DEAL, NO DEAL: *BOSTOCK*, *OUR LADY OF GUADALUPE*, AND THE FATE OF RELIGIOUS HIRING RIGHTS AT THE U.S. SUPREME COURT

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INTRODUCTION

In a year marked by the extraordinary—an impeachment, a global pandemic, a national movement for racial justice, a reeling U.S. economy, a rancorous presidential election, the departure of Britain from the European Union, wildfires engulfing the West Coast, and, of all things, murder hornets—it was unlikely the United States Supreme Court would escape unscathed.[1] And, indeed, for the first time since the 1918 Spanish flu pandemic, the Court closed its doors to the public and shelved oral argument. "In keeping with public health precautions recommended in response to COVID-19," the Court said it was "postponing the oral arguments currently scheduled for the March session" and "w[ould] remain closed to the public until further notice."[2] With the COVID-19 pandemic dragging on, it took the unprecedented step of hearing the ten deferred arguments by telephone and live-streaming the audio over the internet for the public.[3]

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1. *See* A.J. Willingham, *2020 Has Changed Everything. And It's Only Half Over*, CNN (July 3, 2020), https://www.cnn.com/interactive/2020/07/world/2020-year-in-review-july/; Christianna Silva, *After A Bitter Election, Can Americans Find A Way To Heal Their Divides?*, NPR (Nov. 1, 2020, 6:16 PM), https://www.npr.org/2020/11/01/929856421/after-a-bitter-election-can-americans-find-a-way-to-heal-their-divides.

2. Press Release, Sup. Ct. of the U.S. (Mar. 16, 2020), https:/www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20.

3. *See* Press Release, Sup. Ct. of the U.S. (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20; Press Release, Sup. Ct. of the U.S., Media Advisory Regarding May Teleconference Argument Audio (Apr. 30, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20. As of late-October 2020, the U.S. Supreme Court remained "closed to the public until further notice." Press Release, Sup. Ct. of the U.S. (Sept. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-16-20. The October 2020 arguments

The delayed argument calendar led to the Court releasing eight merits opinions in July—something that had not occurred since Warren Burger helmed the Court in the 1980s.[4] Ultimately, when the Court recessed for the summer on July 9, 2020, it had handed down only fifty-three signed opinions,[5] the lowest number since the Civil War.[6]

The Supreme Court took religious employers along for the ride. Over the term, it oscillated between the two sides of the cultural conflict over LGBTQ rights and religious freedom. On the one side, the Court protected the rights of gay, lesbian, and transgender Americans in *Bostock v. Clayton County*,[7] interpreting Title VII of the Civil Rights Act of 1964[8] to prohibit job discrimination on the basis of sexual orientation and gender identity. And, on the other, it showed continued concern for accommodating religious exercise by expanding the scope of the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*,[9] and by upholding the Trump administration's religious and moral exemptions from contraceptive coverage requirements in *Little Sisters of the Poor Saints Peter & Paul*

were once again held by telephone with the audio streamed over the internet for the public. "In keeping with public health guidance in response to COVID-19," the Court said, "the Justices and counsel will all participate remotely . . . [,] following the same format used for the May teleconference arguments." *Id.* The Court later confirmed that arguments for the next three months, November, December, and January, would also be held by teleconference. Press Release, Sup. Ct. of the U.S. (Oct. 9, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_10-09-20; Press Release, Sup. Ct. of the U.S. (Nov. 25, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_11-25-20.

4. *See* Adam Feldman, *Final Stat Pack for October Term 2019 (Updated)*, SCOTUSBLOG (July 10, 2020, 7:36 PM), https://www.scotusblog.com/2020/07/final-stat-pack-for-october-term-2019/.

5. *Id.* Note this number does not include unsigned opinions, such as the ten *per curiam* opinions issued by the Court this past term or those cases otherwise disposed of by the Court by an unsigned order. *See generally* Dylan Hosmer-Quint, *In Anonymous Decisions, Supreme Court Opaquely Takes a Hard Right*, NAT'L L.J. (July 29, 2020, 1:06 PM), https://www.law.com/nationallawjournal/2020/07/29/in-anonymous-decisions-supreme-court-opaquely-takes-a-hard-right/ (discussing per curiam decisions and unsigned orders); James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020, 12:15 PM), https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/ ("[T]he [term] shadow docket . . . refer[s] unofficially to the body of orders issued by the Supreme Court outside the formal opinions in the 70 or so cases in which it hears oral argument each term. Some of those orders are peripheral and procedural. But others resolve, at least temporarily, contentious policy disputes or matters of life and death. And this year, the shadow docket is taking on more significance—and getting more attention—than it ever has before.").

6. Adam Feldman, *Something We Haven't Seen in the Supreme Court Since the Civil War*, EMPIRICAL SCOTUS (Apr. 14, 2020), https://empiricalscotus.com/2020/04/14/since-the-civil-war/; Feldman, *supra* note 4.

7. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

8. 42 U.S.C. § 2000e-2.

9. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).

Home v. Pennsylvania.[10] More pointedly, in *Bostock*, the Court threw a pall of doubt over religious employers' ability to hire and fire consistent with their beliefs. Yet it pushed back the clouds of uncertainty just a smidgen in *Our Lady of Guadalupe* by making clear that anti-discrimination laws cannot limit religious schools' ability to choose like-minded teachers of religious subjects.

The accepted wisdom is that the Court's schizophrenic rulings are part of a settlement rather than the product of addled minds. According to this line of argument, because the other branches of the federal government—the President and the United States Congress—have been unable or unwilling to broker a compromise in the clash between ever expanding nondiscrimination protections for LGBTQ Americans and the rights of people of faith to *live* according to that faith, the Court stepped in to force a compromise. A laundry list of scholars have peddled this explanation: Andrew Koppelman, Michael McConnell, Akhil Amar, Jeffrey Rosen, Mark Movsesian, David French, and others.[11]

And perhaps they're right. But, to quote Baymax, "I have some concerns."[12] The biggest being a lack of a track record. One instance of the Court supposedly balancing out a ruling in favor of LGBTQ rights with a ruling in favor of religious rights is not much to go on. Such sparse data at the very least counsels caution. Aristotle's warning is well taken: "For one

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10. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373 (2020).

11. *See* Andrew Koppelman, *Supreme Court Rulings Make the World Safer for Both LGBT People and Religious Freedom*, USA TODAY (July 21, 2020, 12:58 PM), https://www.usatoday.com/story/opinion/2020/07/21/supreme-court-religious-liberty-gay-lesbian-trans-people-column/5469039002/; Michael W. McConnell, *On Religion, the Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020), https://www.nytimes.com/2020/07/09/opinion/supreme-court-religion.html; Akhil Reed Amar, *The Roberts Court Is Nothing like America*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/opinion/john-roberts-supreme-court-partisanship.html; Jeffrey Rosen, *The Battle for the Constitution: John Roberts Is Just Who the Supreme Court Needed*, ATLANTIC (July 14, 2020, 12:56 PM), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/; Mark Movsesian, *The Roberts Court Attempts a Compromise*, FIRST THINGS (July 15, 2020), https://www.firstthings.com/web-exclusives/2020/07/the-roberts-court-attempts-a-compromise; David French, *The Supreme Court Tries to Settle the Religious Liberty Culture War*, TIME (July 14, 2020, 7:00 AM), https://time.com/5866374/supreme-court-settle-religious-liberty/; Thomas C. Berg, *Religious Freedom Amid the Tumult*, 17 U. ST. THOMAS L.J. (forthcoming 2021) (manuscript at 9–13) (available at https://ssrn.com/abstract=3675627).

12. Alex Horwitch, *A Baymax Quote for Any Occasion*, OH MY DISNEY (May 1, 2016), https://ohmy.disney.com/movies/2016/05/01/a-baymax-quote-for-any-occasion/. Baymax, a large, white, squishy robot covered in vinyl, expresses concern that his new carbon fiber armor may "undermine [his] non-threatening, huggable design." BIG HERO 6 (Walt Disney Animation Studios 2014).

swallow does not make a summer; nor does one day."[13] A single occurrence of something is just that; it doesn't indicate a trend. Patternicity,[14] illusory correlations,[15] apophenia,[16] conditioned seeing,[17] whatever we call it, the fundamental fact is that "humans tend to see patterns when, in fact, the results are completely random."[18]

Maybe the decisions in *Bostock* and *Our Lady of Guadalupe* do indeed mark the start of an orchestrated settlement of the culture war, but they could just as easily be the product of happenstance. Before we get on our Harold Finch, break out the red yarn, and start stringing together Supreme Court

13. ARISTOTLE, NICOMACHEAN ETHICS bk. I, at 12 (Lesley Brown ed., W.D. Ross trans., Oxford Univ. Press 2009) (c. 384 B.C.E.).

14. *See* Michael Shermer, *Patternicity: Finding Meaningful Patterns in Meaningless Noise*, SCI. AM. (Dec. 1, 2008), https://www.scientificamerican.com/article/patternicity-finding-meaningful-patterns/ (defining "patternicity" as "the tendency to find meaningful patterns in meaningless noise").

15. *See* Anne-Laure Le Cunff, *Illusory Correlations: How to Identify Your Hidden Assumptions*, NESS LABS, https://nesslabs.com/illusory-correlations (last visited Jan. 1, 2021). University of Wisconsin Psychology Professors Loren and Jean Chapman—a husband and wife research team—coined the term "illusory correlation" to describe the phenomenon of when a person sees an association between two variables (events, actions, ideas, etc.) when they are not in fact associated. *See* Loren J. Chapman & Jean P. Chapman, *Illusory Correlation as an Obstacle to the Use of Valid Psychodiagnostic Signs*, 74 J. ABNORMAL PYSCH. 271, 271–80 (1969); *see also* Ira Hyman, *Race, Violence, and Illusory Correlations*, PSYCH. TODAY (June 21, 2015), https://www.psychologytoday.com/us/blog/mental-mishaps/201506/race-violence-and-illusory-correlations (considering illusory correlations as "a type of biased information processing" potentially leading to racist or bigoted beliefs).

16. *See* Bruce Poulsen, *Being Amused by Apophenia*, PSYCH. TODAY (July 31, 2012), https://www.psychologytoday.com/us/blog/reality-play/201207/being-amused-apophenia ("The experience of seeing patterns or connections in random or meaningless data was coined *apophenia* by the German neurologist, Klaus Conrad."); Sandra L. Hubscher, *Apophenia: Definition and Analysis*, DIGIT. BITS SKEPTIC (Nov. 4, 2007), https://archive.is/20130121151738/http://www.dbskeptic.com/2007/11/04/apophenia-definition-and-analysis/#selection-127.2-129.17 (referencing Klaus Conrad's definition of "apophenia" as the "unmotivated seeing of connections accompanied by a specific feeling of abnormal meaningfulness") (internal brackets omitted); Eric Dietrich, *The Paradox at the Heart of Psychology*, PSYCH. TODAY (July 30, 2015), https://www.psychologytoday.com/us/blog/excellent-beauty/201507/the-paradox-the-heart-psychology ("[H]uman minds impose patterns on input, rather than simply responding to patterns imposed on us. Humans are, to use an apt metaphor, *pattern hungry*. . . . As research advanced, psychologists discovered that humans are so good at finding patterns that we can find them when they aren't there at all.").

17. *See* B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 266–70 (Free Press 2014) (1965) (using the term "conditioned seeing" to describe how humans experience cognitive errors because of their pattern-recognizing habits and interpreting those patterns by an expected model they prematurely hold).

18. Richard A. Muller, *The Illusion of Randomness*, MULLER'S GRP., (Sept. 28, 2002) https://muller.lbl.gov/ teaching/Physics10/old%20physics%2010/chapters%20(old)/4-Randomness.htm.

cases on our metaphorical bulletin boards, alternative explanations should be considered.[19]

Moreover, the Court's balancing of LGBTQ and religious rights can hardly be described as even. *Bostock* expanded Title VII's ban on "sex" discrimination to encompass sexual orientation and gender identity for every employer in the nation that "has fifteen or more employees," whether that employer is religious, nonreligious, or otherwise.[20] The Equal Employment Opportunity Commission annually receives between 50,000 to 73,000 discrimination charges under Title VII.[21] For religious employers then, *Bostock* raises the specter of significant legal liability for practices that until now went unquestioned.

Our Lady of Guadalupe counteracted *Bostock* but only barely. It exempted private religious schools from nondiscrimination laws, including Title VII, but exclusively in the context of when they are managing teachers providing religious instruction.[22] The vast majority of religious employers remain uncertain as to their ability to make job decisions consistent with their faith.[23] Perhaps *Our Lady of Guadalupe* provides reason for these religious employers to hope for robust religious accommodations moving forward, but, for now, the case far from balances the sweeping change wrought by *Bostock*.

