “was discriminating on religious grounds in its employment practices.”¹⁶⁶ The radio station licensee was a “non-profit, interdenominational, religious, and charitable organization”¹⁶⁷ whose “activities include[d] a number of ministries whose basic goal is to ‘share Christ world wide’.”¹⁶⁸ The “controversy arose when a job applicant at one of King’s Garden’s stations complained to the FCC that he was asked questions such as ‘Are you a Christian?’, ‘Is your spouse a Christian?’, and the like.”¹⁶⁹

The FCC had its own antidiscrimination regulations and exemptions for religious employers.¹⁷⁰ The precise issue in *King’s Garden* was whether the FCC’s religious exemption adequately conformed to the relevant statutes and to the U.S. Constitution.¹⁷¹ The FCC’s position was that “only ‘those persons hired to espouse a particular religious philosophy over the air should be exempt from the non-discrimination rules.’”¹⁷²

In contrast, the 702 exemption, as amended by Congress in 1972, covered all “activities” of religious organizations, not merely their “religious activities.”¹⁷³ The *King’s Garden* court stated that the 702 exemption as amended in 1972 “is of very doubtful constitutionality, and Congress has given absolutely no indication that it wished to impose the exemption upon the FCC.”¹⁷⁴ Thus, the circuit court sidestepped the constitutional issue¹⁷⁵ and held that the 702 exemption did not apply to the

166. *Id.* at 52.

167. *Id.*

168. *Id.*

169. *Id.* at 52 n.1. The circuit court continued: “The Commission forwarded the complaint to King’s Garden . . . King’s Garden responded by claiming the statutory and constitutional right to discriminate on religious grounds with respect to all positions of employment at its radio stations.” *Id.* (citations omitted).

170. *King’s Garden*, 498 F.2d at 52.

171. The circuit court said:

The Commission ruled . . . that only “those persons hired to espouse a particular religious philosophy over the air should be exempt from the non-discrimination rules.” This position was reaffirmed after enactment of the 1972 exemption to the Civil Rights Act mentioned in text. The question in this case is whether the Commission’s qualified exemption facially conforms to relevant statutes and the Constitution. We do not deal with application of the exemption to any particular job position at King’s Garden.

Id. at 52 n.1.

172. *Id.*

173. *See supra* text accompanying notes 118-21.

174. *King’s Garden*, 498 F.2d at 53.

175. “A definitive resolution of the constitutional issues raised by the 1972 exemption can therefore be deferred to a case where they are squarely raised.” *Id.* at 57-58.

radio station because the radio station was subject to the FCC's own rules. The circuit court found that the FCC was "justified in finding the [amended 702 exemption] irrelevant to its regulation"¹⁷⁶ of the defendant. Thus, the issue of whether the defendant in *King's Garden* qualified for the 702 exemption was never squarely reached.

King's Garden was decided in 1974. Thirteen years later, in *Amos*,¹⁷⁷ the U.S. Supreme Court gave a "definitive resolution of the constitutional issues raised by the 1972 exemption."¹⁷⁸ In *Amos*, the Court held that the 702 exemption applies even to the secular activities of religious organizations.¹⁷⁹ While the precise issue in *King's Garden* was not at issue in *Amos*, the constitutionality of the 702 exemption was no longer in doubt.

Two remaining cases squarely addressed the 702 exemption. In the first case, *Fike v. United Methodist Children's Home of Virginia*,¹⁸⁰ the district court, on remand from the Fourth Circuit,¹⁸¹ held that the defendant was not a religious organization, and thus did not qualify for the 702 exemption.¹⁸² The defendant in *Fike* was a children's home that "was founded by and . . . had close ties with the Methodist Church."¹⁸³ Although the home originally accommodated children placed in the home by "private sources through Christian auspices,"¹⁸⁴ over time, the state placed more children in the home, and the home adapted to accommodate a "new type of youngster"¹⁸⁵ and the accompanying state funding.¹⁸⁶ Although the children's home offered some evidence of its ties to the Methodist Church and other religious indicia,¹⁸⁷ countervailing evidence suggested that, by

176. *Id.* at 58 (emphasis added).

177. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

178. *King's Garden*, 498 F.2d at 57-58.

179. *Amos*, 483 U.S. at 338.

180. *Fike v. United Methodist Children's Home of Va., Inc.*, 547 F. Supp. 286 (E.D. Va. 1982).

181. The district court originally dismissed the plaintiff's Title VII religious discrimination claim after finding no religious discrimination. *Fike v. United Methodist Children's Home of Va., Inc.*, 493 F. Supp. 935, 938 (D.C. Va. 1980). But, on appeal, and in an unpublished opinion, 660 F.2d 489 (4th Cir. 1981), the Fourth Circuit reversed and remanded, directing the district court to determine whether the children's home was a sectarian or secular organization. *Fike*, 547 F. Supp. at 287-88.

182. *Fike*, 547 F. Supp. at 290.

183. *Id.* at 288.

184. *Id.*

185. *Id.*

186. *Id.* at 289.

187. "During plaintiff's tenure, the Board of Trustees of the Home drafted a 'statement of church relatedness' to pronounce officially its ties with the Church. Trustees of the Home must be confirmed by the Virginia Methodist Annual Conference. A trustee must be a member in good standing of the Methodist Church." *Fike*, 547 F. Supp. at 289.

the time of the alleged discrimination, the children's home was, "quite literally, Methodist only in name."¹⁸⁸

The children's home had tried to downplay its religiosity "for the purpose of establishing that [it] was secular and therefore not in violation of the establishment clause in receiving State funds."¹⁸⁹ The *Fike* court found the children's home to be duplicitous because it "tried to serve God and mammon by representing to the Church its sectarian nature and representing to the government its secular nature."¹⁹⁰ The *Fike* court concluded, "For an organization to be considered 'religious' requires something more than a board of trustees who are members of a church. . . . [T]he United Methodist Children's Home is, quite literally, Methodist only in name. It is a secular institution."¹⁹¹ Therefore, the children's home in *Fike* did not qualify for the 702 exemption.

