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# Protecting Your Right to Serve: How Religious Ministries Can Meet New Challenges without Changing Their Witness

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# *Protecting Your Right to Serve: How Religious Ministries Can Meet New Challenges without Changing Their Witness*

*Eric N. Kniffin*

With increasing frequency, religious congregations and ministries are facing unfamiliar challenges. Recent months have seen a major escalation in the willingness of political and other leaders to use cultural, political, and legal pressure against religious groups and individuals that resist the newest manifestations of the sexual revolution. For instance, in April 2015, *The New York Times* columnist Frank Bruni favorably quoted an activist urging that church leaders should be “made” to “take homosexuality off the sin list.”<sup>1</sup> Weeks later, former Secretary of State Hillary Clinton said that “religious beliefs...have to be changed” where they conflict with abortion rights.<sup>2</sup> These statements were echoed by *Time* magazine columnist Mark Oppenheimer, who advocated stripping nonprofit tax status from religious organizations “that dissent” from government policies concerning sexuality.<sup>3</sup>

The character of these challenges is new. Consider the case of the U.S. Department of Health and Human Services mandate (HHS mandate) requiring nearly all insurance plans to cover contraception at no additional cost to the insured, including several abortion-inducing drugs and devices. Despite more than 100 lawsuits involving more than 300 plaintiffs seeking relief on religious liberty grounds, the Obama Administration has been unwilling to accommodate their concerns. This marks “the first time in American history” that the federal government is attempting to make it “unlawful” to “practice a well-known teaching of the largest religions in the country,” says leading religious liberty scholar and advocate Douglas Laycock. “This

attempt to suppress practices of the largest faiths is a new thing in the American experience.”<sup>4</sup>

The same can be said about more recent efforts to coerce religious groups to change their views about human sexuality. The Supreme Court’s recent decision in *Obergefell v. Hodges*, which created a constitutional right to same-sex marriage, is certain to intensify challenges to religious organizations that seek to live out their convictions on marriage, sexual ethics, and the nature of the human person. The day the decision came down, the ACLU announced it no longer supports the federal and state Religious Freedom Restoration Acts (RFRA), repudiating the group’s work to enact the 1993 law, passed nearly unanimously in Congress and signed by President Bill Clinton.<sup>5</sup>

Despite these challenges, religious groups can take steps to protect their ability to continue serving the public and operating according to their mission. While religious organizations have not asked for these confrontations, they can choose how to respond to them. This *Special Report* helps religious congregations and ministries understand the present and emerging threats to religious liberty and outlines practical steps they can take in response.

- **Section I** illustrates some of the present and emerging pressures on religious organizations from government and culture.
- **Section II** provides an overview of the religious freedom protections in federal and state constitutions and laws—both what these laws protect and what a

religious organization typically must show to qualify for such protection. Despite recent hostility toward some religious groups, American law and culture still reflect a strong commitment to religious liberty.

- **Section III**, the core of this *Special Report*, outlines a “mission audit” for religious congregations and ministries to undertake in light of these challenging circumstances. Just as a general audit

helps an organization understand its financial soundness, a mission audit will help a religious organization understand how its religious convictions affect its work and how these convictions may face conflict. The proposed mission audit outlines the kind of practical steps religious institutions can take to avoid such conflicts, improve their ability to claim religious liberty protections, and prepare themselves for potential challenges.\*

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\* **Disclaimer:** This *Special Report* contains general information regarding legal matters and should not be construed or relied upon as legal advice or legal opinion. Readers are urged to consult a qualified attorney concerning their specific questions regarding any legal matter.

## Section I: Challenges to Religious Liberty

Religious individuals' and groups' ability to serve the public in a manner consistent with their convictions is under attack. What follows is by no means a complete list of the incidents and laws that should concern religious organizations; rather the following examples will provide a general sense of the challenges these organizations may face.<sup>6</sup>

**Conditions on Nonprofit Tax Status.** Of all of the challenges religious organizations may face, none looms larger than the possibility of losing federal or state nonprofit tax status. In 1983, the Supreme Court upheld the IRS's decision to revoke Bob Jones University's nonprofit tax status because the school's ban on interracial dating conflicted with an established public policy against race-based discrimination.<sup>7</sup> In April 2015, as the Supreme Court heard arguments in the *Obergefell* case to redefine marriage, the U.S. Solicitor General admitted that, if the Court found a constitutional right to same-sex marriage, the question of nonprofit tax status for religious groups that oppose same-sex marriage was "certainly going to be an issue."<sup>8</sup> Two days after the Court redefined marriage for the entire nation in *Obergefell*, *The New York Times* religion columnist Mark Oppenheimer, writing in *Time* magazine, called for an end to tax exemptions for religious institutions that disagree with the new public policy resulting from the decision.<sup>9</sup>

**Health Care Mandates.** Religious organizations may face laws that force them to provide health care benefits that conflict with their convictions. This list includes not only the Affordable Care Act's (ACA) HHS mandate, but also state contraception and abortion mandates.

*The Affordable Care Act's HHS Mandate.* Perhaps the best known intrusion on religious liberty in recent years has been the federal government's requirement that nearly all health plans cover prescription contraceptives—a category that includes drugs and devices that prevent embryos from implanting in the mother's uterus, thereby ending nascent human life.<sup>10</sup> As one of the first mandates on insurance plan coverage under the Affordable Care Act, this directive is indicative of the kinds of ethical and moral concerns that may arise for religious organizations as a result of increasingly centralized decisions concerning what insurance plans must cover.<sup>11</sup>

The mandate was promulgated by HHS under the Affordable Care Act<sup>12</sup> and requires group health

plans to give beneficiaries free access to all U.S. Food and Drug Administration (FDA)-approved contraceptives, abortifacient drugs, sterilization, and related counseling.<sup>13</sup> Failure to do so could result in monumental fines of \$36,500 per beneficiary per year.<sup>14</sup>

The Administration eventually created an exemption for "religious employers," but defined this term so narrowly that it essentially covers only churches and their integrated auxiliaries. The exemption does not extend to other religious nonprofits like charitable organizations, hospitals, and schools (nor to closely held for-profit religious employers). Religious employers that do not qualify for the exemption are offered a regulatory "accommodation" that many religious organizations have found still forces them to violate their conscience by facilitating access to contraceptives and abortion-causing drugs.<sup>15</sup>

This unprecedented attack on religious liberty has been met with a wave of litigation. Over 100 lawsuits have been filed against the mandate by churches, religious nonprofits, and closely held for-profit religious employers.<sup>16</sup> The Supreme Court upheld the rights of two family-owned businesses in *Burwell v. Hobby Lobby* and has issued five orders protecting the conscience rights of nonprofits.<sup>17</sup> These cases are still being litigated across the country; most expect the Supreme Court to take up one of the nonprofit cases against the regulations and issue a decision by the end of June 2016.