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19. *See String Theory*, TV TROPES, https://tvtropes.org/pmwiki/pmwiki.php/Main/StringTheory (last visited Jan. 1, 2021) (listing the character Harold Finch's "wall of photographs connected with strings in [his] office" from the television show *Person of Interest* as an example of "string theory" or a "conspiracy wall"). To get the conspiratorial tone of the show just right, each episode of *Person of Interest* began with a voiceover of Finch saying: "You are being watched. The government has a secret system: a machine that spies on you every hour of every day." *Person of Interest*, WIKIQUOTE, https://en.wikiquote.org/wiki/Person_of_Interest_(TV_series) (Nov. 25, 2020, 09:17 PM).

20. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020); 42 U.S.C. § 2000e(b).

21. *See Title VII of the Civil Rights Act of 1964 Charges FY 1997 – FY 2019*, EEOC, https://www.eeoc.gov/statistics/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges (last visited Jan. 1, 2021).

22. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2064, 2069 (2020); *see also* Ira C. Lupu & Robert W. Tuttle, *The 2020 Ministerial Exception Cases: A Clarification, Not a Revolution*, *TAKE CARE* (July 8, 2020), https://takecareblog.com/blog/the-2020-ministerial-Exception-cases-a-clarification-not-a-revolution (describing *Our Lady of Guadalupe* as adopting a "far narrower approach . . . focused on both the exclusively ecclesiastical question of fitness for ministry and the independence of judicial review of exemption claims").

23. *See* Berg, *supra* note 11 (manuscript at 11) ("It's unclear how far this protection will extend. Does the exception cover teachers who don't teach doctrine classes but are encouraged to integrate religious insights in their English or history classes? Is it enough that, as many schools say, teachers must act as 'role models' of faith for their students? What about other employees?").

This article explains the give and take of the Supreme Court's decisions in *Bostock* and *Our Lady of Guadalupe* and their likely impact on religious employers. It considers the conventional wisdom that the Court's decisions—bouncing back and forth across the ideological aisle—signal a compromise in the culture war. The article concludes that the Court's decisions may provide some basis for optimism for finding a middle ground in the clash between expanded protections for LGBTQ persons and religious liberty, but they provide far more reasons for skepticism.

I. GIVE AND TAKE

One of the oddities of 1980s television was the ubiquity of ads for Broadway musicals. Many included breathless testimonials from theater buffs, like the New York woman proclaiming, "Cyd Charisse is fabulous! Wonderful! I'd like to see the show two more times! I loved it so much!"[24] But perhaps best remembered is the fan declaring, "I laughed, I cried! It was better than *Cats*!"[25]

Religious employers could say the same of the Supreme Court's recent October 2019 term. It ebbed and flowed with emotion, from the mix of relief and despair that was *Bostock* to the thrill of *Our Lady of Guadalupe*. And, ultimately, we can all agree, it was better than *Cats*.

The Court delivered *Bostock* in mid-June,[26] holding by a 6–3 margin that under Title VII[27] employment "discrimination based on homosexuality or transgender status necessarily entails [unlawful] discrimination based on

24. jamesababcock, *Grand Hotel Audience Reaction Commercial*, YOUTUBE (Mar. 25, 2009), https://youtu.be/-Wcf64hp_54.

25. *I Laughed, I Cried! It Was Better Than Cats!*, MILOWENT (Dec. 20, 2011) (emphasis added), http://milowent.blogspot.com/2010/11/i-laughed-i-cried-it-was-better-than.html (documenting the research done to locate the source of this famous quote). Dear reader, I must warn you that seeking to find the source of this quote will lead only to ruin and misery. You will end mere steps away from the Redditors posting about the nonexistent, 1990s movie, *Shazaam*, starring the comedian Sinbad as a genie. *See* Amelia Tait, *The Movie That Doesn't Exist and the Redditors Who Think It Does*, NEWSTATESMAN (Dec. 21, 2016), https://www.newstatesman.com/science-tech/internet/2016/12/Movie-doesn-t-exist-and-redditors-who-think-it-does. As Trinity told Neo, "[Y]ou have to trust me. . . . You know that road, you know exactly where it ends. And I know that's not where you want to be." THE MATRIX (Warner Brothers 1999); *see also* tsdempster1, *Matrix 01 You Have Been Down that Road Before*, YOUTUBE (Apr. 7, 2013), https://youtu.be/mlztKOlqiEQ.

26. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1731 (2020).

27. 42 U.S.C. § 2000e-2.

sex."[28] The Court's ruling cleared LGBTQ persons to earn a livelihood without fear of being fired, shunned, or harassed because of their sexual orientation or perceived gender.

The LGBTQ community fought for these protections in the United States Congress in one form or another since May 1974, when Democratic Representatives Bella Abzug and Ed Koch from New York introduced the Equality Act of 1974.[29] For the next forty-six years, Democrats beat their collective heads against the wall, introducing bill after bill to extend workplace protections to gay, lesbian, and transgender persons only to be thwarted by Republicans. Far too often these Democratic-led initiatives made almost no concession to religious liberty. Most recently, on February 25, 2021, a group of largely Democratic Representatives in the House passed the Equality Act (yes, it has the same name as the 1974 bill; creativity is apparently not the politician's strong suit). The bill was received by the Senate and promptly referred to the Senate Committee on the Judiciary.[30] GovTrack.us reports that the odds of passage are low, only about twenty percent.[31] Passage seems unlikely since "[s]o far no Senate Republicans—who hold 50 of the 100 seats—have said they will vote for the bill."[32]

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28. *Bostock*, 140 S. Ct. at 1747. Justice Gorsuch's opinion for the Court was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. *Id.* at 1737–54. Justice Alito, with whom Justice Thomas joined, filed a dissenting opinion. *Id.* at 1754 (Alito, J., dissenting). Justice Kavanaugh filed a separate dissent. *Id.* at 1822 (Kavanaugh, J., dissenting).

29. *See* Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011, 9:00 AM), https://www.americanprogress.org/issues/lgbtqrights/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/; *History of Nondiscrimination Bills in Congress*, NAT'L GAY & LESBIAN TASK FORCE, https://web.archive.org/web/20140524062405/http://www.thetaskforce.org/issues/nondiscrimination/timeline (last visited Jan. 1, 2021).

30. Equality Act, H.R. 5, 116th Cong. (2019).

31. *See H.R. 5: Equality Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/117/hr5 ("[T]he bill would need 60 votes to avoid a filibuster in the Senate."); *see also* Danielle Kurtzleben, *House Passes the Equality Act: Here's What It Would Do*, NPR (Feb. 24, 2021, 5:00 AM), https://www.npr.org/2021/02/24/969591569/house-to-vote-on-equality-act-heres-what-the-law-would-do.

32. *Equality Act: US House Passes Legislation Protecting LGBT Rights*, BBC (Feb. 25, 2021), https://www.bbc.com/news/world-us-canada-56202805. For more information about the House's vote, see *H.R. 5: Equality Act*, GOVTRACK.US (Feb. 25, 2021, 4:27 PM), https://www.govtrack.us/congress/votes/117-2021/h39. Notably, a companion bill was introduced in the Senate around the same time on February 23, 2021. *S. 393: Equality Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/117/s39. The companion Senate bill seems unlikely to go anywhere. Instead, the bill passed by the House (H.R. 5) and now referred to the Senate is the bill likely to be considered by the Senate and given a vote. For assignment of the bill to the Senate Judiciary Committee, see *Senate Committee on the Judiciary*, GOVTRACK.US, https://www.govtrack.us/congress/committees/SSJU#activity. For the overall current status of the bill, see *H.R. 5: Equality Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/117/hr5.

Why is that? For starters, the bill flatly "prohibit[s] appeals to [the Religious Freedom Restoration Act] when a religious person or organization is charged with violating a nondiscrimination rule."[33] That means when LGBTQ rights come up against religious freedom, "an LGBT person's claim wins by default—therefore not ensuring equality but elevating their rights over those of religious Americans."[34] University of Virginia law professor Doug Laycock explained, "This is not a good-faith attempt to reconcile competing interests. It is an attempt by one side to grab all the disputed territory and to crush the other side."[35] Thus, the Equality Act was not a bid for compromise but a perpetuation of the winner-take-all strategy that has so dominated the religious liberty culture war.

Republicans have fared no better. Rather than seeking middle ground, Republicans seem "content to simply block Democratic legislation without passing any additional affirmative protections for religious freedom."[36] When Republican Representative Chris Stewart from Utah introduced a piece of compromise legislation, called the "Fairness for All Act" (or "FFA"), in late-2019,[37] it drew widespread opposition from his fellow conservatives. "[I]t would enshrine radical gender ideology in federal law and decimate the religious freedom of institutions and individuals alike," claimed The Heritage Foundation.[38] "[The] FFA is anything but fair," declared the Family Research Council. "It sends the message that anyone who holds to a traditional view of marriage and lives their lives and

33. Stanley Carlson-Thies, *A Better Way Than the Equality Act*, INST. RELIGIOUS FREEDOM ALL. (Apr. 25, 2019), https://irfalliance.org/a-better-way-than-the-equality-act/. The text of H.R. 5 states in pertinent part, "The Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb *et seq.*) shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title." H.R. 5 § 1107.

34. Brad Polumbo, *Gay Conservative: Equality Act Would Crush Religious Freedom. Trump Is Right to Oppose It*, USA TODAY (May 20, 2019, 3:15 AM), https://www.usatoday.com/story/opinion/2019/05/20/lgbtq-equality-act-fails-fair-religious-freedom-provisions-accommodation-column/3731197002/.

35. John McCormack, *Religious Liberty After Bostock and Our Lady of Guadalupe*, NAT'L REV. (July 15, 2020, 4:11 PM), https://www.nationalreview.com/2020/07/religious-liberty-after-bostock-and-our-lady-of-guadalupe/.

36. French, *supra* note 11.

37. *See* Fairness for All Act, H.R. 5331, 116th Cong. (2019); *H.R.5331 - Fairness for All Act*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/5331?q=%7B%22search%22%3A%5B%22hr+5331%22%5D%7D&s=1&r=1 (last visited Feb. 18, 2021).

38. Andrea Jones, *Misguided Fairness for All Act Would Undermine Religious Liberty*, HERITAGE FOUND. (Dec. 7, 2019), https://www.heritage.org/religious-liberty/commentary/misguided-fairness-all-act-would-undermine-religious-liberty.

operates their business according to that view is a bigot and their actions are unacceptable and discriminatory."[39] The Ethics & Religious Liberty Commission, the lobbying arm of the Southern Baptist Convention, gave more of the same:

> While the stated intention of the legislation is to protect both those who identify as LGBT and people of faith, we believe the protections for people of faith are insufficient and that the legislation will use the federal government to impose a new orthodoxy on matters of sexuality and gender on the entire country through the Civil Rights Act.[40]

The sharp criticism from supposed friends led to the swift demise of the FFA.

Legislatively, no one was moving. No one was compromising. With *Bostock*, the Supreme Court stepped up to break the impasse. It took the opportunity to accomplish, at least in part, what Congress would not or could not do—finally provide LGBTQ Americans with some modicum of protection from workplace discrimination.

A. Side Effects

But the Supreme Court does not operate in a vacuum. Rather, as the philosopher Mario Bunge[41] observed, "every action has side effects."[42] The Court's choice to extend Title VII to gay, lesbian, and transgender people necessarily threw doubt on the freedom of religious organizations—churches, schools, and charitable organizations—to continue their faith-based hiring practices. Many religious employers sincerely believe God

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39. *The Unfairness of the "Fairness for All Act,"* FAM. RSCH. COUNCIL (Dec. 16, 2019), https://www.frc.org/fairnessforall.

40. Policy Staff, *ERLC Opposes the Fairness for All Act of 2019*, ETHICS & RELIGIOUS LIBERTY COMM'N (Jan. 10, 2020), https://erlc.com/resource-library/issue-briefs/erlc-opposes-the-fairness-for-all-act-of-2019/.

41. *See* Emeritus Faculty Profile for Mario Bunge, MCGILL UNIV., https://www.mcgill.ca/philosophy/people/emeritus-faculty/bunge (last visited Mar. 11, 2021). Bunge taught at McGill University in Montreal, Canada until age 90. He published more than 400 papers and 80 books discussing the intersection of philosophy and science. He died in February 2020 at the age of 100. *See Renowned Scientist and Philosopher Mario Bunge Dies at 100*, BUENOS AIRES TIMES (Feb. 25, 2020, 6:47 PM), https://www.batimes.com.ar/news/argentina/esteemed-argentine-scientist-mario-bunge-died-at-the-Age-of-100.phtml.