The reasoning of the *Fike* court provides insight into the analysis required to determine whether an organization qualifies for the 702 exemption.¹⁹² In *Fike*, the defendant children's home clearly had

188. *Id.* at 290. The *Fike* court noticed the following facts:

[The children's home] admits that the chapel is no longer used for religious services. In fact, no religious services have been held on the campus since 1978. Aside from a painting of the Bishop in the administration building, there are no religious symbols whatsoever in the cottages or anywhere else on the campus. While a Bible may be provided to any child who specifically requests it, Bibles are not provided to each child and are not placed in each cottage; while a chaplain is on the staff, the chaplain never engages in Bible study or prayer groups. In fact, such instruction in theology as is conducted by the chaplain involves various perspectives and concepts, including without any normative teaching, atheism. Attendance at religious services is not encouraged and is purely voluntary. Indeed, in light of the affidavits of responsible officials of the Home filed in this case, it would appear that the incumbent chaplain is indifferent to the Christian religion.

Id. at 289-90.

189. *Id.* at 290 n.2.

190. *Id.* at 290.

191. *Id.*

192. Because the *Fike* court held to its original decision that the plaintiff had "failed to state a claim of religious discrimination," the determination as to the children's home secularity was, ultimately, somewhat irrelevant. *Fike*, 547 F. Supp. at 290. The *Fike* court itself recognized this:

This Court understands that a determination of the secular or sectarian nature of the Home is necessary to decide whether the Home is entitled to the religious exemption in § 2000e-1. But the religious exemption from a charge of religious discrimination is unnecessary if, as this Court held, plaintiff failed to state a claim of religious discrimination. While the Fourth Circuit did not question this Court's holding that plaintiff had failed to state such a claim, its directions to this Court imply such questioning; otherwise, the Fourth Circuit has sent this Court on a fool's errand. However, the Fourth Circuit opinion provided no guidance for this

abandoned whatever religious character it originally had.¹⁹³ Further, the children's home apparently was willing to sacrifice its religious emphasis in exchange for State funds.¹⁹⁴ Writing a "statement of church relatedness"¹⁹⁵ and requiring trustees to be members "in good standing of the Methodist Church"¹⁹⁶ simply were not enough to qualify the children's home for the 702 exemption.¹⁹⁷

For largely the same reasons, the Ninth Circuit reached the same result under similar facts in *EEOC v. Kamehameha/Bishop Estate*.¹⁹⁸ In *Kamehameha*, the defendants were two schools that had a policy of hiring only Protestant teachers.¹⁹⁹ The policy was dictated by the terms of the Bishop estate, which had established the schools.²⁰⁰ According to those terms, "[T]eachers of said schools shall forever be persons of the Protestant religion."²⁰¹ Both schools eventually were sued for religious discrimination when one of the schools did not hire a job applicant because the applicant was not Protestant.²⁰² In their defense, the schools claimed the 702 exemption.²⁰³

The *Kamehameha* court began its analysis of the 702 exemption by stating it would "construe the statutory exemptions narrowly."²⁰⁴ The circuit court then found that "[n]o religious organization has ever controlled or supported the Schools, and the Schools are not affiliated with any denomination of Protestants or with any organization or association of religious schools."²⁰⁵ The circuit court also found that "[t]he Schools are a part of the Bishop Trust, which is a large and overwhelmingly secular business."²⁰⁶ According to the circuit court, the schools' "purpose and emphasis . . . have shifted over the years from providing religious

Court on the discrimination claim and indicated no errors in the law or the logic relied on by this Court.

Id. at 288 n.1.

193. In the words of the court, "as far as the direction given the day-to-day life for the children at the [children's home] is concerned, it is practically devoid of religious content or training, as such." *Id.* at 290.

194. *Id.* at 289-90.

195. *Id.* at 289.

196. *Id.*

197. *Fike*, 547 F. Supp. at 289.

198. *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993).

199. *Id.* at 459.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Kamehameha*, 990 F.2d at 459.

204. *Id.* at 460.

205. *Id.* at 461.

206. *Id.*

instruction to equipping students with ethical principles that will enable them to make their own moral judgments.”²⁰⁷ The circuit court also found that the schools “have explicitly disavowed any effort to convert non-Protestant students.”²⁰⁸ Even though the schools demonstrated some religious character,²⁰⁹ the court ultimately concluded that “the general picture of the Schools reflects a primarily secular rather than a primarily religious orientation.”²¹⁰ The schools in *Kamehameha* did not qualify for the 702 exemption.²¹¹

The *Kamehameha* court concluded that the schools were primarily a secular organization.²¹² The *Kamehameha* Schools apparently imposed the Protestant requirement not out of any “desire to create communities faithful to their religious principles,”²¹³ but rather to comply with the terms of the trust.²¹⁴ The schools were not affiliated with any church or other religious organization, and therefore were forced to satisfy independently the requirements of the 702 exemption.²¹⁵ Because “the general picture of the [s]chools reflect[ed] a primarily secular rather than a primarily religious orientation,”²¹⁶ the circuit court refused to extend the 702 exemption to the schools.²¹⁷ The schools failed to show genuine religious motive and

207. *Id.* at 462.

208. *Kamehameha*, 990 F.2d at 463.

209. The court explained:

Student activities include daily prayer in grades kindergarten through eight; athletic teams pray before games; daily bulletin includes a Bible verse; boarding students pray before meals and attend church weekly; students go to other islands to lead services; many mandatory school functions include prayer and hymns in addition to celebrations of Hawaiian culture.

Id. at 462–63.

210. *Id.* at 461.