*State Contraception Mandates.* In addition to the federal contraception mandate and potential future mandates that may pose ethical and moral problems for religious organizations, 28 states have their own mandates that, like the federal mandate, cover drugs and devices that cause early abortions by preventing implantation. Twenty of these laws have more or less generous exemptions for religious employers; the other eight have no exemption at all.<sup>18</sup>

*State Abortion Mandates.* The arguments lodged in support of these contraception mandates may also pave the way for surgical abortion mandates.<sup>19</sup> Although Washington State has come close, no state has passed legislation requiring group health plans to cover surgical abortions.<sup>20</sup> However, just as HHS created a contraception mandate through regulations, in 2014 California's Department of Managed Health Care interpreted a decades-old law to require surgical abortion coverage.<sup>21</sup>

**Employment Discrimination Charges.** In 2012, the Supreme Court reaffirmed America's strong and long-standing commitment to the principle, enshrined in the First Amendment, that religious institutions have the right to select their own leaders, free from government scrutiny.<sup>22</sup> Yet, this crucial freedom remains under attack. Because religious employers who make mission-related employment decisions, like other employers, are subject to review under local anti-discrimination ordinances, state civil rights laws, and federal laws, such organizations must be cognizant of where these policies may conflict with their convictions. At present, 19 states and the District of Columbia have laws that prohibit discrimination on the basis of sexual orientation and gender identity; three others cover sexual orientation but not gender identity.<sup>23</sup> Cities typically have their own civil rights laws, which are often broader than applicable state laws.<sup>24</sup>

The federal employment non-discrimination law, Title VII, prevents discrimination because of "sex," but does not list sexual orientation or gender identity as protected classes.<sup>25</sup> However, the Supreme Court has read the term "sex" expansively, to prohibit "sex stereotyping."<sup>26</sup> Under this theory, homosexual and transgender persons have recovered damages under Title VII when they have proven that they suffered an adverse employment action because they do not conform to traditional notions of what is appropriate for their biological sex.<sup>27</sup> On July 17, 2015, the federal Equal Employment Opportunity Commission (EEOC) announced its conclusion that Title VII bans all discrimination on the basis of sexual orientation, even though the EEOC's decision acknowledges that "Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation."<sup>28</sup>

In recent years, the EEOC and private plaintiffs have aggressively used Title VII to limit the rights of religious employers.<sup>29</sup> For example:

- In 2009, before the Obama Administration implemented the HHS mandate, the EEOC said that Belmont Abbey College, a Catholic liberal arts school near Charlotte, North Carolina, was guilty of sex discrimination because its employee health plan did not cover contraceptives.<sup>30</sup>
- In 2011, a Catholic school in Fort Wayne, Indiana, dismissed a junior high school language arts

teacher, Emily Herx, because she continued with *in vitro* fertilization treatments after the pastor told her this violated Church teaching and asked her to stop. Ms. Herx alleged that this constituted sex discrimination and the EEOC agreed. In December 2014 the jury found for Herx and awarded her \$1.9 million in damages.<sup>31</sup>

- In 2014, a Catholic school in Macon, Georgia, dismissed its music teacher, Flint Dollar, after he announced on Facebook his upcoming same-sex wedding. In March 2015 the EEOC found "reasonable cause to conclude" that this was sex discrimination under Title VII. On June 29, the next business day after the *Obergefell* decision, Mr. Dollar filed his Title VII lawsuit against the Catholic school.<sup>32</sup>

Employment non-discrimination laws also make it illegal to treat people differently in the terms of their employment, such as employee benefits. In the wake of *United States v. Windsor*, which struck down the federal Defense of Marriage Act, President Obama ordered federal agencies to recognize legally married same-sex couples wherever federal law recognized legally married opposite-sex couples.<sup>33</sup> Because the affected laws were written before the definition of marriage became controversial, none include religious exemptions related to the definition of "marriage" or "spouse." Subsequently, the Department of Labor required employers subject to the Family and Medical Leave Act (FMLA) to provide spousal benefits to persons in same-sex marriages<sup>34</sup> and HHS required insurance companies that offer plans covering married opposite-sex spouses to also cover married same-sex couples.<sup>35</sup>

The federal government also governs the employer-employee relationship through the Occupational Safety and Health Administration (OSHA). In June 2015 OSHA announced that employers must allow transgender employees to use restrooms that correspond to their subjective gender identity.<sup>36</sup>

**Housing Discrimination Charges.** The federal Fair Housing Act, like Title VII, prohibits discrimination on the basis of sex but not sexual orientation or gender identity.<sup>37</sup> Yet, as with Title VII, the Administration has interpreted the Fair Housing Act to prohibit discrimination against transgender persons.<sup>38</sup> Religious organizations that either refuse to make housing available to transgender persons

or refuse to house transgender persons according to their subjective gender identity may be subject to an investigation by the U.S. Department of Housing and Urban Development (HUD), forced participation in HUD's mediation process, or a lawsuit brought by the Department of Justice or private parties.

**Public Accommodations Discrimination Charges.** Public accommodations laws generally state that businesses or buildings open to the public cannot refuse to serve people because of their race, sex, religion, national origin, or other protected class. The addition of sexual orientation and gender identity to such non-discrimination policy at the state and local level has been used in recent years by Lesbian, Gay, Bisexual, and Transgender (LGBT) advocates to target organizations that operate according to their religious convictions. On July 2, less than a week after the *Obergefell* decision, the commissioner of Oregon's Bureau of Labor and Industries ordered a Christian couple to pay \$135,000 in damages because their bakery declined to create a cake to celebrate a same-sex wedding.<sup>39</sup> Similar charges have been brought against a florist,<sup>40</sup> photographer,<sup>41</sup> wedding venue,<sup>42</sup> and reception site.<sup>43</sup> These creative entrepreneurs have no objection to serving LGBT customers, but they could not in good conscience contribute their talents to a same-sex wedding celebration.

**Requirements from Licensing or Accrediting Organizations.** Religious organizations and individuals may also come under pressure to act in violation of conscience from licensing or accrediting organizations—those that license individual professionals and those that accredit departments or organizations as a whole.