42. Mario Bunge, *Towards a Technoethics*, 6 PHIL. EXCH. 69, 75 (1975).

established marriage as a union between a man and a woman[43] and that the sexes, male and female, are "grounded in the order and design of creation."[44] Unsurprisingly, their employment standards in turn reflect these beliefs.

Before *Bostock*, these religious employers hired and fired consistent with their religious tenets without concern of being sued. Indeed, "it was still legal for employers to discriminate on the basis of sexual orientation or gender identity in most states."[45] Federal law was silent, and just under half of U.S. jurisdictions—twenty-three states and the District of Columbia—had statutes prohibiting employment discrimination on the basis of sexual orientation, gender identity, or both.[46] To the extent these statutes could

43. *See Religious Groups' Official Positions on Same-Sex Marriage*, PEW F. ON RELIGION & PUB. LIFE, https://www.pewforum.org/docs/?DocID=291 (May 20, 2008); *Views About Same-Sex Marriage by Religious Group*, PEW RSCH. CTR., https://www.pewforum.org/religious-landscape-study/views-about-same-sex-marriage/#religious-tradition-trend (last visited Jan. 23, 2021). The Public Religion Research Institute (PRRI) released more current data in April 2020. However, the data is compiled differently, focusing on the correlation of race, religion, and beliefs about same-sex marriage. *See Religious Differences by Demographic Subgroups*, PRRI (Apr. 14, 2020), https://www.prri.org/ research/broad-support-for-lgbt-rights/ ("Slim majorities of black Protestants (54%) and other nonwhite Protestants (53%) support same-sex marriage. Hispanic Protestants are more divided with just under half (47%) favoring same-sex marriage, while 49% are opposed. Among major religious groups, majority opposition to same-sex marriage remains confined to white evangelical Protestants. Just over four in ten (41%) white evangelical Protestants support same-sex marriage, while 53% are opposed. However, since 2018, support among white evangelical Protestants has risen significantly from 31% and opposition has declined from 60%.").

44. James N. Anderson, *Transgenderism: A Christian Assessment*, REFORMED FAITH & PRAC., Sept. 2017, at 51, 64; *see also* Gregory A. Smith, *Views of Transgender Issues Divide Along Religious Lines*, PEW RSCH. CTR. (Nov. 27, 2017), https://www.pewresearch.org/fact-tank/2017/11/27/views-of-transgender-issues-divide-along-religious-lines/ ("Most Christians in the United States (63%) say that whether someone is a man or a woman is determined by their sex at birth."); Kevin DeYoung, *What Does the Bible Say About Transgenderism?*, GOSPEL COAL. (Sept. 8, 2016), https://www.thegospelcoalition.org/blogs/kevin-deyoung/what-does-the-bible-say-about-transgenderism/ ("Far from being a mere cultural construct, God depicts the existence of a man and a woman as essential to his creational plan.").

45. Ian Millhiser, *The Supreme Court's Landmark LGBTQ Rights Decision, Explained in 5 Simple Sentences*, VOX (June 15, 2020, 12:00 PM), https://www.vox.com/2020/6/15/21291515/supreme-court-bostock-clayton-county-lgbtq-neil-gorsuch (emphasis omitted).

46. *See* Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the U.S. Not Protected by State Non-Discrimination Statutes*, WILLIAMS INST. (Apr. 2020), https://williamsinstitute.law.ucla.edu/ publications/lgbt-nondiscrimination-statutes/ ("At the federal level and in most states, non-discrimination statutes do not expressly enumerate sexual orientation and gender identity as protected characteristics. Twenty-three states and Washington, D.C. expressly enumerate either or both of these characteristics in their non-discrimination statutes, although not necessarily in all settings."); *State Maps of Laws & Policies Regarding Employment Discrimination*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/state-maps/employment (Mar. 22, 2021).

even be construed to have application to religious employers, they contained religious exemptions—many of them broad and unequivocal.[47]

Thus, a clear pattern developed among the states. When prohibitions on discrimination were expanded, protections for religious liberty were equally expanded. *Bostock* upset this balance. The Court extended Title VII's nationwide ban on "sex" discrimination in employment to include sexual orientation and gender identity without an attendant expansion of the protections for religious liberty.

To be fair, the *Bostock* Court understood the side effects of its ruling. Justice Gorsuch, writing for the majority, said:

> [T]he employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society.[48]

But apparently not too "deeply concerned." Because a mere paragraph later, Justice Gorsuch swept aside religious liberty concerns as "questions for future cases."[49] Justice Alito in his dissent called out the majority's easy

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47. *See* CAL. GOV'T CODE §§ 12922, 12926(d), 12926.2(c) (LEXIS through 2020 Reg. Sess.); COLO. REV. STAT. § 24-34-401 (LEXIS through 2020 Reg. and First Extraordinary Legis. Sess.); CONN. GEN. STAT. ANN. §§ 46a-81p, 46a-81aa (LEXIS through 2020 Sept. Special Sess.); DEL. CODE ANN. tit. 19, §§ 710(7), 711(l) (LEXIS through 82 Del. Laws, Ch. 292); HAW. REV. STAT. ANN. § 378-3(5) (LEXIS through 2020 Legis. Sess.); 775 ILL. COMP. STAT. ANN. 5/2-101(B)(2) (LEXIS through P.A. 101-651 of 2020 Legis. Sess.); IOWA CODE ANN. § 216.6(6)(d) (LEXIS through 2020 Reg. Sess.); ME. REV. STAT. ANN. tit. 5, § 4573-A(2) (LEXIS through Second Reg. Sess.); MD. CODE ANN. STATE GOV'T §§ 20-604(2), 20-605(a)(3) (LEXIS through 2021 legislation); MASS. ANN. LAWS ch. 151B, § 4(18) (LEXIS through Chs. 1-252 and 254-259); MINN. STAT. ANN. §§ 363A.20(2), 363A.26 (LEXIS through 2020 Reg. Sess. and Seventh Special Sess.); NEV. REV. STAT. ANN. §§ 613.320(1)(b), 613.350(4) (LEXIS through 2019 Reg. Sess. and 32nd Special Sess.); N.H. REV. STAT. ANN. §§ 354-A:2(VII), 354-A:18 (LEXIS through 2020 Reg. Sess.); N.J. STAT. ANN. § 10:5-12(a) (LEXIS through 2020 First Annual Sess.); N.M. STAT. ANN. § 28-1-9(B)–(C) (LEXIS through 2020 legislation); N.Y. EXEC. LAW § 296(11) (LEXIS through 2020 released Chs. 1-387); OR. REV. STAT. ANN. § 659A.006(4) (LEXIS through 2020 Second Special Sess.); 28 R.I. GEN. LAWS § 28-5-6(8)(ii) (LEXIS through 2020 Sess.); UTAH CODE ANN. §§ 34A-5-102(1)(i)(ii), 34A-5-106(3)(a)(ii) (LEXIS through 2020 Sixth Special Sess.); VT. STAT. ANN. tit. 21, § 495(e) (LEXIS through Act 180 and Municipal Act M-12 of 2019 Adj. Sess.); WASH. REV. CODE ANN. § 49.60.040(11) (LEXIS through 2020 Reg. Sess.); WIS. STAT. ANN. § 111.337(2) (LEXIS through Act 186 of 2019-2020 Legis. Sess.); D.C. CODE § 2-1401.03(b) (LEXIS through Dec. 2, 2020 legislation).

48. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753–54 (2020).

49. *Id.* at 1754.

dismissal of "the consequences of its reasoning" as "irresponsible."[50] He expressed "deep concern that the position now adopted by the Court 'will trigger open conflict with faithbased employment practices of numerous churches, synagogues, mosques, and other religious institutions.'"[51]

The majority's casualness perhaps stems from a view that the religious-liberty protections already in place are adequate. Justice Gorsuch listed several such protections, including the religious-employer exemption in Title VII itself,[52] the Religious Freedom Restoration Act,[53] and the ministerial exception,[54] which the Court took up just a few weeks later in *Our Lady of Guadalupe*.[55] But religious employers should postpone the merrymaking. The majority lists these protections merely as examples of *potential* bulwarks against Title VII's now expanded ban against "sex" discrimination. The Court makes no promises that the listed doctrines and carve-outs will in fact shield religious employers. "[They] *might*," said Justice Gorsuch, "supersede Title VII's commands in appropriate cases."[56] To know for sure, he tells religious employers to wait for "other employers in other cases."[57]

B. Judicial Restraint

At one level, the majority's decision to punt on religious liberty is not surprising. After all, it is axiomatic that "[t]he Court should not reach out for issues that are not properly before it."[58] Justice Gorsuch notes over and over

50. *Id.* at 1778 (Alito, J., dissenting).

51. *Id.* at 1780 (quoting Brief for Nat'l Ass'n of Evangelicals et al. as Amici Curiae Supporting Petitioners at 3, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107)).

52. *Id.* at 1754 (majority opinion) (citing 42 U.S.C. § 2000e-1(a)).

53. *Id.* (citing 42 U.S.C. §§ 2000bb-1, -3 (originally enacted as Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that RFRA only applies to the federal government but not to the states)).

54. *Id.*; *see also* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012) (recognizing the ministerial exception protects against discrimination claims that "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who [teach and] personify its beliefs").

55. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (explaining that the Court was now considering whether the ministerial exception "permits courts to intervene in employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith").

56. *Bostock*, 140 S. Ct. at 1754 (emphasis added).

57. *Id.*

58. Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 164 (2011).

that "[t]he only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'"[59] Harris Funeral Homes—the Christian-owned business that fired Aimee Stephens for being transgender—unsuccessfully pursued a free exercise defense in the lower courts.[60] But it "declined to seek review of that adverse decision, and no other religious liberty claim [was] before [the Court]."[61] Prudence then, of course, dictates waiting.[62]

But, at another level, the majority's protests of judicial restraint feel like concern trolling. The prototypical "concern troll" professes support for the group's cause but actively undermines that cause with criticisms couched as "concerns."[63] "I'm on your side," assures the concern troll, "but you

59. *Bostock*, 140 S. Ct. at 1753; *see also id.* (dismissing concern "that [the Court's] decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," saying, "none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today"); *id.* (brushing aside questions about "bathrooms, locker rooms, or anything else of the kind"); *id.* at 1754 ("But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.").

60. *Id.* at 1738, 1754.

61. *Id.* at 1754.

62. Yee v. City of Escondido, 503 U.S. 519, 538 (1992); *see also* Lytle v. Household Mfg., Inc., 494 U.S. 545, 551 n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this . . . Court's discretion.").

63. *Concern Troll*, WIKTIONARY, https://en.wiktionary.org/wiki/concern_troll (May 24, 2020, 7:15 PM) (defining "concern troll" as "[s]omeone who posts to an internet forum or newsgroup, claiming to share its goals while deliberately working against those goals, typically, by claiming 'concern' about group plans to engage in productive activity, urging members instead to attempt some activity that would damage the group's credibility, or alternatively to give up on group projects entirely"); *see also* Ana Marie Cox, *Making Mischief on the Web*, TIME (Dec. 16, 2006), http://content.time.com/time/magazine/article/0,9171,1570701,00.html ("A more subtle beast than your standard troll, this species posts comments that appear to be sympathetic to the topic being discussed but who, in reality, wishes to sow doubt in the minds of readers."). Perhaps one of the best descriptions of a concern troll—long before the term even existed—was by Martin Luther King, Jr. in his "Letter from a Birmingham Jail." *See* MARTIN LUTHER KING, JR. TO BISHOP C.C.J. CARPENTER ET AL. (Apr. 16, 1963), http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf ("First, I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate, who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says 'I agree with you in the goal you seek, but I cannot agree with your methods of direct action;' who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a 'more convenient season.' Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering

shouldn't do X, Y, and Z. It just looks bad to some people—not that I agree, but I thought you should know."[64] Justice Gorsuch and his comrades fit the mold. They purport to share religious employers' goal of "preserving the promise of the free exercise of religion."[65] Yet, at the same time, they subvert that goal by raising "concerns" about judicial overreach as an apparent cover-up for not actually doing anything concrete to promote religious freedom. "[N]one of these [issues] are before us," says Justice Gorsuch, "we have not had the benefit of adversarial testing . . . , and we do not prejudge any such question today."[66]

Here's the twist though. Any judicial overreach the *Bostock* majority might be guilty of occurred long before they set to rehearsing their "worries about how Title VII may intersect with religious liberties."[67] The Supreme Court generally follows a canon of constitutional avoidance—that is, construing statutes, like Title VII, to avoid constitutional difficulty. The canon requires courts to interpret statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[68]

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than outright rejection."); *see also* DeNeen L. Brown, *Martin Luther King Jr.'s Scorn for 'White Moderates' in his Birmingham Jail Letter*, WASH. POST (Jan. 15, 2018, 7:00 AM), https://www.washingtonpost.com/news/retropolis/wp/2018/01/15/martin-luther-king-jr-s-scathing-critique-of-white-moderates-from-the-birmingham-jail/ ("The day after his arrest, eight prominent white clergy members placed an ad in the Birmingham News, accusing King of being an outside agitator whose demonstrations were 'unwise and untimely.' Infuriated by their words, King unleashed his literary wrath on the clergymen.").