211. *Id.* at 463–64. The court subsequently also refused to qualify the schools under the 703(e)(1) and 703(e)(2) exemptions. *Id.* at 464–65.

212. *Id.* at 463–64.

213. *Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991).

214. It seemed as if the trust which had established the schools continued to maintain the schools financially, although the circuit court did not explicitly say so.

215. The circuit court emphasized the schools’ independence from any church: “[W]here the school is not owned by a church, the courts must determine in each case whether a particular educational institution is a religious organization.” *Kamehameha*, 990 F.2d at 460 n.5. “In view of the narrow reach of the [702] exemption, it is not surprising that we have found no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church.” *Id.* at 461 n.7.

216. *Id.* at 461.

217. *Id.*

character; the religious preference dictated by the estate that had established the schools was not enough.²¹⁸

A summary of seven cases in which defendants did not qualify for the 702 exemption goes like this. Three of the cases involved sex discrimination.²¹⁹ Because the 702 exemption does not include sex discrimination, those organizations did not qualify for the 702 exemption. One case involved a for-profit commercial manufacturing company.²²⁰ Because the 702 exemption includes only religious organizations, that organization did not qualify for the exemption. Two cases involved organizations that had devolved into or were primarily secular entities.²²¹ Because the 702 exemption includes only religious organizations, those organizations did not qualify for the 702 exemption. Finally, *King's Garden*,²²² a pre-*Amos* ruling involving an issue of administrative law, has little bearing on the analysis in this Article. For the most part, defendants that did not qualify for the 702 exemption clearly should not have qualified for the 702 exemption.

B. Cases Where Defendant Qualified for the 702 Exemption

In at least eight cases, defendants have qualified for the 702 exemption.²²³ In these cases, the defending organizations have included a nonprofit gymnasium open to the public and operated by religious entities associated with the Church of Jesus Christ and Latter-Day Saints,²²⁴ a Baptist university,²²⁵ a parish-operated Roman Catholic school,²²⁶ a Jewish

218. "The fact that the Protestant-only requirement appears in Mrs. Bishop's will cannot in itself alter the result." *Id.* at 466. This conclusion by the circuit court was made in the context of holding that the Protestant-only requirement was not a bona fide occupational qualification but it nevertheless also sheds light on the 702 exemption context. *Id.* at 466-67.

219. EEOC v. Fremont Christian Sch., 781 F.2d 1362 (9th Cir. 1986); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Ia. E.D. 1980).

220. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 611 (9th Cir. 1988).

221. Fike v. United Methodist Children's Home of Va., Inc., 547 F. Supp. 286, 290 (E.D. Va. 1982); EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 461 (9th Cir. 1993).

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

223. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997); *Little*, 929 F.2d at 944; *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, No. Civ.A.04-430, 2004 WL 2931268 (E.D. Pa. Dec. 16, 2004); *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174 (D.D.C. 2002); *Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185 (W.D. Mo. 1998); EEOC v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D. Wash. 1992); *Heintzelman v. St. Mary's Med. Ctr. of Evansville, Inc.*, No. EV 87-203-C, 1989 WL 247140 (S.D. Ind. Jan. 10, 1989).

224. *Amos*, 483 U.S. at 330. It was not contested that the operating organizations were "religious organizations for purposes of § 702." *Id.* at 330 n.3.

225. *Killinger*, 196 F.3d at 199.

226. *Little*, 929 F.2d at 945.

community center,²²⁷ an affiliated auxiliary of the United Methodist Church,²²⁸ a nondenominational Christian college,²²⁹ a retirement home operated by a Presbyterian church,²³⁰ and a medical center affiliated with and operated by a religious order of the Roman Catholic Church.²³¹

In these eight cases, one immediately notices that most of the organizations that qualified for the 702 exemption were either a church or affiliated with a church.²³² Because churches and church-operated activities clearly qualify for the 702 exemption, this observation is not surprising.²³³

The three remaining cases require further analysis. Two of the cases involved educational institutions — a Baptist university and a nondenominational Christian college. These cases shed little light on the question posed in this Article because the 702 exemption explicitly includes religious educational institutions.²³⁴ The third case, however, involved a Jewish Community Center. This Article argues that this Jewish Community Center is the first parachurch organization in federal law to qualify for the 702 exemption.

227. *LeBoon*, 2004 WL 2931268, at *1.

228. *Hopkins*, 238 F.2d at 176. Defendant United Methodist Women was an auxiliary to the Women's Division of the General Board of Global Ministries of the General Conference of the United Methodist Church. *Id.* at 176.

229. *Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185, 1187–88 (W.D. Mo. 1998).

230. *EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 1155 (W.D. Wash. 1992). The court stated that the nursing home was operated by Presbyterian Ministries, Inc., though it was not clear whether they were affiliated with the Presbyterian Church. But, in its summary of the facts, the court states that the plaintiff was informed that the retirement home “is operated as a Christian retirement home by the Presbyterian Church.” *Id.* Treatment of the case in this article is based on this language.

231. *Heintzelman v. St. Mary's Med. Ctr. of Evansville, Inc.*, No. EV 87-203-C, 1989 WL 247140, at *1 (S.D. Ind. Jan. 10, 1989).

232. In *Presbyterian Ministries*, it is unclear whether the retirement home was owned by a church. The court applied the 702 exemption to Exeter House, “a retirement home [] operated by Presbyterian Ministries, Inc.” *Presbyterian Ministries*, 788 F. Supp. at 1155. The court does not directly say who owned the home. But, the court does say this: “It was explained to Plaintiff that Exeter House is operated as a Christian retirement home by the Presbyterian Church . . .” *Id.* This language seems to indicate that Presbyterian Ministries, Inc. may itself have been owned by or affiliated with the Presbyterian Church. For purposes of this Article, then, the retirement home was effectively owned by a church.