For example, Julea Ward was expelled from her graduate counseling program at Eastern Michigan University because her Christian faith prevents her from affirming non-marital sexual relationships. Ms. Ward was willing to counsel gays and lesbians as a general matter, but she wished to refer persons seeking same-sex relationship advice to her colleagues. In expelling Ms. Ward, the university claimed that she had violated the antidiscrimination requirement in the American Counseling Association's code of ethics.<sup>44</sup>

Religious colleges and universities have also come under pressure from their accrediting bodies because of their convictions about marriage and sexual morality:

- In 2014, Gordon College came under attack because its student covenant bans all “sexual relations outside marriage,” including any “homosexual practice.” Pressure from the New England Association of Schools and Colleges led to Gordon College undertaking “fourteen initiatives” to “enhance its support for LGBTQ [Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning] students.”<sup>45</sup>
- In 2009, other Christian colleges were threatened with censure from the American Philosophical Association because their school covenants allegedly violated the Association's nondiscrimination policy.<sup>46</sup>
- On July 2, 2015, less than a week after the U.S. Supreme Court redefined marriage across America, a Canadian court upheld a decision to deny Trinity Western University in British Columbia accreditation for a new law school because its campus covenant forbids sex outside marriage, with marriage being understood as a union of a man and a woman.<sup>47</sup>

Similarly, the National Collegiate Athletic Association (NCAA) has adopted a handbook that instructs athletic programs on “how to ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams.”<sup>48</sup> The handbook teaches that gender is subjective and that “all people” must “recognize and respect the transgender person's identification as a man or a woman.” This is not yet a requirement but is set out by the NCAA as a best practice. Because of the leadership role the NCAA plays in athletics, these model policies will likely influence state high school athletic associations as well.

**Title IX Compliance.** If they receive any federal funding, elementary, secondary, and post-secondary public and private schools alike are subject to the federal nondiscrimination rules under Title IX—even if a school merely participates in federally subsidized school lunch or student loan programs. Like Title VII, the text of the law only covers sex discrimination.<sup>49</sup> But the Department of Education and the Department of Justice have interpreted Title IX to cover discrimination based on “gender identity,” including students and employees who identify as transgender or who otherwise do not

conform with traditional gender stereotypes.<sup>50</sup> These departments hold that Title IX requires schools to grant transgender students access to restrooms, locker rooms, and overnight facilities that match their subjective gender identity.<sup>51</sup>

**Conditions on Government Funding.** Religious organizations that receive government grants or contracts may find that new and emerging conditions on such funding require them to stop making distinctions based on sexual orientation or marital status—both in whom they employ and what services they provide.

In 2014, the federal government signed an executive order that bans faith-based organizations that receive federal contracts from discriminating on the basis of sexual orientation or gender identity. Under the rule, faith-based agencies are denied the right to make employment decisions that reflect their religious commitments and must extend benefits to same-sex spouses.<sup>52</sup> At the end of May 2015, reports surfaced that the White House might be in the process of expanding this policy from the relatively small group of federal contracts to the much larger world of federal grants.<sup>53</sup> More recently, a coalition wrote a letter asking President Obama to direct the Attorney General to instruct the Department of Justice Office of Legal Counsel to review and reconsider its memorandum that protects faith-based hiring by federal contractors and grant recipients.<sup>54</sup>

Other requirements at the state and federal level may require grant or contract recipients to provide services that violate religious convictions. For instance, in 2011 HHS ended a \$2.5 million grant to the U.S. Conference of Catholic Bishops (USCCB) to help human-trafficking victims because the bishops' program would not offer or refer for artificial contraceptives, sterilization, or abortions.<sup>55</sup> As of June 24, 2015, groups that receive federal funding to aid refugees must also help them access emergency contraceptives and abortions. They may not house boys and girls based on their "physical anatomy" but must take into account their expressed gender identity.<sup>56</sup> Although religious groups like the USCCB and World Relief resettle the majority of refugees entering the United States each year, these new regulations contain no religious or moral exceptions.<sup>57</sup> Similar requirements at the state or local level have forced religious organizations to lose contracts or licenses to provide adoption and/or foster care services in Boston, San Francisco, Illinois, and Washington, DC.<sup>58</sup>

**Conditions on Private Funding.** Religious organizations may also lose funding from private sources such as charitable foundations and corporate nonprofit discounts. A number of foundations already prohibit grants to groups that make faith-based distinctions on the basis of sexual orientation.<sup>59</sup> Similarly, Google and Microsoft offer free or heavily discounted services to nonprofits, but exclude any 501(c)(3) that takes sexual orientation or gender identity into account in hiring or benefits.<sup>60</sup>

**Narrowing Exemptions for Religious Organizations.** Other religious organizations may see their circumstances change as existing religious exemptions are narrowed. In the *Hosanna-Tabor* case, the EEOC argued that a church should lose its religious liberty protections as soon as it "decide[s] to open its doors to the public to provide [a] socially beneficial service," like "educating children" "for a fee."<sup>61</sup> Elsewhere, the government argued that religious organizations have no more First Amendment protections than "a labor union or a social club."<sup>62</sup>

Although the Supreme Court rejected these arguments in *Hosanna-Tabor*, they are indicative of ongoing efforts to shrink the sphere in which religious organizations are able to operate according to their own convictions. For example, the *Obergefell* decision only offered that religious groups retain the right to "advocate" and "teach" that "same-sex marriage should not be condoned."<sup>63</sup> As Chief Justice Roberts noted in dissent, the *Obergefell* decision "ominously" omits the freedom to "exercise" religion, the right guaranteed in the text of the First Amendment.<sup>64</sup>

Another exemption currently under attack is the rule that exempts "church plans" from federal laws that regulate health insurance plans and pension plans.<sup>65</sup> The purpose of this exemption is to avoid the entanglement between state and church the Establishment Clause prohibits.<sup>66</sup> In recent years, plaintiffs have attacked Catholic hospitals, arguing that their pension plans do not have a close enough connection to a church or that the hospitals are not Catholic enough to qualify for the "church plan" exemption.<sup>67</sup> Losing these suits would have devastating consequences for religious hospitals.

**Additional Areas of Concern.** Finally, religious organizations may face increasing pressure and bad publicity from corporate boycotts and other public campaigns. Earlier this year, civic leaders in San Francisco took issue with the Catholic Church after

Archbishop Salvatore Cordileone published a new document intended for the faculty handbooks of the four archdiocesan high schools. The document summarized Catholic moral teaching on a range of issues and asked faculty to “avoid fostering confusion among the faithful and any dilution of the schools’ primary Catholic mission.”<sup>68</sup> This modest statement was grossly distorted in the press and was met with outrage from some parents, prominent local Catholics,<sup>69</sup> and city<sup>70</sup> and state legislators.<sup>71</sup>



## Section II: Religious Liberty Protections

While the challenges facing churches and religious organizations are daunting, America was built on an unparalleled commitment to religious liberty.<sup>72</sup> That commitment continues to live in constitutional guarantees, broad religious liberty statutes, and specific exemptions found in a number of laws. This section provides a brief overview of the most important of these protections.