64. *See* Alexandra Petri, *Enter the Concern Troll*, WASH. POST (Jan. 13, 2014, 4:50 PM), https://www.washingtonpost.com/blogs/compost/wp/2014/01/13/enter-the-concern-troll/.

65. *Bostock*, 140 S. Ct. at 1754.

66. *Id.* at 1753.

67. *Id.* at 1754.

68. Almendarez-Torres v. United States, 523 U.S. 224, 237–38 (1998) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)); *see also* Jones v. United States, 529 U.S. 848, 857 (2000) ("[T]he guiding principle [is] that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" (quoting U.S. *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)); Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems."); Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurrring) (containing what is now considered the definitive elaboration of the canon of constitutional avoidance— "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions

For example, in *NLRB v. Catholic Bishop of Chicago*,[69] the Court interpreted the National Labor Relations Act[70] to exclude teachers at religious schools from the National Labor Relations Board's jurisdiction. To construe the Act to permit "the Board's exercise of its jurisdiction here," the Court said, "would give rise to serious constitutional questions."[71]

> [W]e would be required to decide whether that was constitutionally permissible under the Religion Clauses of the First Amendment. . . . We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow. . . . [T]he record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses.[72]

The Court fell back on the canon of constitutional avoidance. "[A]n Act of Congress ought *not* be construed to violate the Constitution if any other possible construction remains available."[73] The Act, according to the Court, did not evidence "a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board."[74] It, thus, "decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."[75]

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pressed upon it for decision," including "that this Court will first ascertain whether a construction of [a] statute is fairly possible by which [a constitutional] question may be avoided" (quoting *Crowell*, 285 U.S. at 62)); Parsons v. Bedford, 28 U.S. 433, 448–49 (1830) ("If, indeed, the construction contended for at the bar were to be given to the act of congress, we entertain the most serious doubts whether it would not be unconstitutional. No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution."); Blodgett v. Holden, 275 U.S. 142, 147–48 (1927) (Holmes, J., concurring) ("Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same.").

69. NLRB v. Cath. Bishop of Chicago, 440 U.S. 490 (1979).

70. National Labor Relations Act, 29 U.S.C. §§ 151–169.

71. *Cath. Bishop*, 440 U.S. at 501.

72. *Id.* at 499, 504, 507.

73. *Id.* at 500 (emphasis added).

74. *Id.* at 507.

75. *Id.*

Unlike the reticence shown by the Court in *Catholic Bishop*, Justice Gorsuch and his fellow Justices ran headlong into a heap of constitutional troubles. His capacious reading of Title VII's ban on "sex" discrimination means

> churches and faith-based schools and charities [are] impeded or even outright barred from hiring and retaining a workforce that agrees with them on questions of faith and morals that are integral to their message and mission. This raises very difficult constitutional questions as to rights of church governance, free exercise, association, and speech. [The] ruling . . . tee[s] up those questions in scores of cases with varying fact patterns.[76]

The canon of constitutional avoidance suggests the Court should have parsed Title VII to sidestep this constitutional quagmire. That it did not do so is notable. "[T]he Roberts Court [has] developed a reputation for aggressively using the avoidance canon . . . ."[77] Indeed, one scholar has dubbed the Court's routine recourse to the canon as its "signature move."[78] Perhaps most infamously, the Roberts Court wielded the canon to uphold the Affordable Care Act in *National Federation of Independent Business v. Sebelius*[79] and to save (at least for a time) the preclearance coverage formula

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76. Brief for U.S. Conference of Catholic Bishops et al. as Amici Curiae Supporting Petitioners, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623), 2019 WL 4013297, at *23; *see also* Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 137–38 (3d Cir. 2006) (applying *Catholic Bishop* in interpreting federal nondiscrimination law not to require courts "to measure the degree of severity of various violations of Church doctrine"); Duquesne Univ. of the Holy Spirit v. NLRB, 947 F.3d 824, 829 (D.C. Cir. 2020) ("Given this vital role played by teachers, exercising jurisdiction over disputes involving teachers at *any* church-operated school presented a 'significant risk that the First Amendment will be infringed.'" (quoting *Cath. Bishop*, 440 U.S. at 502)).

77. Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 517 (2019); *see also* ANDREW NOLAN, CONG. RSCH. SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 11, 15–16 (2014) (observing that the Roberts Court has "frequently" used the canon of constitutional avoidance to bypass major constitutional questions); Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1276–78 (2016) (describing how the Roberts Court dodged "thorny" constitutional questions in several early-term cases); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2110 (2015) ("The Supreme Court in the last few years has resolved some of the most divisive and consequential cases before it by employing the same maneuver: construing statutes to avoid constitutional difficulty.").

78. Fish, *supra* note 77, at 1279.

79. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562–63 (2012); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 42 U.S.C.).

of the Voting Rights Act of 1965 in *Northwest Austin Municipal Utility District Number One v. Holder*.[80]

While it is true that "canons," are mere "rules of thumb or presumptions that courts use to interpret the meaning of statutes," the Court has "unanimity on basic points related to the avoidance canon."[81] In fact, the avoidance canon has been called the "most important."[82] "All the Justices on the . . . Court accept[] the avoidance canon as a legitimate tool of statutory interpretation and all believe[] it applie[s] in cases where there [are] two 'plausible' interpretations of a statute, one of which raises serious constitutional doubts."[83] The Justices have understood that the canon "guards the [constitutional] boundaries by making it more difficult for Congress even to approach them."[84] But the *Bostock* majority seems happy not just to approach the boundaries keeping Title VII within its constitutional confines—leaving ample room for religious employers to exercise their rights—but to smash them altogether. Thus, if concerns about judicial restraint and overreach lurk at the edges of *Bostock*, as warned by Justice Gorsuch, those concerns mostly stem from the majority's own indifference to the canon of constitutional avoidance.

The majority's declaration of "deep concern" for the rights of religious employers is commendable, but empty talk will not protect religious employers from discrimination suits. Professor Berg is right. "[E]ven if courts [eventually] do declare strong religious-freedom rights, it will take years of litigation."[85] In other words, dear religious employer, prepare to be sued.

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80. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 196–97 (2009); *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (codified as amended at 52 U.S.C. § 10303), *invalidated in part by* Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

81. Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184, 192.

82. RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 88 (5th ed. 2003).

83. Hasen, *supra* note 81, at 192; *see also* NOLAN, *supra* note 77, at 27 ("[T]he doctrine of constitutional avoidance appears to have a broad following at the Supreme Court, as demonstrated by the recent terms of the Roberts Court.").

84. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1217 (2006); *see also* United States v. Marshall, 908 F.2d 1312, 1318 (7th Cir. 1990) ("The canon about avoiding constitutional decisions, in particular, must be used with care, for it is a closer cousin to invalidation than to interpretation. It is a way to enforce the constitutional penumbra, and therefore an aspect of constitutional law proper.").

85. Berg, *supra* note 11 (manuscript at 13); *see also* Brief for Nat'l Ass'n of Evangelicals et al., *supra* note 51, at 13 ("Years of litigation will be necessary to distinguish between lawful religious

C. Doubtful Safeguards

The uncertain nature of the available religious liberty protections makes the majority's apparent apathy all the more baffling.

1. Title VII's Religious-Employer Exemption

Title VII's religious exemption permits religious employers to hire individuals "of a particular religion," and it defines religion to include "all aspects of religious observance and practice, as well as belief."[86] The exemption applies to all employees at the organization, not just those doing religious functions or in leadership roles.[87]

Courts have confirmed that the exemption "gives religious organizations the freedom to hire with respect not just to belief and affiliation, but also to religiously grounded standards of conduct,"[88] such as asking employees to

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standards under the exemption and religious standards that (it will be argued) constitute unlawful [sexual orientation and gender identity] (SOGI) discrimination.").

86. 42 U.S.C. §§ 2000e-1(a), 2000e(j).

87. *See* 42 U.S.C. § 2000e-1(a); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) ("Congress acted with a legitimate purpose in expanding the § 702 exemption to cover all activities of religious employers."); Spencer v. World Vision, Inc., 633 F.3d 723, 731 (9th Cir. 2011) ("Congress amended the statute, however, to remove the limiting reference to 'religious activities.'"); Little v. Wuerl, 929 F.2d 944, 950 (3d Cir. 1991) (explaining that Congress broadened "the exception to cover all employees rather than only those engaged in 'religious activities'"); Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 247 (S.D.N.Y. 2005) ("This revised language applied Section 702's exemption to any activities of religious organizations, regardless of whether those activities are religious or secular in nature.").

88. Thomas C. Berg, *Partly Acculturated Religious Activity: A Case for Accommodating Religious Nonprofits*, 91 NOTRE DAME L. REV. 1341, 1367 (2016). "Courts uniformly reject the theory that the license to consider an employee's 'particular religion' means a license to consider his or her self-identified religious *affiliation* only." Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 303–04 (2016); *see*, e.g., Kennedy v. St. Joseph's Ministries, Inc., 657 F.3d 189, 190–96 (4th Cir. 2011) (permitting a Catholic nursing facility to terminate an employee for wearing Church of the Brethren religious attire); Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 623, 626–27 (6th Cir. 2000) (permitting a Baptist college to terminate a professor for assuming a leadership position in an organization that supported beliefs contrary to the college's); Killinger v. Samford Univ., 113 F.3d 196, 199–200 (11th Cir. 1997) (permitting a Baptist university to terminate a Baptist professor for holding beliefs that differed from the dean's); *Little*, 929 F.2d at 945–46, 949–51 (permitting a Roman Catholic school to terminate a Protestant professor for not abiding by Catholic marriage teachings); Wirth v. Coll. of the Ozarks, 26 F. Supp. 2d 1185, 1187–88 (W.D. Mo. 1998) (permitting a non-denominational Christian employer to make an employment decision based on an employee's Catholic religion, even though Catholicism is a Christian denomination), *aff'd*, 208 F.3d 219 (8th Cir. 2000); Larsen v. Kirkham, 499 F. Supp. 960, 966 (D. Utah 1980) (permitting the

abstain from sexual activity outside the bounds of marriage or to refrain from publicly supporting abortion.[89] Even commentators, like Marty Lederman, Ira Lupu, and Rose Saxe, who are no great friends to religious exemptions, acknowledge that Title VII permits religious employers more leeway than just "favor[ing] employees who belong to a particular church or denomination."[90] They concede that "[b]y judicial interpretation, [Title VII's religious exemption] extends to practices forbidden or required by religious faith."[91] For example, "[a]n Orthodox Jewish congregation . . . could fire an Orthodox Jewish employee for failing to follow Jewish dietary laws, or for disrespecting the Sabbath."[92] So when a religious employer asks employees to adhere to a standard of conduct, the employer is still preferring individuals "of a particular religion" as allowed by the Title VII exemption.[93]

The rub is that the bevy of cases protecting religious employers' conduct standards have largely involved straightforward claims of *religious* discrimination, to which Title VII's religious exemption unquestionably

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L.D.S. Business College to condition employment on church participation in addition to L.D.S. church membership), *aff'd*, No. 80-2152, 1982 WL 20024 (10th Cir. Dec. 20, 1982).

89. *See, e.g.*, Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 140–41 (3d Cir. 2006) (holding that Title VII's religious exemption protected a Catholic school's ability to ensure that its teachers not only professed to be Catholic but were "faithful to their doctrinal practices" such that the school could terminate a teacher for publicly "promoting a woman's right to abortion" contrary to the Catholic Church's teaching); *Hall*, 215 F.3d at 623, 626–27 (holding that Title VII's religious exemption protected a Baptist institution that terminated administrator who was in a lesbian relationship); *Little*, 929 F.2d at 948–51 (holding that Title VII's religious exemption allowed a Catholic school to limit hiring to persons whose beliefs and conduct were consistent with the school's religious tenets, such that the school could terminate a teacher remarried in violation of canon law).

90. Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees (2014), reprinted in Cornerstone Forum: A Conversation on Religious Freedom and Its Social Implications* 1, 3 RELIGIOUS FREEDOM INST. ED., (2016), https://www.religiousfreedominstitute.org/cornerstone/2016/6/30/why-the-law-does-not-and-should-not-allow-religiously-motivated-contractors-to-discriminate-against-their-lgbt-employees (noting that religious employers may "also . . . insist that employees adhere to particular religious tenets"); Rose Saxe, *The Truth About Religious Employers and Civil Rights Laws (2014), reprinted in Cornerstone Forum, supra*, at 2 (observing that Title VII's religious exemption permits religious employers "to terminate an employee whose conduct violated the organization's religious precepts," such as "a policy banning extramarital sex" or a rule prohibiting "remarrying after [an employee] had divorced"); Ira C. Lupu, *Moving Targets:* Obergefell, Hobby Lobby, *and the Future of LGBT Rights*, 7 ALA. C.R. & C.L.L. REV. 1, 43 (2015) ("The right to prefer co-religionists is not limited to matters of religious identity or affiliation.").

91. Lupu, *supra* note 90, at 43 (citing Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991)).

92. *Id.* at 43–44.

93. *See, e.g.*, *Little*, 929 F.2d at 951 ("[T]he 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.") (emphasis added).

applies.[94] But when religious employers step outside that narrow context—to claims of race, sex, or national origin discrimination—they enter a world of danger. As the medieval cartographers put it, "Here be dragons."[95] After *Bostock*'s widening of Title VII's ban on "sex" discrimination, the number of religious employers venturing into this dragon-ridden territory will undoubtedly increase.

"[T]here is debate," says Berg, "whether the [religious exemption] protects *only* against claims of religious discrimination, not against claims of sex discrimination."[96] On one side, scholars, like Carl Esbeck, Doug Laycock, and Stephanie Phillips, advocate for a broad interpretation of the religious exemption, allowing religious employers to discriminate not just on the basis of religion but also on the basis of race, sex, or national

94. *See* Saxe, *supra* note 90, at 1 (granting that Title VII's religious exemption "allows religiously affiliated employers to consider religion in some of their employment decisions, specifically by *favoring those of the same faith* in hiring decisions") (emphasis added); Lupu, *supra* note 90, at 43 (recognizing that Title VII's religious exemption "permits religious entities to prefer members of their own religious community for the purposes of carrying out the organization's mission"); Lederman, *supra* note 90, at 2–3 (reading Title VII's religious exemption as permitting "primarily religious" organizations to "prefer coreligionists"); Micah Schwartzman et al., *Hobby Lobby and the Establishment Clause, Part III: Reconciling Amos and Cutter*, BALKINIZATION (Dec. 9, 2013, 11:15 AM), https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause_9.html (acknowledging that there is a "reasonable expectation that employees who work for churches and religious-affiliated non-profits understand that their employers are focused on advancing a religious mission").

95. Robinson Meyer, *No Old Maps Actually Say 'Here Be Dragons,'* ATLANTIC (Dec. 12, 2013), https://www.theatlantic.com/technology/archive/2013/12/no-old-maps-actually-say-here-be-dragons/282267/ (reporting that the Latin words "*Hic sunt dracones*" (meaning "Here be dragons") do indeed appear on a globe, "[c]alled the Hunt-Lenox Globe, . . . built in 1510," though the title of the article would lead one to believe otherwise).

96. Berg, *supra* note 11 (manuscript at 12) (emphasis added). My focus in this article is on the scope of discrimination permitted by Title VII's religious exemption. Courts are also engaged in a separate but related discussion of how best to determine whether an employer qualifies for the exemption in the first place. As of now, they are split. *See* LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007) (presenting a nine-factor test); Spencer v. World Vision, Inc., 633 F.3d 723, 730 (9th Cir. 2011) (setting aside the *LeBoon* factors). "Commentators and even the government have offered their own proposals." John T. Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J.L. & RELIGION 280, 288 (2018); *see, e.g.*, Thomas M. Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL'Y 63, 104–06 (2006); Roger W. Dyer, Jr., *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test*, 76 MO. L. REV. 545, 567–73 (2011); Mark Jansen, *Religious Organizations and Employment Decisions Based on Religion: A Principled Pluralist Critique*, 5 PHX. L. REV. 183, 186–87, 220–28 (2011); Brian M. Murray, *The Elephant in* Hosanna-Tabor, 10 GEO. J.L. & PUB. POL'Y 493, 525–28 (2012); *see also* Memorandum from Jeff Sessions, U.S. Att'y Gen., to all Exec. Dep'ts & Agencies 12a (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download (asserting that the exemption applies to a broad range of organizations, possibly including for profits).

origin—the other grounds prohibited under Title VII.[97] According to Esbeck, so long as an "employment decision was motivated by the employer's religious beliefs or practices,"[98] it falls within the exemption. That some prohibited characteristic, other than religion, may be implicated is irrelevant. Laycock agrees: "The exception says that this section of the statute shall not apply to hiring decisions within the exception. So it shouldn't matter that the employer is discriminating on the basis of some other protected category. If the decision is based on religion, it should be protected."[99]

On the other side, scholars, like Ira Lupu from George Washington University Law School, argue for a much narrower reading of the exemption—often labeled the "co-religionist view."[100] Under this view, "religious organizations are permitted to favor members of their own faith based on affiliation, but discrimination based on any other status disfavored for religious reasons is not permitted."[101] Rose Saxe put it more bluntly, "Title VII does *not* allow religious organizations to make employment decisions on the basis of race, sex, or national origin—even where religiously motivated."[102]

The lower courts have yet to settle the matter.[103] But the apparent trend is not favorable to religious employers. Post-*Bostock*, only one court has so far considered whether "Title VII's exemption for religious employers . . .

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97. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368, 372 (2015); Phillips, *supra* note 88, at 302 ("[A] religious employer may consider the 'particular religion' of employees or potential employees in order to employ the individuals best suited to carry out its mission. When a religious employer makes an employment decision in this way, then the employer is exempt from all of Title VII.").

98. Esbeck, *supra* note 97, at 389.

99. Christopher D. Cunningham, *Douglas Laycock: How Will New LGBT+ Rules Affect Religious Liberty?*, PUB. SQUARE MAG. (June 17, 2020), https://publicsquaremag.org/questions-and-answers/douglas-laycock-how-will-new-lgbt-rules-effect-religious-liberty/.

100. *See* Lupu, *supra* note 90, at 44 (noting that "the law constrains the co-religionist exemption with another, equally powerful principle — the relevant religious prohibition may not run afoul of other prohibited categories of discrimination").

101. Melcon, *supra* note 96, at 292.

102. Saxe, *supra* note 90, at 2 (emphasis added).

103. *See* Phillips, *supra* note 88, at 301 ("Courts have not consistently applied Title VII's religious-employer exemption, and the Supreme Court has not yet clarified the proper interpretation."); Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 141 (3d Cir. 2006) ("[T]here are circumstances in which Congress'[s] intention to apply Title VII to religious employers is less clear. These cases tend to involve the interplay of Title VII's exemption for religious employers and the application of Title VII's remaining substantive provisions.").

bar[s] . . . claims for discrimination on the basis of sexual orientation."[104] That Indiana federal district court flatly held it did not. The exemption, said the Indiana court, "allows religious employers to favor coreligionists in employment decisions. It does not allow religious employers to do so in a way that also discriminates against another protected class."[105] The court explained:

> The exemption under Section 702 should not be read to swallow Title VII's rules. It should be narrowly construed to avoid reducing Title VII's expansive rights and protections. Recall, religion is a protected class under Title VII. Section 702 allows religious employers to make employment decisions based on that class alone. It does not allow them to make decisions based on that class and another class. Defendants' argument would allow a religious employer to convert any claim of discrimination on the basis of one of the protected classes under Title VII to a case of religious discrimination, so long as there was a religious reason behind the employment decision. This would effectively strip employees of religious institutions of all Title VII protections, if the employer's religion clashed with the employee's protected class status. If Congress had intended to allow religious employers to avoid liability for discriminating on the basis of race, sex, or national origin, it could have done so. Instead, it adopted a limited exception, one intended to respect the rights of religious employers to employ those of the same faith, but that stopped short of allowing religious employers to otherwise limit Title VII's protections.[106]

The scope of Title VII's religious exemption is, at best, disputed. Maybe it protects religious employers from increased liability under *Bostock*'s now amplified ban on "sex" discrimination, but maybe it doesn't. For the *Bostock* majority to confidently assert that the exemption provides a reliable source of protection for religious employers is simply disingenuous.

2. Religious Freedom Restoration Act

The *Bostock* majority described the Religious Freedom Restoration Act as a federal "super statute"—a law that hovers over and above all other federal laws, providing protection to people of faith. And, in fact, it's the

104. Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., No. 19-cv-03153, 2020 WL 6434979, at *1 (S.D. Ind. Oct. 21, 2020), *appeal docketed*, No. 20-3265 (7th Cir. Nov. 20, 2020).

105. *Id.* at *7.

106. *Starkey*, 2020 WL 6434979, at *5.

law that in 2006 prevented U.S. Customs agents from seizing sacramental tea imported by members of the religious society, Centro Espírita Beneficente Uniã do Vegetal.[107] It's the law that in 2014 permitted Hobby Lobby to opt out of part of the Affordable Care Act's contraception mandate.[108] And it's the law that early in 2020 protected activists from a Unitarian Universalist Church from criminal prosecution for trespassing on federal lands to leave food and supplies for undocumented immigrants crossing a desolate part of Arizona's border with Mexico.[109]

But it's also a law, the application of which is mired in uncertainty. "The circuits are split as to whether RFRA can be claimed as a defense in citizen suits—suits solely between private citizens in which the government is not a party."[110] The typical Title VII claim—where a private party brings a workplace discrimination action against a private employer—is a prime example of such a suit.[111] Perhaps it need not be said, but RFRA can only protect religious employers if it in fact applies in the first place.

The divide in the federal circuit courts is significant. The Second, Eighth, and District of Columbia Circuits apply RFRA whenever federal law burdens religious exercise—regardless of the identity of the parties involved.[112] In contrast, the Sixth, Seventh, and Ninth Circuits read

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107. *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 423, 425–26 (2006).

108. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014).

109. *See* United States v. Hoffman, 436 F. Supp. 3d 1272, 1276–77, 1289 (D. Ariz. 2020).

110. Shruti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 343–44 (2013); *see also* Berg, *supra* note 11 (manuscript at 12) ("[T]here's debate whether the statute applies in suits brought by private parties, such as individuals claiming discrimination."); Diana Beltré Acevedo, *Employment Discrimination: How* Hobby Lobby *Enables a RFRA Affirmative Defense Against Title VII's Protections for LGBT People in the Workplace*, 2017 REV. JURÍDICA. U. P.R. 1191, 1209 ("Even though [RFRA's] phrasing seems straightforward, there is controversy regarding RFRA's sphere of application; in particular, whether RFRA is equally applicable to suits between private plaintiffs as to those where the government is a party."); Sara Lunsford Kohen, *Religious Freedom in Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L., POL'Y & ETHICS J. 43, 49 (2011) ("Though it is clear that RFRA applies to conduct by federal officers and agencies, the lower federal courts disagree about whether it applies to suits involving only private parties.").

111. *See* Chaganti, *supra* note 110, at 345 ("A significant number of these cases occur when private citizens seek to enforce employment laws or antidiscrimination laws against private religious organizations and individuals.").