233. In 1993, the *Kamehameha* court recognized this same thing: “In view of the narrow reach of the [702] exemption, it is not surprising that we have found no case holding the exemption to be applicable where the institution was not wholly or partially owned by a church.” *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458, 461 n.7 (9th Cir. 1993).

234. “This title shall not apply . . . to a[n] . . . educational institution . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . educational institution . . . of its activities.” 42 U.S.C.A. § 2000e-1 (West 2005).

1. Religious Educational Institutions Qualify for the 702 Exemption

The educational institution cases mentioned above involved a Baptist university and a nondenominational Christian college. In *Killinger v. Samford University*,²³⁵ the court declared that the defendant university was “doubtlessly a ‘religious educational institution’.”²³⁶ In support of this conclusion, the *Killinger* court recounted extensive evidence of the university’s religious character.²³⁷ First, the court analyzed the relationship between the university and its founding organization, the Alabama Baptist State Convention. Although “[the university had] amended its charter to remove the Convention’s power to elect the school’s trustees,”²³⁸ the court noted that the university “receives roughly seven percent of its annual budget (over four million dollars) from the Convention.”²³⁹ The court also noted that the university “reports financially to . . . the Convention.”²⁴⁰ Thus, while it was unclear whether the Alabama Baptist State Convention “owned” or “operated” the university, there were clearly strong financial ties between the Convention and the university.

In addition to emphasizing the university’s ties with the Alabama Baptist State Convention, the *Killinger* court also examined the religious qualities of the university itself.²⁴¹ The circuit court noted the university’s charter designated its chief purpose as “the promotion of the Christian Religion throughout the world by maintaining and operating . . . institutions dedicated to the development of Christian character in high scholastic standing.”²⁴² Faculty members who taught religion courses at Samford had to subscribe to a statement of Christian faith,²⁴³ and “all students [were] required to attend chapel.”²⁴⁴ Overall, the circuit court rejected the notion that “some kind of rigid sectarianism is a requirement for the [702] exemption”²⁴⁵ and held that the university was “doubtlessly a ‘religious educational institution.’”²⁴⁶

235. 113 F.3d 196 (11th Cir. 1997).

236. *Id.* at 199.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Killinger*, 113 F.3d at 199.

241. In fact, because the circuit court devotes a separate section to the 703(e)(2) exemption — providing for educational institutions that are in “whole or substantial part, owned, supported, controlled, or managed by a particular religion,” 42 U.S.C. § 2000e-2(e) — it seems the circuit court applied the 702 exemption to the University on the basis of the University’s independent religious qualities.

242. *Killinger*, 113 F.3d at 199.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

The same was true in the second educational institution case, *Wirth v. College of the Ozarks*.²⁴⁷ In applying the 702 exemption²⁴⁸ to the nondenominational Christian college in *Wirth*, the court cited the following facts:

The Presbyterian Church Synod founded the College of the Ozarks in 1906. In 1986, the college was incorporated in the state of Missouri as a not-for-profit corporation. The charter mission of the college is “providing Christian education for youth of both sexes, especially those found worthy but who are without sufficient means to procure such training.” Additionally, the college is a member of the Coalition for Christian Colleges and Universities, a national organization of evangelical Christian institutions, and a member of the Association of Presbyterian Colleges and Universities.²⁴⁹

The plaintiff in *Wirth* argued that the college’s nondenominationalism prevented the College from firing the plaintiff, a Roman Catholic, because the plaintiff’s “views [were] also Christian.”²⁵⁰ The *Wirth* court found this argument to be without merit.²⁵¹ In support of its conclusion, the *Wirth* court stated, “The exemptions under Title VII . . . apply, by their terms, to ‘religious corporations’ notwithstanding the particular beliefs which the religious corporations seek to foster.”²⁵² The *Wirth* court continued, “The [college] clearly meets the definition of a religious corporation and therefore is not subject to Title VII . . . claims based upon religion.”²⁵³ The college was, therefore, allowed to “employ only persons whose beliefs are consistent with the views of the [college].”²⁵⁴ Thus, the *Wirth* court held that the nondenominational Christian college could fire a Roman Catholic employee.²⁵⁵

At least, *Killinger* and *Wirth* stand for the proposition that religious universities affiliated with greater religious bodies qualify for the 702 exemption. At most, the cases stand for the proposition that religious universities independently qualify for the 702 exemption. Either way, *Killinger* and *Wirth* have little to say about whether parachurch

247. *Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185 (W.D. Mo. 1998).

248. The *Wirth* court also applied the 703(e)(2) exemption. *Wirth*, 26 F. Supp. 2d at 1188. The Missouri Human Rights Act was also at issue. *Id.*

249. *Id.* at 1187. It is unclear whether the Presbyterian Church Synod continued to “own” or “operate” the College.

250. *Id.* at 1188.

251. *Id.*

252. *Id.*

253. *Wirth*, 26 F. Supp. 2d at 1188.

254. *Id.*

255. *Id.*

organizations qualify for the 702 exemption because most parachurch organizations are not religious colleges or universities.

2. *LeBoon* — A Prototypical Parachurch Case

*LeBoon v. Lancaster Jewish Community Center Association*²⁵⁶ arguably is²⁵⁷ the first federal case in which a parachurch organization successfully qualified for the 702 exemption.²⁵⁸ The defendant in *LeBoon* was a Jewish Community Center, characterized as “a nonprofit Jewish organization.”²⁵⁹ The plaintiff employee, a business manager,²⁶⁰ was an evangelical Christian.²⁶¹ The employee alleged she was fired for religious reasons after the Jewish Community Center discovered she had attended a “Jews For Jesus” concert at her church.²⁶² The *LeBoon* court held that the Jewish Community Center qualified for the 702 exemption and therefore could fire the plaintiff for religious reasons.²⁶³

The Jewish Community Center in *LeBoon* is a good example of a parachurch organization. Unlike the defendants in most other 702 exemption cases, the Jewish Community Center was not a traditional religious organization, nor was it affiliated with a traditional religious organization. The court found that the Jewish Community Center was “not run by, and [was] not directly answerable to . . . any one synagogue or denomination of Judaism.”²⁶⁴ The Jewish Community Center was both religious and independent. This is precisely the definition of a parachurch organization as proposed and illustrated in this Article.²⁶⁵

In conducting its analysis of whether the Jewish Community Center was primarily religious, the *LeBoon* court noted the following factors.

256. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, No. Civ.A.04-430, 2004 WL 2931268, (E.D. Pa. Dec. 16, 2004), *reconsidered in LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, No. Civ.A. 04-430, 2005 WL 387642 (E.D. Pa. Feb. 17, 2005).

257. It depends how you define parachurch organization. Based on the definition, understanding, and illustration of parachurch organization in this Article, the assertion in this statement seems to hold true.

258. The children’s home in *Fike*, and the schools in *Kamehameha*, are something like parachurch organizations, in some sense. That is, both defendant organizations provided some indicia of religiousness, and both defendant organizations were relatively independent of other religious institutions.

259. *LeBoon*, 2004 WL 2931268, at *1.

260. *Id.*

261. *Id.*

262. *Id.* at *2. The *LeBoon* court decided the case on motion for summary judgment and therefore construed the facts in favor of the plaintiff. *Id.* at *3 (“When ruling on a summary judgment motion, the court must construe the evidence and any reasonable inferences drawn from it in favor of the non-moving party.”).

263. *Id.* at *3.

264. *LeBoon*, 2004 WL 2931263, at *4.

265. *See supra* Part III.

First, the *LeBoon* court noted the strong link between the Jewish Community Center and the surrounding Jewish community. Rabbis from local synagogues had served on the center's board of directors.²⁶⁶ Second, documents prepared by the Jewish Community Center suggested it specifically served the Jewish community.²⁶⁷ The *LeBoon* court cited the center's mission statement, which stated that the Jewish Community Center sought to "develop, involve and sustain a cohesive Jewish Community through Identity, Education and Cooperation for all Ages."²⁶⁸ The *LeBoon* court also noted that the center engaged in primarily Jewish activities and customs.²⁶⁹ Third, in addition to considering the Jewish Community Center's mission statement and activities, the *LeBoon* court also examined notes from board meetings as evidence of the community center's religiosity. As the *LeBoon* court put it, "Notes of board meetings also reveal a pervasive Jewish orientation."²⁷⁰ Whether or not board meeting notes are the best available evidence of religiosity, the important aspect of the *LeBoon* court's analysis is the finding that the Jewish

266. *Id.*

267. *Id.*

268. *LeBoon*, 2005 WL 387642, at *3 (citation omitted).

269. These activities included "the celebration of Jewish holidays such as Purim and Chanukah, the attachment to each door in the building of a kosher mezuzah, the maintenance of a kosher kitchen, the holding of a 'Melavah Malka' program, and numerous education programs on Jewish themes." *Id.*

270. *Id.*

Aside from planning the Jewish activities described above, the board members discussed other events specifically of interest to Jews, such as a community trip to Israel, and a Jewish Federation program about Jews in the former Soviet Union. Concepts of relevance only to Jews were also employed, such as using Hebrew terms to refer to donors, and asking for donations in the amount of \$613, where 613 is a number of Jewish significance.

... [The community center's] membership drive talking points, as set forth in its ... board meeting notes, reflected its concept of itself as a specifically Jewish organization. For example, one point was that "The LJCC is the best point of positive contact between all segments of the Lancaster Jewish community." Other points included: "The Center produces Jewish education and cultural programming for the whole community[.]" "The LJCC is a meeting ground for our own Jewish youth[.]" "The LJCC is the first point of contact for Jews new to the area[.]" ... "The Center is the place for Jewish seniors to meet[.]" and "The LJCC is the community connection to Israel."

Id. (emphasis added).

Community Center had a “pervasive Jewish orientation”²⁷¹ and a “concept of itself as a specifically Jewish organization.”²⁷²

Weighing these types of religious characteristics requires a qualitative analysis²⁷³ that, as opposed to a more rigid focus on legal structure or sources of funding, is more appropriate in 702 exemption cases due to the statute’s general language.²⁷⁴

Evangelical Christians, while sympathizing with the fired employee in *LeBoon*, should recognize the holding as a vindication of an important religious liberty: the right of religious employers to require religious conformity in their employees’ beliefs and lifestyles.²⁷⁵ Courts have protected this right as to traditional religious organizations and their affiliates.²⁷⁶ Likewise, courts should now follow *LeBoon* by applying the 702 exemption to parachurch organizations.

V. STATUTORY INTERPRETATION AND THE 702 EXEMPTION

The Court of Appeals for the Ninth Circuit has adopted a less expansive view of the 702 exemption than perhaps some other circuits.²⁷⁷ In four cases involving a defendant who invoked the 702 exemption, the Ninth Circuit refused to apply the exemption in each case.²⁷⁸ There may be a correlation between the outcomes in these cases and the methodology used by the court in interpreting the 702 exemption. In three of the four cases in

271. *Id.*

272. *Id.*

273. In its original opinion granting the LJCC’s motion for summary judgment, the *LeBoon* court gave greater weight to the community center’s sources of funding. *See supra* note 99.

274. For a discussion of methodologies for interpreting the 702 exemption, *see supra* text accompanying notes 113-53.

275. One observer of evangelical Christianity was quick to discern precisely this point. *See* Ted Olsen, *Weblog: Bad News for Fired Christian is Good News for Christian Organizations*, CHRISTIANITY TODAY, Dec. 21, 2004, <http://www.christianitytoday.com/ct/2004/151/21.0.html>.

276. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 330-40 (1987).

277. The trial court in *Kamehameha* stated this explicitly in vacating, on remand from the Ninth Circuit, its previous order granting the Kamehameha Schools motion for summary judgment on grounds that the Schools qualified for the 702 exemption. According to the District Court for the District of Hawaii, “In reaching its decision, the Ninth Circuit panel (Judges Browning, Norris, and Reinhardt) ruled that the [702 exemption] must be construed narrowly; whereas all other Circuit Courts which have considered the issue have held that [the 702 exemption] should be construed broadly.” *EEOC v. Kamehameha Schs./Bishop Estate*, 848 F. Supp. 899, 899-900 (D. Haw. 1993). The *Kamehameha* court also noted that the “U.S. Supreme Court declined to consider this conflict between the circuits.” *Id.*

278. *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993); *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986); *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272 (9th Cir. 1982).

which the Ninth Circuit refused to apply the 702 exemption to the defendant employer, the court looked to legislative history to support its interpretation of Title VII and the 702 exemption.²⁷⁹ This strategy is best illustrated by the *Townley* case.²⁸⁰

In *Townley*, the court refused to extend the 702 exemption to the Christian owners of a manufacturing company that required its employees to attend a weekly devotional service during work hours.²⁸¹ Employees were paid for the time they spent at the devotional services.²⁸² When an employee sued the manufacturing company for religious discrimination, the defendants argued that because the company was a religious corporation for the purposes of the 702 exemption, the defendants could require employees to attend weekly devotional services.²⁸³

According to the defendants, the weekly devotional services were just one way the defendants sought to honor their “covenant with God that their business ‘would be a Christian, faith-operated business.’”²⁸⁴ In addition to holding devotional services, the defendants also put a Gospel tract in each piece of outgoing mail, printed Bible verses on company documents, and gave money to various churches and missionaries.²⁸⁵ Faced with these facts, the Ninth Circuit had to decide whether the trial court had correctly denied the 702 exemption to the defendants.

The circuit court immediately looked to the legislative history of the 702 exemption.²⁸⁶ Admitting that the available legislative history was not

279. *Townley*, 859 F.2d at 617–18; *Fremont Christian Sch.*, 781 F.2d at 1366; *Pac. Press*, 676 F.2d at 1276–77.

280. *Townley* is the best example for two reasons. First, the *Kamehameha* court follows *Townley*. The *Kamehameha* court said, “We . . . observed [in *Townley*] [that] ‘Congress’ conception of the scope of [the 702 exemption] was not a broad one. All assumed that only those institutions with extremely close ties to organized religion would be covered. Churches, and entities similar to churches, were the paradigm.” *Kamehameha*, 990 F.2d at 460 (citing *Townley*, 859 F.2d at 618). This language from the opinion in *Townley* was developed in *direct reliance* on the use of legislative history. See *Townley*, 859 F.2d at 617–18. Second, the *Fremont Christian School* and *Pacific Press Publishing Association* courts used legislative history for a more limited purpose — to support holdings that the 702 exemption includes only religious discrimination. *Fremont Christian Sch.*, 781 F.2d at 1366; *Pac. Press Publ’g Ass’n*, 676 F.2d at 1276–77. See *supra* text accompanying notes 113–53 (discussing the scope of the 702 exemption). Therefore, the use of legislative history in the *Fremont* and *Pacific Press* cases is not on point for the immediate issue of who qualifies for the 702 exemption.

281. *Townley*, 859 F.2d at 617.

282. *Id.* at 612.

283. *Id.* at 617.

284. *Id.* at 612.

285. *Id.*

286. In less than three sentences after raising the issue of the 702 exemption, the *Townley* court stated: “A brief review of the relevant legislative history is necessary.” *Townley*, 859 F.2d at 617. As the *Townley* court found:

definitive,²⁸⁷ the *Townley* court nevertheless concluded that this legislative history indicated Congress intended a narrow scope for the 702 exemption.²⁸⁸ Remarkably, the *Townley* court drew the following conclusion from its survey of the scant legislative history: "All assumed that only those institutions with extremely close ties to organized religions would be covered. Churches, and entities similar to churches, were the paradigm."²⁸⁹ This conclusion is remarkable because, on the basis of a handful of recorded statements made by a few legislators, the *Townley* court found that "all assumed" the scope of Title VII was narrow.²⁹⁰

Title VII of the bill [that was the basis of much of the Civil Rights Act of 1964] included a section [the 702 exemption] that stated the title would not apply to a "religious corporation, association, or society." The committee report accompanying the bill did not elaborate on the section. However, the section was the subject of some debate in the House after Representative Purcell proposed amending [the bill] to allow an educational institution to discriminate on the basis of religion if the institution was wholly or partly supported or managed "by a particular religion or by a particular religious corporation, association, or society," or if the institution's curriculum was "directed toward the propagation of a particular religion."

Id. The *Townley* court next said:

The debate on this proposal is relevant because an issue in the debate was whether such institutions were already protected by the "religious corporation" exemption. The consensus was that they were not protected if they were merely "affiliated" with a religious organization. For example, Representative Celler, the chairman of the Judiciary Committee and one of the drafters of the bill, was asked whether a church-supported orphanage would already be covered by the bill. He said, "If it is a wholly church supported organization, that is, a religious corporation that comes under [then] section 703." This coverage was considered too narrow, and the House passed the proposed amendment.

Id. (citation omitted) (emphasis omitted).

287. *Id.* ("[The House Bill] was amended by the Senate in 1964, and [the enacted law] was amended . . . by Congress in 1972, but the debate on the amendments sheds no more light on the definition of religious corporations.").

288. *Id.* at 617–18 ("The debate over Representative Purcell's amendment . . . indicate[s] . . . that Congress's conception of the scope of [the 702 exemption] was not a broad one.").