**U.S. Constitutional Protections for Religious Organizations.** This nation's commitment to religious liberty is found most readily in the First Amendment to the United States Constitution.

*First Amendment Free Exercise Clause.* The First Amendment commands that Congress shall not “prohibit[] the free exercise” of religion. As currently interpreted by the Supreme Court, this guarantee protects religious individuals and organizations from laws that are not neutral or generally applicable—for example, laws that entail a system of discretionary and individualized assessments (like zoning or unemployment compensation laws), or allow for secular, but not religious, exemptions, or laws that are selectively enforced.<sup>73</sup> In such instances, a law may not substantially burden religion, unless the government proves that it is pursuing a compelling interest that cannot be accomplished through any less restrictive means.<sup>74</sup> Additionally, it is not permissible under the Constitution to pass laws that discriminate against religion.

Free exercise of religion is further protected by federal and, where applicable, state Religious Freedom Restoration Acts, or RFRA laws. These laws are discussed later in this section.

*First Amendment Establishment Clause.* The First Amendment's Establishment Clause does more than prevent the government from setting up an official religion; it also means the government cannot regulate the activities of religious organizations or make legislative distinctions among them if doing so “entail[s] intrusive governmental judgments regarding matters of religious belief and practice.”<sup>75</sup> “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>76</sup> Religious organizations may be able to claim protection on the basis of the Establishment Clause if the government denies them an exemption available to other religious organizations, either because the distinction

unconstitutionally prefers some religious groups over others, or because it unconstitutionally entangles the government with religious doctrine or the organization's religious views.

A good example of such a case is *Colorado Christian University v. Weaver*, which challenged a state scholarship program that was closed to students at “pervasively sectarian” colleges and universities.<sup>77</sup> A federal court of appeals found the program unconstitutional for two reasons. First, the program expressly discriminated between religious schools and “pervasively” religious schools. Second, this distinction forced Colorado officials to make “intrusive judgments regarding contested questions of religious belief or practice,” something courts are both ill-equipped and constitutionally prohibited from doing.

*First Amendment Church Autonomy Doctrine (Including Ministerial Exception).* The Doctrine of Church Autonomy derives from both the Free Exercise and Establishment Clauses.<sup>78</sup> This doctrine “acknowledges the existence of an arena of discourse, activity, commitment, and organization for the ordering of life over which the state has no authority.”<sup>79</sup> It “radiates...a spirit of freedom for religious organizations,...to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>80</sup>

The Church Autonomy Doctrine protects a religious body's right to control its membership,<sup>81</sup> its speech,<sup>82</sup> and its leaders. This last category is called the Ministerial Exception and was the subject of the recent *Hosanna-Tabor* case, in which the Supreme Court agreed unanimously that the government cannot interfere with a religious organization's ability to make employment decisions about its ministerial employees.<sup>83</sup>

There is no clear test for what counts as a ministerial employee. In *Hosanna-Tabor*, the Supreme Court held that the exemption applied to a Lutheran school's decision to terminate the contract of a teacher with religious responsibilities.<sup>84</sup> Shortly after *Hosanna-Tabor*, the Fifth Circuit Court of Appeals determined that a Catholic parish had the discretion to decide who can fill its music director position.<sup>85</sup> In early 2015, the Sixth Circuit held that a “spiritual director” with InterVarsity Christian Fellowship, an outreach ministry to college and university students, also counted as a ministerial employee.<sup>86</sup>

*First Amendment Freedom of Association.* The First Amendment also protects “expressive associations,” groups of individuals who gather to exercise their right to free speech, religious worship, or petition the government.<sup>87</sup> The touchstone “expressive associations” case is *Boy Scouts of America v. Dale*, where the Supreme Court upheld the Boy Scouts of America’s right to select leaders that model its code of values, even when the Scouts’ criteria conflicted with New Jersey’s anti-discrimination law.<sup>88</sup> The case arose when the Boy Scouts revoked James Dale’s membership after it “learned that he is an avowed homosexual and gay rights activist.”<sup>89</sup> Because the Boy Scouts believed that “homosexual conduct is inconsistent with the values it seeks to instill” it decided that Dale would not properly model the Scouts’ beliefs and could therefore not be a scoutmaster.<sup>90</sup>

The Court found that the Boy Scouts was an “expressive association.” The key issue in the case was whether the “forced inclusion of Dale” “would significantly burden the Boy Scouts’ desire not to ‘promote homosexual conduct as a legitimate form of behavior.’”<sup>91</sup>

Expressive association cases typically turn on the court’s impression of the nature of the group at issue. If a court finds that a group is mainly a commercial organization that offers members networking opportunities, the court will find it is not an expressive association. It was for such reasons that the Court held that organizations with few meaningful membership qualifications, like the Jaycees and Rotary Club, had to accept female members.<sup>92</sup> On the other hand, the Court found the Boy Scouts was an expressive association because it was primarily involved in transmitting values and forming its members. As such, the Court deferred to the Boy Scouts’ judgment that forcing them to appoint Dale as a scoutmaster would significantly impair its ability to carry on First Amendment activities.<sup>93</sup>

**State Constitutional Provisions.** State constitutions also offer protections for religious organizations. At the time Congress adopted the First Amendment to the U.S. Constitution, all but one of the states already protected free exercise in their constitutions.<sup>94</sup> Many state courts interpret their constitutional provisions in lockstep with the Supreme Court’s decisions concerning the First Amendment. Others offer more liberty to religious organizations than the federal constitution.<sup>95</sup>

**Statutory Protections for Religious Liberty.** In recent years, Congress and state legislatures have

buttressed constitutional free exercise protections with general statutes that offer additional protections. The most important of these are the federal and state RFRA laws.

*Federal Religious Freedom Restoration Act.* Congress passed the original RFRA in 1993 in response to *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), after Congress found that the Supreme Court had “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.”<sup>96</sup>

The RFRA was passed with overwhelming bipartisan support. It was introduced by Representative Charles Schumer (D-NY) in the U.S. House, where it passed unanimously, and sponsored by Senator Edward Kennedy (D-MA) in the U.S. Senate, where it passed 97-3.<sup>97</sup> At the signing ceremony, President Clinton affirmed religious freedom as “perhaps the most precious of all American liberties.” The law, he said, “affirm[s] the historic role that people of faith have played in the history of this country” and “reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision [in *Employment Division v. Smith*].” The RFRA “honor[s] the principle that our laws and institutions should not impede or hinder but rather should protect and preserve fundamental religious liberties.”<sup>98</sup>

In President Clinton’s words, the RFRA says that “the Government should be held to a very high level of proof before it interferes with someone’s free exercise of religion.... We believe strongly that we can never, we can never be too vigilant in this work.”<sup>99</sup> Once a religious individual or organization shows that the challenged law or regulation substantially burdens religious exercise, the government must prove two things. First, the government must show that applying this law to the religious individual or organization advances a “compelling governmental interest.” Second, the government must prove that it is advancing that interest in the “least restrictive means.”<sup>100</sup> This standard is known as “strict scrutiny.”