112. *See* EEOC v. Cath. Univ. of Am., 83 F.3d 455, 470 (D.C. Cir. 1996) (holding that Congress "create[d] a compelling interest defense for the benefit of those whose free exercise rights would be burdened by a neutral federal law of general application," including Title VII) (emphasis omitted); Young v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 856, 863 (8th Cir. 1998) (permitting the church to assert RFRA as a defense against a trustee in bankruptcy); Hankins v. Lyght, 441 F.3d 96, 104

RFRA to apply only to claims or defenses against the federal government.[113] Thus, the availability of RFRA as a claim or a defense depends on where a religious employer is located in the country. Though the issue obviously seems ripe for review, the Supreme Court has not yet addressed the split.[114]

This past term, however, the Court did tip its hand ever so slightly. In *Little Sisters of the Poor*, it seemingly endorsed a broad reading of RFRA. The Court upheld the Trump administration's newly-minted religious exemption to the contraception mandate.[115] Justice Clarence Thomas, writing for the majority, ruled that the administration "had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections."[116] He ducked the

(2d Cir. 2006) (holding that RFRA allows parties who "claim that a federal statute . . . substantially burdens the exercise of their religion to assert the RFRA as a defense to any action asserting a claim based on [that statute]"). Note that "[t]he foundations of the Court's reasoning in *Hankins* . . . appear to be eroding." Acevedo, *supra* note 110, at 1211. The decision has been rejected by other circuits, and even by subsequent panels of the Second Circuit itself. *See* Rweyemamu v. Cote, 520 F.3d 198, 203 & n.2 (2d Cir. 2008) (expressing "doubts about *Hankins*'s determination that RFRA applies to actions between private parties" and concluding that RFRA should not apply to purely private disputes "regardless of whether the government is capable of enforcing the statute at issue").

113. *See* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 411 (6th Cir. 2010) ("Congress did not intend [RFRA] to apply against private parties."); Listecki v. Off. Comm. of Unsecured Creditors, 780 F.3d 731, 737 (7th Cir. 2015) ("The plain language [of the statute] is clear that RFRA only applies when the government is a party."); Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) ("RFRA is applicable only to suits to which the government is a party."), *abrogated by* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th Cir. 1999) (holding that a plaintiff may not bring a religious discrimination suit against a private employer under RFRA, unless the employer "acted under color of law"). The Court of Appeals for the Fifth Circuit, in an unpublished opinion, affirmed a district court's holding that RFRA does not apply to lawsuits between private parties. *See* Boggan v. Miss. Conf. of the United Methodist Church, 222 F. App'x 352, 353 (5th Cir. 2007) (per curiam), *aff'g* 433 F. Supp. 2d 762 (S.D. Miss. 2006).

114. So far, the government has been a party in every RFRA case reviewed by the Supreme Court. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 511–12 (1997) (involving RFRA suit against city government), *superseded by statute*, Religious Land Use and Institutionalized Person Act of 2000, Pub. L. No. 106-274, §3, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc–1(b)), *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 423 (2006) (involving RFRA suit against federal government); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 688–91 (2014) (involving RFRA suit against federal government); Zubik v. Burwell, 136 S. Ct. 1557, 1559–60 (2016) (per curiam) (involving RFRA suit against federal government); Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2376 (2020) (RFRA raised as defense in suit against federal government); Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (involving RFRA suit against federal government).

115. *See Little Sisters of the Poor*, 140 S. Ct. at 2382.

116. *Id.* at 2372–73.

more weighty question of whether RFRA—being the "super statute" that it is—actually *required* the exemption.[117]

Nonetheless, Justice Thomas still gave the law meaningful discussion. He reaffirmed "that, under RFRA, the [Administration] must accept the sincerely held complicity-based objections of religious entities."[118] And he specifically rejected the challengers' argument that the administration "could not even consider RFRA as they formulated the religious exemption."[119] RFRA, reiterated Justice Thomas, "applies to all Federal law," unless Congress has expressly excluded a statute from the law's purview.[120] "The ACA does *not* explicitly exempt RFRA," said Justice Thomas.[121] Moreover, he directed that the Court's previous decisions addressing the contraceptive mandate "all but instructed the [Administration] to consider RFRA going forward."[122]

Thus, the Court may be leaning toward an ever more expansive reading of RFRA. But it has yet to address head on whether the law applies to private workplace discrimination claims brought against private employers, like the many churches, charities, and other religious nonprofits operating across the country. Until the Court does so, Justice Gorsuch's statement in *Bostock* that RFRA "*might* supersede Title VII's commands"[123] should be taken as written. RFRA maybe, possibly, conceivably, kinda, sorta could help religious employers. That's hardly reassuring.

3. Ministerial Exception

The last of the religious liberty protections listed by the *Bostock* majority was the ministerial exception.[124] A unanimous Supreme Court, in the 2012 case *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[125] "recognized the existence of a 'ministerial exception,' grounded in the First

117. *See id.* at 2381–82.

118. *Id.* at 2383.

119. *Id.* at 2382–83.

120. *Id.* at 2383 (quoting 42 U.S.C. § 2000bb–3(a)).

121. *Id.* (emphasis added).

122. *Id.*

123. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (emphasis added).

124. *See id.* ("This Court has also recognized that the First Amendment can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers.'" (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188 (2012))).

125. *Hosanna-Tabor*, 565 U.S. at 171.

Amendment, that precludes application of [discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers."[126] That is, the Free Exercise and Establishment clauses of the First Amendment work together to remove the government—including all nondiscrimination laws—from the ministerial selection process.

The exception is, as Justice Sonia Sotomayor put it, "extraordinarily potent."[127]

> It gives an employer free rein to discriminate because of race, sex, pregnancy, age, disability, or other traits protected by law when selecting or firing their "ministers," even when the discrimination is wholly unrelated to the employer's religious beliefs or practices. That is, an employer need not cite or possess a religious reason at all; the ministerial exception even condones animus.[128]

Religious employers, thus, are *completely* exempt from nondiscrimination statutes when hiring and firing employees classified as "ministers."

A central issue then in determining the scope and application of the ministerial exception is which positions qualify for the legal label of ministry. The *Hosanna-Tabor* Court gave little guidance. It explicitly spurned "adopt[ing] a rigid formula for deciding when an employee qualifies as a minister."[129] It is enough, the Court said, "for us to conclude, in this our first case involving the ministerial exception, that the exception covers [the elementary school teacher, Cheryl] Perich, given all the circumstances of her employment."[130]

The "circumstances of [Perich's] employment" placed her squarely within the ministerial exception. She obviously fit the definition of a minister. She was theologically trained, formally ordained, and called by a specific congregation of the Lutheran Church to serve as a pastor and teacher.[131] She was even given the title, "Minister of Religion."[132] It was not surprising then when the Court declared, "In light of these

126. *Id.* at 188.

127. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2072 (Sotomayor, J., dissenting).

128. *Id.* (citation omitted).

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

130. *Id.*

131. *See id.* at 191–92.

132. *Id.* at 191.

considerations . . . [,] we conclude that Perich was a minister covered by the ministerial exception."[133]

Little could be gleaned from the Court's fact-specific analysis about the precise contours of the legal label "minister." It was clear, but hardly revelatory, that the ministerial exception applied to formally called and trained clergy. But whether the legal label could or would be extended beyond that was unclear.

That was the status of the ministerial exception when the Court decided *Bostock* and invoked the exception as a potential source of protection for religious employers against Title VII's growing ban on "sex" discrimination. The exception, though "extraordinarily potent," was extraordinarily limited. It provided strong safeguards for religious employers—primarily churches—to hire and fire clergy, but not much else. While that's great for the smattering of religious employers able to leverage the exception, it hardly qualifies as the broad protection of religious liberty the *Bostock* majority seems to insinuate. For the plethora of religious charities, schools, and other nonprofits, whose employees are almost certainly not formally called and trained clergy, it means little.

Shortly after *Bostock*, the Court broadened, at least by some measure, the boundaries of the legal label minister. How helpful that enlargement will prove to be is grappled with below.

D. Pushing Back in Part

The *Bostock* majority mostly sidestepped the religious liberty difficulties raised by its expansion of Title VII. The Justices ran down a list of protections that are, as laid out above, iffy. Not surprisingly then, many religious employers reacted to *Bostock* with concern.

Robert George described the majority opinion as "sophistical" and the position it endorsed "untenable."[134] "Hard to overstate the magnitude of this loss for religious conservatives," added Rod Dreher.[135] Denny Burk said the decision "eviscerated religious liberty,"[136] while Andrew Walker called the

133. *Id.* at 192.

134. Robert George, *The Bostock Case and the Rule of Law*, MIRROR OF JUST. (June 15, 2020), https://mirrorofjustice.blogs.com/mirrorofjustice/2020/06/the-bostock-case-and-the-rule-of-law.html.

135. Rod Dreher (@roddreher), TWITTER (June 15, 2020, 10:47 AM), https://twitter.com/roddreher/status/1272541229167845376.

136. Denny Burk (@DennyBurk), TWITTER (June 15, 2020, 10:54 AM), https://twitter.com/DennyBurk/ status/1272543044391391232.

opinion "devastating,"[137] adding later, "If you're a Christian higher ed institution taking federal monies, buckle up."[138]

These worried responses, though understandable, were premature. Religious employers would do well to remember the wise words of John "Bluto" Blutarsky: "Over? Did you say 'over?' Nothing is over until we decide it is! Was it over when the Germans bombed Pearl Harbor? Hell, no!"[139] Nor was the fight to protect religious hiring rights over with *Bostock*.

As if to reinforce the point, less than a month after *Bostock*, the Court traded sides and scored a countervailing win for religious freedom.[140] In *Our Lady of Guadalupe*,[141] the Court extended the reach of the ministerial exception from formally called and trained clergy to the range of employees engaged in religious instruction, such as lay teachers at a private religious school. "When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith," said the Court, "judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[142]

Remember that *Hosanna-Tabor* required only a straightforward application of the ministerial exception. Cheryl Perich had a title, training, and responsibilities that led all nine Justices to conclude that her position was "ministerial." *Our Lady of Guadalupe* was far thornier. The two teachers bringing suit—Agnes Morrissey-Berru and Kristen Biel—were not formally ordained, theologically trained, or officially called by a church to be ministers or pastors.[143] But, as the Court explained, different faiths have very different traditions as to the training and appointing of persons tasked

137. Andrew T. Walker (@andrewtwalk), TWITTER (June 15, 2020, 10:43 AM), https://twitter.com/andrewtwalk /status/1272540316978032642.

138. Andrew T. Walker (@andrewtwalk), TWITTER (June 15, 2020, 12:23 PM), https://twitter.com/andrewtwalk /status/1272565505656840199; *see also* Senator Josh Hawley, *Senator Hawley Speaks on the Supreme Court's Bostock Decision*, YOUTUBE (June 16, 2020), https://www.youtube.com/watch?v=hrKb_OuEy2k ("This decision, and the majority who wrote it, represents the end of something. It represents the end of the conservative legal movement . . . as we know it.").

139. *National Lampoon's Animal House Quotes*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/national_lampoons_animal_house/quotes/ (last visited Jan. 19, 2021).

140. *See generally* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–69 (2020) (expanding the ministerial exception to include employees performing religious instruction).

141. *Id.*

142. *Id.* at 2069.

143. *See id.* at 2062, 2066.

with teaching the faith.[144] "What matters, at bottom," said the Court, "is what an employee does. And implicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."[145]

Morrissey-Berru and Biel "both performed [these] vital religious duties."[146] According to the Court:

> [They were] responsible for providing instruction in all subjects, including religion[.] [T]hey were . . . entrusted most directly with the responsibility of educating their students in the faith. . . . [T]hey [were] obligated to provide instruction about the Catholic faith, [and] they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities.[147]

The central role the teachers played in "[e]ducating and forming students in the Catholic faith" led the Court to conclude that "Morrissey-Berru and Biel qualif[ied] for the exemption . . . recognized in *Hosanna-Tabor*."[148]

Our Lady of Guadalupe, thus, expanded "the ministerial exception to cover elementary school teachers with responsibilities for instructing and inculcating their students in the school's faith."[149] That was a clear win for religious liberty but a narrow one. The Court emphasized that it was only "decid[ing] the cases before [it]" and "not imposing any 'rigid formula.'"[150] Most significantly, the Court doesn't spell out the precise quantity of religious education duties required to trigger the ministerial exception. For instance, does the exception apply to a high-school teacher at a private religious school who teaches a secular subject, such as math or computer science?

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144. *See id.* at 2063–66 (observing that "many religious traditions do not use the title 'minister'" and "may differ in the degree of formal religious training thought to be needed in order to teach").

145. *Id.* at 2064.

146. *Id.* at 2066.

147. *Id.*

148. *Id.*

149. Lupu & Tuttle, *supra* note 22.

150. *Our Lady of Guadalupe*, 140 S. Ct. at 2067, 2069 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012)).