289. *Id.* at 618.

290. The *Townley* court's conclusion is confusing because we cannot be sure what was meant by "all assumed." By "all assumed," the *Townley* court seems to have meant that "all Congress assumed," rather than the more restrictive meaning where "all assumed" would refer only to the legislators involved in the particular legislative debate. This broad reading is bolstered by the immediately preceding sentence in which the *Townley* court refers to "Congress' conception" of the scope of the 702 exemption: "Congress' conception of the scope of the [702 exemption] was

The holding in *Townley* is a narrow construction of the 702 exemption. Although the commercial manufacturing company should not have qualified for the 702 exemption, the *Townley* court's narrow interpretation of the statute might exclude bona fide parachurch organizations from qualifying for the 702 exemption. Recall that the cardinal feature of parachurch organizations is independence from traditional religious organizations.²⁹¹ Because the *Townley* court suggested that "only those institutions with extremely close ties to organized religions"²⁹² would qualify for the 702 exemption, the Ninth Circuit's approach seems categorically to rule out parachurch organizations.

The interpretative strategy used in *Townley* can be characterized as a purposivist approach.²⁹³ The approach is unpersuasive, at least in the context of interpreting the 702 exemption.²⁹⁴ First, as the *Townley* court itself admits, the legislative history is "far from comprehensive."²⁹⁵ Second, some wonder why the matter-of-course remarks of a handful of legislators made over thirty years ago have any bearing on interpreting a statute today.²⁹⁶

Third, it can be imprudent for courts to attribute a collective "conception," "assumption," or "intent" to Congress because, according to at least one legal scholar, it is impossible for Congress to have an intent.²⁹⁷

not a broad one. All assumed that only those institutions with extremely close ties to organized religion would be covered." *Id.* at 617-18.

291. *See supra* text accompanying notes 84-87.

292. *Townley*, 859 F.2d at 618.

293. A classic exposition of the purposivist methodology, as used in *Townley*, is found in *United States v. American Trucking Associations*: "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the *intent* of Congress; *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940) (emphasis added).

294. In my discussion of the *Townley* court's approach to statutory interpretation, I have benefited much from my experience in Professor Amy Coney Barrett's excellent seminar on statutory interpretation. Of course, I alone am responsible for the views expressed in this Article.

295. *Townley*, 859 F.2d at 617.

296. *See generally* William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988) (giving reasons for questioning even the more recent statements of lawmakers).

297. Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("legislatures comprise many members . . . [and therefore] do not have 'intents' or 'designs,' hidden yet discoverable." In this way, although "[e]ach member may or may not have a design[,] [t]he body as a whole . . . has only outcomes."). Easterbrook, *supra* note 297, at 547. Easterbrook's point may sound like common sense — at first. But as an issue of social science, group action is subject to searching (and ancient) analysis. *See, e.g.*, JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 23-37 (1998) (discussing, in II.2-II.4, Aquinas' social theory, which accounts for group acts as well as individual acts). Finnis says, "There is a social act, we can say, when some proposal for co-ordinated action is held out to relevant members of the society in such a way that they can, and some or all do, choose to participate in the proposed action precisely as the action thus, 'publicly,' proposed." *Id.* at 28.

If this is true, then it is irresponsible to impute the opinions of a few members to the entire institution to declare an institutional “intent,” “assumption,” or “conception.”²⁹⁸

Fourth, deciding cases on the basis of legislative intent implicates the legitimacy of judicial action. According to Justice Scalia, “It is the law that governs, not the intent of the lawgiver.”²⁹⁹ On this account, judges have no business attempting to divine legislative intent. Rather, judges should attempt to state only what the law itself means.

Sixth, the *Townley* court failed to consider the significance of the 1972 amendment, in which Congress greatly expanded the scope of the 702 exemption.³⁰⁰ The 1972 amendment suggested a congressional intent to broaden the 702 exemption. The *Townley* court’s failure to account for the 1972 amendment encourages the skeptical observer to speculate whether the *Townley* court fell prey to one of the main dangers of using legislative history to determine congressional intent:

The practical threat . . . of pursuing unexpressed legislative intents . . . is that judges will in fact pursue their own objectives and desires When you are told to decide, not on the basis of what the legislature said, but on the basis of what it meant, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person should have meant; and that will surely bring you to the conclusion that the law means what you think it ought to mean³⁰¹

298. Justice Scalia persuasively makes this point:

[W]ith respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by legislative history are bound to be false. Those issues almost invariably involve points of relative detail, compared with the major sweep of the statute in question. That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained *any* view with regard to such issues is utterly beyond belief. For a virtual certainty, the majority was blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved.

ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 32 (1997).

299. *Id.* at 17. Justice Scalia continues, “That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.” *Id.*

300. *See supra* text accompanying notes 116-21.

301. SCALIA, *supra* note 298, at 17-18. The *American Trucking* court recognized this danger but suggested it was not fatal to the purposivist approach:

When judges limit themselves to interpreting the text of a statute, the danger of pursuing their own objectives in interpreting the law is real. However, when judges open themselves to the possibilities and promises of interpreting what lawmakers meant instead of what lawmakers said, that danger is both real and imminent.

Seventh, the legislative history can be used to support a drastically different account of what Congress intended for the 702 exemption than that adopted by the *Townley* court. For instance, in *Little v. Wuerl*,³⁰² the Third Circuit held that the 702 exemption allows religious employers to require employees to conform their lifestyles — not just their religious affiliation — to the teachings of the employer’s religion.³⁰³ In reaching this expansive holding, the court looked to legislative history. The circuit court admitted that “the legislative history never directly addresses the [particular] question,”³⁰⁴ but nevertheless, the legislative history “suggests that the sponsors of the broadened [702] exception [referring here to the 1972 amendment] were solicitous of religious organizations’ desire to create communities faithful to their religious principles.”³⁰⁵ After reviewing the remarks of two senators,³⁰⁶ the court concluded:

Obviously there is danger that the courts’ conclusion as to legislative purpose will be unconsciously influenced by the judges’ own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion.