The Supreme Court has applied the RFRA strict scrutiny test in two recent cases. In *Hobby Lobby*,<sup>101</sup> the Court upheld the rights of a Christian for-profit business against the HHS mandate. This case made clear that religious employers do not lose RFRA

protection simply because they operate under a corporate form. In *Holt v. Hobbs*,<sup>102</sup> the court upheld a Muslim prisoner's right to grow a short beard.<sup>103</sup>

*State Religious Freedom Restoration Acts.* Shortly after Congress passed the federal RFRA in 1993, states began passing similar statutes to provide the same religious liberty protections with regard to state and local laws.<sup>104</sup> Twenty-one states have passed RFRA statutes, including Indiana and Arkansas in 2015.<sup>105</sup> Twelve other states provide the same protections through a court's interpretation of the state constitution.<sup>106</sup>

Contrary to much of the reporting in recent months, neither the federal nor state RFRA determine whether religious liberty arguments will win in any given case. Like the federal law, state RFRA merely guarantee all citizens and organizations the right to raise a religious liberty claim or defense and tell courts what standard to apply when considering them.

**Specific Religious Liberty Exemptions.** In addition to the broad constitutional and statutory religious liberty protections outlined above, many statutes and regulations contain their own carve-outs for religious organizations. One scholar estimated that there were 2,000 religious exemptions or accommodations in state and federal law in 1992.<sup>107</sup>

These exemptions are efforts to fine-tune a law (passed by Congress or a state legislature) or regulation (promulgated by an agency of federal or state government), and they grant religious individuals or organizations exemptions in particular instances. These exemptions are typically passed in connection with the law they reference, or issued in regulations pursuant to it. The examples below show the types of places these exemptions may appear, as well as how the standards for exempting an individual or organization vary in each instance. In other words, it is very important to research the law and regulations covering an activity to identify exemptions for which an organization may qualify.

*“Religious Employer” Exemption from Health Care Mandate.* The “religious employer” exemption to the HHS mandate under the Affordable Care Act is unusually narrow. Many religious organizations will find they do not qualify for the exemption, but it is worth mentioning since it pertains to an issue currently facing religious groups. It borrows a definition found in the Internal Revenue Code, which says that “churches, their integrated auxiliaries, and

conventions or associations of churches, as well as to the exclusively religious activities of any religious order” do not need to file IRS Form 990.<sup>108</sup>

The original exemption HHS proposed, however, was actually even narrower. As announced in 2012, it extended only to those entities identified above that *also*: (1) had the inculcation of religious values as their purpose; (2) primarily employed persons who share their religious tenets; and (3) primarily served persons who share their religious tenets.<sup>109</sup> Critics noticed that this definition was so narrow that Billy Graham, Mother Teresa, and Jesus Christ himself would not qualify as “religious employers.”

Although HHS officials eventually backed off these additional requirements, these factors are still used to define religious employers in some other instances. The exact same test is used to define a religious employer under a California contraception mandate<sup>110</sup> while laws in North Carolina<sup>111</sup> and Arkansas<sup>112</sup> use similar criteria.

*Title VII’s “Religious Organization” Exemption.* As illustrated in Section I, the EEOC and private parties have, in recent years, aggressively used Title VII, the federal employment non-discrimination law, against religious organizations. These cases typically charge that expecting employees to believe and model a religious employer's moral teachings amounts to sex discrimination. In light of *Obergefell* and other similar cultural and legal trends, it is crucial that religious employers understand Title VII's “religious organization” exemption.<sup>113</sup>

To qualify for the exemption, the employer must prove that it is “a religious corporation, association, educational institution, or society.” In 2007, the Third Circuit Court of Appeals held that a Jewish community center qualified for the exemption.<sup>114</sup> In 2011, the Ninth Circuit held that World Vision, a large Christian humanitarian organization, also qualified for the exemption.<sup>115</sup> While there are some differences between the Third Circuit and the Ninth Circuit's tests, the core inquiry is still the same: Courts look first to the organization's corporate documents—articles of incorporation, bylaws, mission statement, and similar documents—for references to the group's religious purpose, beliefs, and mission. Second, courts look to the organization's activities to see if they are consistent with and in furtherance of its religious purpose. Third, courts focus on how the organization expresses itself—to the outside world and to its own employees.

The exemption does not excuse the employer from Title VII entirely; it merely says religious organizations can take religion into account when selecting someone for a job that involves work connected with the organization's religious mission.<sup>116</sup> Because Title VII defines "religion" broadly, this exemption allows a qualifying religious organization to evaluate employees based not only on what they believe, but also whether they act in conformity with those beliefs. Applying this exemption, courts have upheld the right of a parish to dismiss an employee for failing to have her marriage canonically validated<sup>117</sup> and the right of a religious college to dismiss an employee whose sexual conduct did not uphold the school's mission and who was ordained in a church whose "views on homosexuality were inconsistent" with the college's convictions.<sup>118</sup>

Courts have generally found that this exemption *does not* allow religious entities to discriminate on the basis of the other categories mentioned in Title VII: race, color, national origin, and sex.<sup>119</sup> This is extremely important, as those bringing lawsuits against a faith-based organization have in some cases argued that employment decisions based on religious grounds really amount to sex (including gender stereotype) discrimination. Religious employers will typically not benefit from the exemption unless they can rebut the charge of sex discrimination by showing that they interpret (or, even better, have applied) a morality clause evenhandedly. As one court put it, "Requiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer's ability to create and maintain communities of the faithful."<sup>120</sup>

*Title VII's "Bona Fide Occupational Qualification" Exemption.* Separate from the "religious organization" exemption," Title VII allows any employer to take religion or sex into account in hiring if that criterion "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."<sup>121</sup> This is known as the bona fide occupational qualification (BFOQ) exemption. Although this exemption is theoretically available to any employer, the Supreme Court has cautioned that it is "meant to be an extremely narrow exception to the general prohibition on the basis of sex."<sup>122</sup>

To secure the BFOQ exemption, the employer must successfully argue that the religion or sex-based job qualification relates to the "essence" or the "central

mission" of the employer's business.<sup>123</sup> The BFOQ exemption does not apply organization-wide but only to the particular position at issue.<sup>124</sup>

*Title VII and Title IX Exemptions for Schools "Controlled" by a Religious Organization.* Title VII also gives schools the right to "hire and employ employees of a particular religion" if it qualifies in one of two ways. The first qualification category is being "owned, supported, controlled, or managed," "in whole or in substantial part," "by a particular religion or by a particular religious corporation, association, or society."<sup>125</sup> The second qualification category is having a curriculum that "is directed toward the propagation of a particular religion."<sup>126</sup>

A similar but narrower exemption is echoed in Title IX of the federal civil rights act.<sup>127</sup> Just as the law recognizes that a church has the right to reserve some positions for men or women, Title IX recognizes that religious schools have the right to educate students in light of their teachings and to expect students to follow the school's religion-based moral standards.