Professors Lupu and Tuttle suggest "reasonable people can differ."[151] Ryan Anderson, Senior Research Fellow at the Heritage Foundation, argues the exception should still apply. "Even if you're the math teacher," Anderson says, "the logic of this opinion . . . is that if the school asks you to embody the faith, [then] you're a minister."[152] He argues that schoolteachers at religious schools, regardless of what subject they teach, serve as guides and role models for how to live out the faith. As such, they share "responsibilities for instructing and inculcating their students in the school's faith" just as Morrissey-Berru and Biel did.[153]

Professor Laycock, who argued on behalf of the Lutheran Church in *Hosanna-Tabor*, disagrees. "I don't think the Court will expand this to say that those who teach only secular subjects are ministers, even if they are expected to be role models."[154] He draws a distinction between primary and secondary schoolteachers. "[M]ost teachers in religious elementary schools may be ministers, because they teach the whole curriculum, including religion. But most teachers in middle schools and high schools will not be, because they each teach a particular subject, and most of those subjects are secular."[155]

Lupu and Tuttle share Laycock's assessment. "Most elementary school teachers with responsibility for combined religious and secular teaching will fall under the exception; high school teachers in secular subjects will not."[156] They claim Morrissey-Berru and Biel "were at the borderline" of the ministerial exception.[157] Lower courts will have to take up the issue on a case-by-case basis, "measur[ing] the quality and quantity of religious instructional duties assigned to any employee for whom an employer asserts the ministerial exception."[158]

Lupu and Tuttle's assessment highlights a major shortcoming of the ministerial exception. As framed by the Supreme Court, the application of the exception is horribly unpredictable. When is "the quality and quantity of religious instructional duties" enough?[159] For Cheryl Perich, the minister in

151. Lupu & Tuttle, *supra* note 22.
152. McCormack, *supra* note 35.
153. Lupu & Tuttle, *supra* note 22.
154. McCormack, *supra* note 35.
155. *Id.*
156. Lupu & Tuttle, *supra* note 22.
157. *Id.*
158. *Id.*
159. *Id.*

Hosanna-Tabor, "religious duties consumed only 45 minutes of each workday."[160] Yet it was enough. However, according to counsel for Morrissey-Berru and Biel, "40 minutes a day" should not be.[161] Can it really be that a difference of 5 minutes dictates the applicability of the Constitution's religious liberty protections?

Confusingly, the Court purported to reject this kind of line drawing in *Hosanna-Tabor*. It rebuked the Sixth Circuit for "regard[ing] the relative amount of time Perich spent performing religious functions as largely determinative."[162] "The issue before us," said the Court, "is not one that can be resolved by a stopwatch."[163] Yet the Court seemed to settle on a test in *Our Lady of Guadalupe* that requires exactly that—tabulating how much of an employee's time is spent "educating and forming students in the faith."[164]

Why the inconsistency? Because, from the start, the Court shunned consideration of who the religious employer considers to be performing its most important religious functions. It's true, the majority in *Our Lady of Guadalupe* suggested some minimal level of deference to religious employers—"[a] religious institution's explanation of the role of such employees in the life of the religion in question is important"—but, in the end, it concluded "what an employee does" controls.[165] The Court has, thus, pinned the applicability of the exception on the *actions* of the alleged ministers. How much religious training they have undertaken, whether they actively hold themselves out as a minister, and, most centrally of all, "the nature of the religious functions [they] perform[]."[166] That a religious employer has made a sincere determination that a particular employee is ministerial may be somewhere on the list (likely at or near the bottom). The analysis revolves around the employee's actions, not the perspective of the religious employer.

Justice Thomas has twice now urged the Court to take the opposite tack—to look to the views of the religious employer rather than the actions

160. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 193 (2012).

161. Transcript of Oral Argument at 75, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020) (No. 19-267, 19-348), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-267_4g25.pdf.

162. *Hosanna-Tabor*, 565 U.S. at 193.

163. *Id.* at 193–94.

164. *Our Lady of Guadalupe*, 140 S. Ct. at 2069.

165. *Id.* at 2064, 2066.

166. *Id.* at 2063–66; *Hosanna-Tabor*, 565 U.S. at 194.

of the alleged minister.[167] In *Hosanna-Tabor*, he argued, "[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister."[168] Acceding to the understanding of the religious employer, Justice Thomas maintained, avoids the "uncertainty . . . and [the] corresponding fear of liability" perpetuated by the majority's employee-focused approach.[169]

And, in *Our Lady of Guadalupe*, Justice Thomas, now joined by Justice Gorsuch, again implored the majority to adopt an approach to the ministerial exception that "defer[s] to religious organizations' good-faith claims that a certain employee's position is ministerial," rather than one that requires an *ad hoc* evaluation of the duties of potential ministerial employees.[170] He contended:

> [D]eference [to religious employers] is necessary because . . . judges lack the requisite "understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." What qualifies as "ministerial" is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis.[171]

In both *Hosanna-Tabor* and *Our Lady of Guadalupe*, the majority consciously chose *not* to follow this mode of analysis proffered by Justice Thomas. Instead, it saddled courts with the task of sussing out whether a given employee of a religious organization is carrying out religious functions of sufficient "quality and quantity" to qualify for the ministerial exception. Inevitably, this focus on the actions and functions of a potential minister leads to the kind of "stopwatch" analysis the Court professed to be swearing off. The only way to know whether the ministerial exception has been

167. *See Hosanna-Tabor*, 565 U.S. at 196–98 (Thomas, J., concurring); *Our Lady of Guadalupe*, 140 S. Ct. at 2069–71 (Thomas, J., concurring).

168. *Hosanna-Tabor*, 565 U.S. at 196 (Thomas, J., concurring).

169. *Id.* at 197.

170. *Our Lady of Guadalupe*, 140 S. Ct. at 2069–70 (Thomas, J., concurring) ("I write separately, however, to reiterate my view that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'").

171. *Our Lady of Guadalupe*, 140 S. Ct. at 2070 (Thomas, J., concurring) (citation omitted) (first quoting *Id.* at 2066 (majority opinion); and then citing *Hosanna-Tabor*, 565 U.S. at 197 (Thomas, J., concurring)).

triggered is for a court to adjudge, in the words of the *Our Lady of Guadalupe* majority, "what an employee does" is religious enough.[172]

That leaves religious employers—newly living under a threat of liability for sexual orientation and gender identity discrimination—in a precarious position. They simply cannot be confident that, even though they sincerely believe an employee serves a ministerial function, a court will reach the same conclusion. Make no mistake. The potential availability of the ministerial exception, as a defense against the discrimination claims of a wider range of employees, is a win for religious freedom. But the Court's fixation on the employee's actions, rather than the religious employer's views, creates unacceptable uncertainty. Religious employers, concerned about liability for workplace discrimination after *Bostock*, have no assurance that a court will view any given employee the same way they do. That seems more of an endangerment to religious liberty than a safeguard.

II. CONVENTIONAL WISDOM

Merriam-Webster defines "conventional wisdom" as the "opinions or beliefs that are held or accepted by most people."[173] If "most people" means distinguished constitutional scholars, as opposed to the average Walmart shopper,[174] then the conventional wisdom is that the Supreme Court's dueling opinions in *Bostock* and *Our Lady of Guadalupe* outline the contours of a settlement—a compromise in the perceived conflict between LGBTQ rights and religious liberty.[175] The two core components of the settlement being: (1) broad nondiscrimination protections for LGBTQ Americans kicked off by the Court's expansion of Title VII in *Bostock*, and (2) adequate exemptions for believers who object on religious grounds to employing or providing services to LGBTQ people, as exemplified by *Our Lady of Guadalupe*. While the specifics, of course, need to be hammered out, the basic legislative and constitutional framework is becoming clear.

The primary evidence for this alleged compromise is the unlikely alliance of Supreme Court Justices that comprised the majorities in the two cases. Justice Gorsuch—President Trump's first nominee for the high

172. *Id.* at 2064 (majority opinion).

173. *Conventional Wisdom*, MERRIAM-WEBSTER LEARNER'S DICTIONARY, https://www.learnersdictionary.com/definition/conventional%20wisdom (last visited Jan. 7, 2021).

174. Noted travel and science author Bill Bryson puts it best: "[w]hen I say 'most people' I mean of course me when I first got there." BILL BRYSON, IN A SUNBURNED COUNTRY 91 (Broadway Books 2000).

175. *See* sources cited *supra* note 11.

Court—wrote the opinion in *Bostock*, and Chief Justice Roberts, another Republican-nominated Justice, joined him. The two conservatives along with the four liberals—Justices Ginsburg, Breyer, Sotomayor, and Kagan—made up the *Bostock* majority.[176] This development so shocked and appalled right-wing legal activists that they called it "an unprecedented betrayal."[177]

But, less than a month later, two Democratic-nominated Justices, Kagan and Breyer, slid over to join the five conservatives in *Our Lady of Guadalupe*.[178] The case, as discussed above, extended the ministerial exception to cover persons employed to teach and instruct others in the faith and, thereby, rendered *Bostock* potentially inapplicable to thousands of religious employers.[179] Two supposedly liberal Justices—who had just championed the expansion of nondiscrimination protections to LGBTQ persons in *Bostock*—now voted with their archenemies to undermine those protections.

This unfolding of judicial events seemed so unlikely to "most people," i.e., the aforementioned distinguished constitutional scholars, that they demanded an explanation. That explanation could not be found in the originalism of the Court's most conservative Justices or in the "living constitution" hawked by the more progressive Justices. No, the answer had to be that a chunk of the Justices were so fed up with the partisan, polarized illogic of the culture war that they set aside any coherent legal philosophy to settle it once and for all.

That, at any rate, is the conventional wisdom. And, truth be told, it has appeal. Of course, forcing a settlement of the culture war and ending the acrimony would be nice. But it's an unlikely explanation.

First, that Justices Kagan and Breyer joined the majority in *Our Lady of Guadalupe* is not surprising. Recall that the Court decided *Hosanna-Tabor* unanimously. All nine Justices agreed that the First Amendment provides a

176. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

177. Gabby Orr, *'We Will Not Be Betrayed Again': Trump's SCOTUS List Hits a New Roadblock*, POLITICO (July 27, 2020, 4:30 AM), https://www.politico.com/news/2020/07/27/trump-scotus-list-381418 (quoting Carrie Severino, Policy Director and Chief Counsel of the Judicial Crisis Network); *see also The* Bostock *Betrayal*, CRISIS MAG. (June 19, 2020), https://www.crisismagazine.com/2020/the-bostock-betrayal. *Crisis Magazine* captured the outrage well: "The Bostock decision is bad. It is the most egregious instance of judicial activism since *Obergefell v. Hodges*, and perhaps even *Roe v. Wade*. But the fact that it was championed by a so-called conservative justice is catastrophic. For the majority opinion was written by none other than Justice Neil Gorsuch, President Trump's first SCOTUS appointee and doyen of the Federalist Society—a man once dubbed 'the Antonin Scalia of his generation.'" *Id.*

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

179. *See supra* notes 140–72 and accompanying text.

"ministerial exception" that shields religious employers against *any* nondiscrimination claim brought by a ministerial employee.[180] That was eight years ago—long before "most people" had any inkling of a settlement of the culture war.

As Lupu and Tuttle observed, "*Our Lady of Guadalupe School* is a direct outgrowth of the Court's unanimous decision in [*Hosanna-Tabor*]."[181] As previously discussed, it is a narrow decision.[182] The Court rejected again the far more deferential approach to the ministerial exception argued for by Justice Thomas. It doubled down on an approach that prioritizes "what an employee does" and mostly sets aside the views of the religious employer.[183] The applicability of the exception then hinges on a court's evaluation of whether an alleged "minister" has sufficient religious duties—meaning responsibilities for instructing and inculcating persons in the tenets of the faith.

It's fair to call *Our Lady of Guadalupe* an expansion of the ministerial exception but, make no mistake, it's a slight one. The surprising thing is that any Justices dissented at all.

Second, and reinforcing the first point, Justice Kagan's affinity for religious freedom is not new. Prior to her appointment to the Court, she worked in the Clinton White House.[184] She called herself "the biggest fan [of a successor statute to RFRA] . . . in this building,"[185] in a discussion of the statute's fate after *City of Boerne v. Flores*.[186]

And, in a memo to her White House colleagues, Kagan urged the administration to join religious conservatives in asking the Court to review and reverse a California Supreme Court ruling that the state's

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

181. Lupu & Tuttle, *supra* note 22.

182. *See supra* notes 149–50 and accompanying text.

183. *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

184. *See* Melissa Rogers, *Free Exercise Flip? Kagan, Stevens, and the Future of Religious Freedom*, BROOKINGS (June 23, 2010), https://www.brookings.edu/research/free-exercise-flip-kagan-stevens-and-the-future-of-religious-freedom/; Margaret Talbot, *Is the Supreme Court's Fate in Elena Kagan's Hands?*, NEW YORKER (Nov. 11, 2019), https://www.newyorker.com/magazine/2019/11/18/is-the-supreme-courts-fate-in-elena-kagans-hands.