United States v. Am. Trucking, 310 U.S. 534, 544 (1939).

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

303. *Id.* at 950.

304. *Id.*

305. *Id.*

306. The circuit court quoted remarks made by Senator Allen and Senator Ervin in the context of the 1972 amendment. One sponsor claimed that “the establishment of church-related educational institutions is the embodiment of the free exercise of religion. This form of religious activity has always been recognized to occupy the same high estate under the first amendment as worshipping in the churches and preaching from the pulpits.” 118 Cong.Rec. 1994 (1972) (Senator Allen). Another sponsor made it clear that the exception was intended to remove religious employers from government scrutiny:

[Question]: Does the Senator’s amendment limit itself to the opportunity of a religious organization to have the right to hire people of its own faith? Is that the limitation of the amendment?

Senator Ervin: I would allow the religious corporation to do what it pleased. That is what my amendment would allow it to do. It would allow it liberty. It would take it out from under the control of the EEOC entirely. 118 Cong. Rec. 1982 (1972).

Id.

We recognize that Congress intended Title VII to free individual workers from religious prejudice. But we are also persuaded 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." . . . [W]e read the exemption broadly.³⁰⁷

Compared to the *Townley* opinion, this is a very generous reading of the legislative history. It demonstrates just how malleable and unreliable legislative history can be.

Although the *Townley* court likely reached the correct result, its rationale is unpersuasive. Subsequent courts may rely on the reasoning in *Townley* to reach the wrong conclusion.³⁰⁸ Arguably, this is what happened in *Kamehameha*, where the Ninth Circuit followed its earlier reasoning in *Townley*.³⁰⁹ Parachurch organizations may be relieved that several of the other federal circuit courts have adopted a more straightforward interpretation of the 702 exemption.

VI. CONCLUSION

Parachurch organizations should qualify for the 702 exemption. First, the statutory language is straightforward and clear: the Title VII prohibition of religion-based discrimination "shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work

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

308. Is this too harsh a statement? When I presented this Article at a symposium at Notre Dame Law School in April 2005, Professor Barbara Fick graciously suggested a more generous assessment of the Ninth Circuit's opinion in *Townley*. Indeed, one should acknowledge that the court in *Townley* did adopt a flexible, fact-intensive test for determining whether an organization qualified for the 702 exemption. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988). Instead of drawing a bright line and automatically disqualifying the defendant manufacturing company on the grounds of the company's secularity, the *Townley* court stated: "[E]ach case must turn on its own facts. All significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious." *Id.* Informatively, neither defendant nor plaintiff disputed this "'primarily religious' standard." *Id.* at 619. Depending on how it is applied, the balancing test arguably is a more generous standard to apply. The key, however, is how it is applied. In applying the standard, it seems unlikely the *Townley* court would not be influenced by its view of the statute and of congressional purpose in enacting the statute. For this reason, the *Townley* court's use and understanding of legislative history to interpret the statute and apply the standard are at least as relevant as the standard itself.

309. *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993)

connected with the carrying on by such corporation, association, educational institution, or society of its activities.”³¹⁰ It is not too simplistic to read this language and conclude that parachurch organizations are “religious corporations,” “religious associations,” “religious educational institutions,” or “religious societies.” The language of the statute does not require that qualifying organizations be churches or closely affiliated with churches.

Second, the relevant case law, culminating in *LeBoon*, supports the proposition that parachurch organizations should qualify for the 702 exemption. The defendant organizations that failed to qualify for the 702 exemption either discriminated on a non-religious basis or are easily distinguished from parachurch organizations.³¹¹ This conclusion is directly supported by the holding in *LeBoon*, in which a Jewish Community Center qualified for the 702 exemption and was permitted to fire an evangelical Christian employee for religious reasons.³¹²

Third, the interest of parachurch organizations in hiring only co-religionists has important social implications. The thousands of parachurch organizations currently operating in the United States³¹³ boast combined annual budgets of billions of dollars,³¹⁴ serve millions of U.S. citizens each year,³¹⁵ and often provide essential social services.³¹⁶ Religion is at the heart of parachurch organizations and it would be unfortunate if the government failed to free parachurch organizations “to create and maintain communities composed solely of individuals faithful to their doctrinal practices.”³¹⁷

The strong interest of parachurch organizations in “creat[ing] and maintain[ing] communities composed solely of individuals faithful to their

310. 42 U.S.C.A. § 2000e-1 (West 2005).

311. The judge in *LeBoon* noted the significance of his own decision. Finding for the Jewish Community Center, the judge said:

I note that this is a potentially significant finding not only for the [defendant], or even for Jewish Community Centers, of which there are many, nationwide. A Google; search turned up 4,340,000 hits for the term “Jewish Community Center,” but also 2,490,000 for the term “Muslim or Islamic Community Center,” 654,000 for “Hindu Community Center” and 577,000 for “Buddhist Community Center.”

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n, No. Civ.A.04-430, 2004 WL 2931268, at *6 (E.D. Pa. Dec. 16, 2004).

312. See *supra* text accompanying notes 219-21.

313. Hamilton, *supra* note 15.

314. *Id.*; Stafford, *supra* note 16, at 20, 23.

315. See *supra* note 78.

316. The factor that makes parachurch organizations different from other social service providers, of course, is their religious motivation, related mission, and religious quality.

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

doctrinal practices,³¹⁸ in combination with a sound reading of the statute and the full weight of the relevant case law, makes a strong case for the proposition that parachurch organizations should qualify for the 702 exemption.

318. *Id.*