In order to claim the Title IX exemption, a school must file a statement with the Department of Education's Office of Civil Rights. Regulations require, first, the statement must demonstrate that the school is controlled by an outside religious organization.<sup>128</sup> Second, the letter must identify specific Title IX provisions and explain how these provisions "conflict with a specific tenet of the religious organization."<sup>129</sup>

**Exemptions from Public Accommodations Laws.** Public accommodations laws generally state that places open to the public cannot refuse to serve someone based on race, sex, religion, or other protected class. These laws generally do not apply to religious activities. The federal public accommodations law does not affect religious nonprofit organizations because it only applies to inns, restaurants, and entertainment venues.<sup>130</sup> Similarly, California's law does not disturb religious nonprofit organizations because it only applies to "business establishments."<sup>131</sup>

Other public accommodations laws are broader but come with exemptions that apply to most religious nonprofit organizations. For example, Connecticut's law bars discrimination in "any establishment which caters or offers its services or facilities or goods to the general public," but does not apply to "private organizations."<sup>132</sup> New Mexico's law is similarly broad but does not "bar any religious denominational institution or organization that is

operated, supervised or controlled by” a denomination from limiting admission or giving preference to persons of the same religion.<sup>133</sup> It also recognizes a religious institution’s right to “impos[e] discriminatory employment or renting practices that are based upon sexual orientation or gender identity.”<sup>134</sup>

Aside from these specific exemptions, religious organizations can avoid triggering public accommodations laws by limiting their services to only co-religionists. For example, a church that allows only its members to reserve the fellowship hall has not offered that service to the general public.

**Higher Education Opportunity Act Protection.** The 2008 Higher Education Opportunity Act includes a provision that protects religious schools from accrediting agencies that might try to force religious schools to, for example, rescind rules that prohibit sex outside marriage, understood as the union of one man and one woman. The law requires the U.S. Department of Education to revoke the recognition of any accrediting agency that does not “respect the stated religious missions of religious colleges and universities.”<sup>135</sup> Recognition by the Department of Education is critical for accrediting agencies because without it member schools would not have access to federal funds. Religious colleges have used this provision to powerful effect in several disputes where their accrediting agencies were pressuring them to abandon their efforts to establish a campus community that reflects their religious calling.



## Section III: Mission Audit

As this summary has demonstrated, many religious organizations are finding it increasingly difficult to operate according to their mission and convictions. America's commitment to religious liberty remains strong, but there are ongoing efforts to force religious organizations to abandon their convictions and conform to new moral norms.

In light of the present situation, it is imperative that religious organizations undertake a "mission audit" to help them understand where they are likely to face challenges and to ensure that they review and strengthen their capacity to protect their freedom to minister and work in accordance with their faith. While an audit must be tailored to the particular entity, every mission audit will involve three basic steps. The audit offers a religious organization the opportunity to:

- 1. Evaluate how well its documents and operations reflect its religious mission.** By identifying its core convictions and performing an internal review, a group can see whether these convictions are adequately expressed in its corporate documents, employment-related policies and practices, and in how it engages the public.
- 2. Identify the specific pressures it is likely to face from local, state, and federal laws and regulations, as well as from other sources.**
- 3. Make strategic decisions to protect the organization's mission in light of the context described above.** Some conflicts can be avoided. In other cases, religious organizations may seek to improve their ability to qualify for religious exemptions. Finally, each organization must soberly plan for what it will do if and when it faces challenges based on its religious convictions.

This report provides faith-based groups with a broad overview of what an individualized mission audit should cover. It should not be construed as legal advice. Readers are urged to consult a qualified attorney concerning their specific questions regarding any legal matter.

Each group will need to take into account the challenges in its locality, as well as the religious

liberty provisions specific to the organization type and location. Given these conditions, this section proposes an organizational audit to evaluate how the group's beliefs are expressed in policy. The audit outlined below is a sizable undertaking, but such planning is necessary as a matter of stewardship and prudent leadership.

**Step One: Evaluate how well the organization's documents and operations reflect its religious mission.** At the outset, each religious organization must clarify its core mission and convictions, identify which employees must follow its religious convictions, and examine its internal documents and policies.

*Clarify the Organization's Core Mission and Convictions.* In light of the growing pressures on religious organizations, a clear understanding of mission and convictions is essential. Each group should take time now to sharpen statements about what it is and what it stands for, focusing primarily on what it believes the organization is called to be and who it is called to serve.

Leadership should begin this process by identifying the religious organization's mission statement and religious convictions, specifically considering the flashpoints mentioned in the next section. Leadership should then do the same with the organization's activities, specifically identifying those areas most likely to come under attack.

*Clarify the Organization's Expectations of Its Employees.* As noted in Section II, the U.S. Constitution and employment non-discrimination laws recognize that religious organizations, in order to carry out their missions and live out their convictions, must be free to fill certain positions based on religious criteria. In view of this, each religious organization will need to discern its employment needs.

Such a decision ought to reflect the organization's understanding of its mission. Take, for example, two religious schools. One school might decide that only administrators and religion teachers need to embrace the school's faith. A second school, however, might understand its calling and its duty to students and parents very differently. As such, that school might decide that each teacher must serve as a model of faith for students, as each might be approached by students for counsel or prayer. The school might also discern that it cannot create a

vibrant, faithful community unless every employee embraces the school's religious vision and participates in times of prayer and worship. Both models are valid under existing law. The important thing is that each employer decides what its needs are, and be able to articulate these requirements in terms of its religious beliefs and calling.

Many organizations will find that they have some criteria that apply to a small number of positions and other criteria that apply to all employees. For example, many religious organizations require that leaders and teachers be trained in theology or approved by a religious body.<sup>136</sup> While other employees may not have to have a theology degree, religious organizations often have expectations, regarding either faith or moral behavior, that apply to most or all employees.<sup>137</sup>

**Review the Organization's Documents.** Having clarified its convictions, the religious organization is now ready to undertake a review of its policies and other documents. In examining the organization's documents, leaders should look to see not only whether the group's moral convictions are expressed but also whether these convictions are rooted in a religious worldview. If these connections are not made clear, authorities may be skeptical that moral strictures flow from religious beliefs rather than mere convention or bias. Substantiating a religious identity and demonstrating that a moral stance is integral to the organization requires showing that these convictions are part of the fabric of the organization. It is prudent to write these convictions into organizational documents before a dispute arises.