185. Rogers, *supra* note 184 (second alteration in original); *see also* Adam J. White, *Our Tragic Constitution*, COMMENT. MAG. (Sept. 2014), https://www.commentarymagazine.com/articles/adam-white/our-tragic-constitution/.

186. *See id.*; City of Boerne v. Flores, 521 U.S. 507 (1997), *superseded by statute*, Religious Land Use and Institutionalized Person Act of 2000, Pub. L. No. 106-274, §3, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc–1(b)), *as recognized in* Holt v. Hobbs, 574 U.S. 352 (2015).

antidiscrimination law overcame a landlord's religious objections to renting to an unmarried couple.[187]

Calling the California court's decision "quite outrageous," Kagan wrote, "given the importance of this issue . . . and the danger this decision poses to [the] guarantee of religious freedom in the State of California, I think there is an argument to be made for urging the Court to review and reverse the decision."[188]

Since her appointment on the Supreme Court, Kagan has, on multiple occasions, sided with the conservatives in religious liberty cases. *Hosanna-Tabor* and *Our Lady of Guadalupe*, of course, stand as examples but there are others. She joined Breyer and the five conservative Justices in allowing a forty-foot-tall concrete cross commemorating soldiers who died in the First World War to remain on public land in Bladensburg, Maryland.[189] She threw in with the conservative majority to overturn a decision by the Colorado Civil Rights Commission holding that a Christian baker had violated the state's nondiscrimination laws by refusing to make a cake for a gay couple's wedding.[190] She voted with the conservatives to uphold the Trump administration's religious exemption to the ACA's contraceptive mandate.[191] And the list could go on.

Kagan's vote in *Our Lady of Guadalupe* is not an anomaly that requires an explanation. It's part of a broader pattern of ensuring religious liberty.

Third, and finally, religious liberty law is in flux. Until it becomes clear where the Court will land, attempts at hashing out a compromise are likely to fail. The Court recently heard oral arguments in *Fulton v. City of Philadelphia*,[192] a case considering whether Philadelphia violated the Free Exercise Clause by pulling Catholic Social Services' contract to provide foster care placements for children in state custody.[193] The city yanked the contract when it learned the charity's religious beliefs precluded it from

187. *See* Rogers, *supra* note 184.

188. Rogers, *supra* note 184.

189. *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074, 2090 (2019); *id.* at 2094 (Kagan, J., concurring in part).

190. *See* Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1732–34 (2018) (Kagan, J., concurring).

191. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2396–400 (2020) (Kagan, J., concurring).

192. Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (mem.).

193. *Id.* at 146.

placing children with same-sex couples.[194] The case raises a number of thorny legal questions, including whether the Court should overturn, *Employment Division v. Smith*,[195] a 1990 case that substantially watered down the safeguards provided by the Free Exercise Clause.[196] In 2019, four Justices—Alito, Thomas, Gorsuch, and Kavanaugh—expressed a willingness to revisit *Smith*, calling the case a "drastic[] cut back on the protection provided by the Free Exercise Clause," and noting that "[i]n this case, however, we have not been asked to revisit th[at] decision[]."[197] If Catholic Social Services prevails on this point, religious liberty could well receive its biggest boost in decades.

The Court held oral arguments in *Fulton* in early November. Scholars and commentators walked away from those arguments doubtful that the Court will in fact upend *Smith*.[198] Michael McConnell reported, "Alas, during Wednesday's oral argument the Justices showed no serious interest in the merits or demerits of *Smith*."[199] "While [Catholic Social Services] is likely to prevail before the Court's new conservative super-majority," said Fran Swanson, "it is unclear after oral argument that a majority of justices were willing to go as far as Justice Alito and use this case to overturn *Smith* when there are clear off-ramps to avoid doing so."[200] Austin Nimocks and Cory Liu agreed,

194. *Id.* at 146, 148–49.

195. Emp. Div. v. Smith, 494 U.S. 872 (1990).

196. *See* Petition for Writ of Certiorari at i, 32, *Fulton*, 140 S. Ct. 1104 (No. 19-123), https://www.supremecourt.gov/DocketPDF/19/19-123/108931/20190722174037071_Cert%20Petition%20FINAL.pdf (listing one of the questions presented as "[w]hether *Employment Division v. Smith* should be revisited"); *see generally Smith*, 494 U.S. at 874–90 (holding that "Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal result[ed] from use of [a religious] drug").

197. Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (mem.) (Alito, J., concurring in denial of cert.).

198. Case Docket, *Fulton*, 140 S. Ct. 1104 (2020) (No. 19-123), https://www.supremecourt.gov/docket/docketfiles/html/public/19-123.html (noting that the case was "[a]rgued" on November 4, 2020).

199. Eugene Volokh, *Prof. Michael McConnell (Stanford) on Fulton v. City of Philadelphia*, REASON: VOLOKH CONSPIRACY (Nov. 6, 2020, 8:02 AM), https://reason.com/volokh/2020/11/06/prof-michael-mcconnell-stanford-on-fulton-v-city-of-philadelphia/.

200. Fran Swanson, *SCOTUS Hears Oral Argument on Conflict Between Religious Liberty and Anti-Discrimination Measures in Fulton v. City of Philadelphia*, HARV. C.R.-C.L. L. REV. (Nov. 10, 2020), https://harvardcrcl.org/scotus-hears-oral-argument-on-conflict-between-religious-liberty-and-anti-discrimination-measures-in-fulton-v-city-of-philadelphia/.

> Judging from the tenor of the oral argument, the Supreme Court does not appear to be interested in formally jettisoning *Smith*, at least for now. Even if a majority wants to do so in principle, the court appears to have alternative pathways to deciding *Fulton* without reaching the larger question of *Smith*'s future.[201]

But Josh Black hoped that "[e]ven if the case is not overruled, the Court may shed some light on Justice Scalia's decision."[202]

The Court's recent 5–4 decision enjoining New York's COVID-19 restrictions on houses of worship gives a glimpse of where the Court is likely headed.[203] Shortly before midnight on Thanksgiving Eve,[204] the Court ruled that Governor Cuomo's executive order restricting attendance at religious services "violate[d] 'the minimum requirement of neutrality' to religion."[205] New York's "regulations cannot be viewed as neutral," said the Court, "because they single out houses of worship for especially harsh treatment."[206] This "harsh treatment" could be seen by comparing the state's management of houses of worship to its management of other so-called "essential" businesses.[207] For example, "acupuncture facilities, camp grounds, garages, as well as many whose services" had no occupancy restrictions.[208] Even "factories and schools," the Court observed, were "treated less harshly" than worship services.[209]

The key departure from the Court's prior Free Exercise jurisprudence, including its handling of COVID-19 cases, is its method of comparison. Rather than matching up New York's restrictions on houses of worship only

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201. Austin Nimocks & Cory Liu, *Justices May Not Alter Religious Freedom Precedent in Fulton*, LAW360 (Nov. 12, 2020, 4:48 PM) (emphasis added), https://www.law360.com/articles/1328223/justices-may-not-alter-religious-freedom-precedent-in-fulton.

202. Josh Blackman, *Four Observations from* Fulton v. City of Philadelphia, REASON: VOLOKH CONSPIRACY (Nov. 5, 2020, 2:54 PM), https://reason.com/volokh/2020/11/05/four-observations-from-fulton-v-city-of-philadelphia/.

203. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (per curiam).

204. Amy Howe, *Justices Lift New York's COVID-Related Attendance Limits on Worship Services*, SCOTUSBLOG (Nov. 26, 2020, 2:18 AM), https://www.scotusblog.com/2020/11/justices-lift-new-yorks-covid-related-attendance-limits-on-worship-services/.

205. *Roman Cath. Diocese*, 141 S. Ct. at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).

206. *Id.* at 66 & n.1 (citing Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018)).

207. *Id.* at 66–67.

208. *Id.* at 66.

209. *Id.* at 67.

to "*comparable* secular gatherings,"[210] the Court measured the restrictions against the state's treatment of *any* secular enterprise at all, regardless of whether or not it is comparable.[211] Earlier in the year, in *South Bay Pentecostal Church v. Newsom*,[212] Chief Justice Roberts compared California's COVID-19 restrictions to "*comparable* secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[213]

But in ruling on New York's management of houses of worship, the Court compared it to "factories and schools" and "acupuncture facilities, camp grounds, garages, as well as . . . plants manufacturing chemicals and microelectronics and all transportation facilities."[214] Those are secular undertakings that have very little similarity to gatherings at places of worship. The upshot is that if *any* secular businesses at all are treated more favorably, the government has the burden to show why houses of worship are treated less favorably.

Justice Kavanaugh described the approach adopted by the Court this way:

> The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, some secular businesses are subject to similarly severe or even more severe restrictions. *Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class.* Here, therefore, the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses. The State has not done so.[215]

This shift in comparison methods marks a meaningful slackening of the showing required from a Free Exercise claimant. Justice Sotomayor saw it

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210. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring) (emphasis added).

211. *See Roman Cath. Diocese*, 141 S. Ct. at 66–67.

212. *Newsom*, 140 S. Ct. 1613.

213. *Id.* at 1613 (emphasis added).

214. *Roman Cath. Diocese*, 141 S. Ct. at 66–67.

215. *Id.* at 73 (Kavanaugh, J., concurring) (internal citations omitted).

and called it out. *Smith* and *Lukumi*, she said, do not stand "for the proposition that states must justify treating even noncomparable secular institutions more favorably than houses of worship."[216] She's not wrong. But, at this point, a majority of the Court seems willing to abandon *Smith* to the extent it limits comparisons to comparable secular undertakings only.

The Court made this all the more clear in its recent 5–4 decision enjoining California's COVID-19 restrictions that barred people from meeting in homes for informal religious gatherings. A majority of the Court doubled down on the comparison approach used in *Roman Catholic Diocese of Brooklyn v. Cuomo*. The majority affirmed:

> [G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue.[217]

The Court explained that California ran afoul of this principle: "California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."[218] The most important word in that sentence is "some." Or a synonym, "any." If some or any comparable businesses are treated "more favorably," than the restriction on the religious gatherings is not neutral and strict scrutiny applies.

The precedential impact of the Supreme Court rulings granting emergency stays is debatable.[219] Nevertheless, the Court's treatment of New York's and California's COVID-19 restrictions presages the likely outcome of *Fulton*. If so, the Court will not overturn *Smith* as some had hoped, but it will dramatically change its interpretation of the case. That change would

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216. *Id.* at 80 n.2 (Sotomayor, J., dissenting).

217. Tandon v. Newsom, No. 20A151, 2021 WL 1328507, at *1 (Apr. 9, 2021) (per curiam) (citing Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63, 67 (2020) (Kavanaugh, J., concurring) (per curiam)).

218. *Id.* at 3.

219. *See* Trevor McFadden & Vetan Kapoor, *The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM), https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/.

strengthen religious liberty protections by lowering the showing necessary to trigger strict scrutiny.

This potential change is precisely where the difficulty lies in brokering a compromise between LGBTQ rights and religious liberty. The Court's apparent willingness to reconsider *Smith* casts a cloud of doubt over the bargaining process. Any compromise legislation proffered by Congressmen—such as the Fairness for All Act discussed above[220]—could end up subject to immediate challenge and possible undoing should the Court turn back *Smith*. And the Democratic-appointed Justices will be wary of continuing to join the now conservative majority at the Court when free exercise is up for grabs. Lower conservative courts will also be emboldened to push the boundaries of free exercise. The uncertainty of the law understandably sows distrusts between the sides. Such an environment is not one ripe for compromise.

CONCLUSION

This past term, the Court stepped in and finally extended workplace nondiscrimination protections to LGBTQ Americans. Such protections were long overdue. No one should be prevented from making a living simply because of their sexual orientation or preferred gender identity. But the Court dismissed the implications of its decision for religious employers far too easily. Its broadening of the ministerial exception gives religious employers a bit more breathing room to continue hiring and firing consistent with their religious beliefs. However, it does not offset their now increased exposure to liability for employment discrimination claims brought under Title VII. The vast increase in potential liability without a concomitant expansion of religious liberty safeguards belies the claim that the Court is orchestrating a settlement of the longstanding clash between LGBTQ rights and religious liberty. The Justices' track records in religious freedom cases and the uncertain state of religious liberty law reinforce just how dubious the claim of a compromise really is. After this past Court term, religious employers have whiplash. But, better buckle up. The ride is still in motion.

220. *See supra* notes 36–40 and accompanying text.