*Review Corporate Documents.* The best place to begin such a review is with the organization's governing documents: articles of incorporation, bylaws, mission statement, and related documents. Do these documents clearly establish the entity's religious character?

Religious organizations should consider the example of Hobby Lobby, whose corporate documents clarify its religious identity. Hobby Lobby's official statement of purpose commits the company to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." In order to sit on the board of Hobby Lobby's management trust, one must sign a Statement of Faith and agree to "honor God with all that has been entrusted" to the company and to "use the Green family assets to create, support, and leverage the

efforts of Christian ministries."<sup>138</sup> In view of these facts, only two Supreme Court justices denied that Hobby Lobby had a religious identity when its challenge to the HHS mandate came.<sup>139</sup> Every religious organization should strive for this level of clarity.

In reviewing corporate documents, consider whether the organization's powers and purposes are limited to those consistent with its religious doctrine and values. Must a majority of the directors be of the same faith? If the organization comes out of a particular religious tradition, does a denomination, religious body, or other authoritative body have a say in how it is run? Does it have a veto over certain decisions or reserve the power to appoint officers or board members? Are there religious requirements for executive officers? Are net assets, upon dissolution, required to go to another religious entity? The more corporate documents reference and bind the entity to religious standards, the easier it will be for others to recognize the organization as religious.

*Review Human Resources Policies and Practices.* Religious organizations should also review their human resources documents and procedures. This will include handbooks, employment agreements, policies, selection materials, and broader practices speaking to how an organization treats and evaluates its employees.

As explained above, religious organizations will typically decide that some and sometimes all employees must affirm and agree to live consistently with the organization's religious convictions. For any such position, the organization should review employment-related documents to ensure they explain the reason behind the religious requirement. If the position is crucial to the ministry's leadership or if the position involves inculcating religious values, these expectations and requirements must be stated clearly in internal documents and in documents shared with the employee.

Religious organizations may also have a general set of expectations that apply to all employees. Some employers simply require that employees affirm certain religious beliefs. For example, in the *World Vision* case discussed earlier, the Ninth Circuit upheld the organization's right to require that all employees share the organization's belief that "Jesus Christ is God and is a member of the Trinity."<sup>140</sup> Some groups expect that employees will model and support religious values at all times, including outside business

hours. For example, Calvin College requires its faculty to be “active members in good standing of a congregation in the Christian Reformed Church” or a similar denomination and expects them to place their children in private Christian schools.<sup>141</sup> Other religious employers do not have religious qualifications per se, but instead require that employees broadly support the organization’s mission and values. For example, the University of Notre Dame expects that faculty and staff will “[u]nderstand[], accept[], and support[] the Catholic mission of the University and foster[] values consistent with that mission.”<sup>142</sup>

Expectations or requirements that apply to all employees will typically appear in an employee handbook or in a separate document, often called a morals or morality clause. Religious organizations should look to see whether these standards are stated and whether they are connected to the organization’s religious identity and values. More generally, employers should ask whether these standards are integrated into the organization’s job descriptions and performance reviews. An employer should be able to show that these standards reflect the organization’s actual expectations of its employees. That generally means the employer should have a means for deciding whether its standards have been violated as well as a consistent way of responding to violations.

The internal review should also consider the organization’s non-discrimination policy, typically found in the employee handbook. Instead of merely cut-and-pasting some general language, religious employers should craft a statement that accurately reflects their practices and convictions. If a religious employer uses religion as a factor for some positions or reserves certain positions for men or women, its non-discrimination statement should not state otherwise. A non-discrimination statement is also a good opportunity to express a religious employer’s commitment, rooted in religious texts or doctrines, to treating its employees fairly.

Finally, the human resources review should examine agreements and documents related to employee benefits and leave programs, particularly where these benefits are available based on family structure or spousal and parental relationships. As explained in Section II, many state and federal rules already require that employers treat same-sex domestic partners as spouses. These requirements will certainly grow in light of the *Obergefell* decision. Step three of the mission audit will help

employers address conflicts between these employment laws and regulations and a religious employer’s convictions.

*Identify Issues Related to the Organization’s Ministries or Activities.* So far, the mission audit has focused on a religious organization’s internal documents. The review should also consider the organization’s relationship with those it serves and with the public at large.

- **Facility use policies.** Many religious organizations make their facilities available to others, including church halls, sleeping facilities, retreat centers, camps, and dormitories. Organizations should review policies and related documents for these facilities. Whether or not facilities are made available to individuals or groups unrelated to the religious organization, every organization should have rules and safeguards in place to ensure that its facilities are used in ways that are consistent with its convictions and with its religious mission.
- **Gender identity issues.** Schools in particular need to review policies for bathrooms, locker rooms, dressing rooms, showers, and sleeping facilities as they relate to gender identity issues.
- **Volunteer criteria.** Many religious organizations rely on volunteers to help provide services, or to help lead programs. Beyond the sexual abuse and reporting issues discussed in the next paragraph, each organization should be clear on its criteria for volunteers. Most organizations have some sort of screening or interview process for volunteers. This may involve confirming that the volunteer is a church member or otherwise shares the organization’s religious faith.
- **Sexual abuse policies.** While not a religious liberty issue in itself, religious organizations must take affirmative steps to make sure they have strong policies in place to help prevent sexual abuse, and to make sure any abuse is promptly reported. Religious organizations should examine how they screen and train staff and volunteers who interact with children. The organization should also have clear reporting procedures that comply with applicable laws and that are familiar to its employees and volunteers.

**Step Two: Identify Pressures.** Having completed the internal review, every religious organization should undertake a careful inventory of applicable laws, regulations, and other obligations. This will be different for every organization based on a myriad of factors including its location, its activities, and how it receives its funding.

*Identify Actual and Potential Conflicts.* Section I of this *Special Report* provides an overview of areas where religious organizations are likely to face conflicts between their convictions and new public policy. This is a good starting point, but every organization should go further to understand the full range of federal, state, and local laws and regulations that may restrict its ability to operate according to mission. Any such survey should start with a review of the following areas, where religious organizations tend to face the most conflicts: state and local laws regarding employment, housing, and public accommodations discrimination; and other state and local laws that relate to discrimination on the basis of sex, pregnancy, and LGBT status.

Organizations should also look for other laws and regulations that apply to their specific activities or ministries. A number of national and state-based organizations track such federal, state, and local laws. Appendix A includes a partial list of groups that can provide more information.

*Identify the Catalyst for Action.* A thorough survey will not only identify such public policies but will also note how these rules are enforced. In many instances, the catalyst for a conflict is an individual or group that decides to file a civil rights complaint with a government administrative agency. That agency may have the power to issue fines, order compensation, or mandate other consequences itself. In other instances, the agency may conduct an investigation and attempt to mediate the conflict before the complainant can file suit in court. Religious organizations should also be aware of the potential consequences of any violation—whether intrusive investigations, damages (actual and punitive), civil penalties, mandatory training, forced policy changes, and continuing oversight from a government or civil rights agency.

*Identify Relevant Outside Organizations with Oversight.* Some religious organizations or their employees may depend on licensing, accrediting, or similar approval from outside bodies. The mission audit should identify all such entities relevant to the religious

organization and review each entity's standards to see whether they forbid distinctions the organization believes it must make as a matter of religious principle.

Many programs or ministries operated by religious organizations are subject to oversight from private organizations or government agencies. Licensure or accreditation is generally required for schools, health care institutions, and groups that participate in activities such as athletic leagues, child care, food preparation, and child placement.

Individual professionals may also be subject to licensure and professional codes of conduct. An audit should identify all personnel who are licensed professionals and examine their respective codes of professional conduct or licensing requirements.

In each instance, the religious organization should try to understand what current rules require, how they are enforced, how and when they could change, and the organization's opportunities to shape any of these factors.

*Identify Funding Sources.* Many religious groups rely on donations from individuals or grants from foundations. Some may receive discounted services from private companies (e.g., software licenses); others may receive government grants. Groups involved with foster care or other social services may depend on a contractual arrangement with the government. In each instance, religious organizations should understand the terms of these agreements and how these terms may change.

Religious organizations should be aware of how reliant they are on various funding sources. Groups should consider what they will do if presented with a potential loss of such funding and what they can do now to diversify their sources of support. The possibility of losing a government contract—such as that faced by religious adoption agencies in Illinois<sup>143</sup>—may lead a group to take steps in coalition with others to avert a public policy outcome that would force them out of a particular ministry.

**Step Three: Make Strategic Decisions to Protect the Organization's Mission.** The first two steps of the mission audit give religious organizations a strong sense of where they stand. In this final step of the process, a religious organization should identify and implement strategies to help it continue to pursue its mission despite the present and emerging threats to religious liberty.

**Identify Obstacles That Can Be Avoided.** Some conflicts can be avoided in one way or another. This

section offers a few ways religious organizations may consider avoiding confrontations without violating their convictions.

*Eliminate Unnecessary Conflicts.* Some conflicts between a religious organization's practices and public policy standards are not compelled by its faith or are not necessary to its mission. While it is one thing for a religious organization to be coerced into violating its conscience, it is another for a religious organization to thoughtfully and prayerfully decide that it need not seek an accommodation to a law.

For example, a religious charity may decide that, aside from top leadership positions, it does not need its employees or its volunteers to adhere to specific religious criteria. For decades, people from around the world have been inspired by Mother Teresa to serve "the poorest of the poor" alongside the Missionaries of Charity. Volunteers are welcome to the work regardless of their background or religious affiliation, and few would dare suggest that Mother Teresa's order is less Christian as a result because of its already strong religious identity.

This is not to suggest that religious organizations should make concessions to the increasingly hostile public policy environment. Decisions should be made on the basis of the group's convictions and mission. As noted above, the Ninth Circuit recently confirmed that World Vision has the right to require each of its employees to affirm basic Christian doctrines. That said, some religious groups may find that the mission audit presents a good occasion for reassessing employment needs. A religious organization should be able to speak with conviction and specificity as to why it needs a religious exemption. Groups that have a hard time expressing why they cannot comply with a general expectation should also consider whether they may have overestimated their mission-specific needs.

*Find Creative Solutions.* Religious organizations should also look for ways to comply with seemingly problematic public policy without violating their convictions. When San Francisco passed a law in 1996 requiring groups with city contracts to extend spousal benefits to domestic partners, religious leaders were concerned. Cardinal William Levada, then serving as Archbishop of San Francisco, believed the law "force[d] our Catholic agencies to create internal policies that recognize domestic partnerships as a category equivalent to marriage."<sup>144</sup>

Upon further reflection, however, Cardinal Levada found a creative solution that allowed the Archdiocese to comply with the law without violating its conscience. Under the Levada solution, the Archdiocese allowed each employee to "designate another member of the household to receive benefits," regardless of whether this person was the employee's sister, friend, spouse, or domestic partner. "We would know no more or no less about the employee's relationship with that person than we typically know about a designated life insurance beneficiary."<sup>145</sup> By decoupling benefits from marriage status, the Levada solution complied with the law without having to equate domestic partnerships with marriage in internal policy.

Such an approach is a model for religious organizations to keep in mind for some situations as they confront new laws that challenge their convictions.

*Identify Peripheral Activities.* The mission audit should also help religious organizations distinguish between core and peripheral activities. To take an easy example, a synagogue could not stop performing wedding ceremonies, but it could stop renting out its hall to neighborhood groups. Identifying peripheral activities and services can help a religious organization identify viable options if it confronts a public accommodations charge. In some instances, it may make more sense to stop a challenged activity than to divert resources from ministry to litigation.

*Be Wary of Dependence on Government Funding.* Charitable organizations dependent on government contracts or grants may soon face circumstances requiring them to engage in activity that violates their convictions as a condition of continued funding. Religious organizations whose activities are deeply entangled with government funding should give careful thought to what they would do if the conditions on such funds became unacceptable. Religious schools like Grove City College and Wyoming Catholic College show it can be done. These schools have opted out of federal student loan programs, on which nearly all colleges and universities depend, in order to maintain their independence from government oversight through Title IX.<sup>146</sup> In such situations, transitioning away from government funding is a major decision and cannot be done without careful planning.

*Reduce Oversight From Licensing or Accrediting Organizations.* Sometimes religious organizations can avoid conflicts by shifting their activities in

subtle ways. For example, religious schools that offer counseling programs and religious organizations that employ them may come to find the licensing standards too constraining. As noted above, Julea Ward was expelled from her graduate counseling program because her university said her religious convictions violated the American Counseling Association's code of ethics. Faced with such challenges, an organization should consider whether its ministries could be equally effective if the counselors limited themselves to spiritual counseling, which is not subject to licensure.

**Improve the Organization's Ability to Claim Religious Exemptions.** For those conflicts that are not easily avoidable, religious organizations should work to improve their ability to claim crucial protections for religious liberty. As noted earlier, state and federal law contain thousands of religious exemptions.<sup>147</sup> The mission audit will help religious organizations identify the religious liberty protections most relevant to their activities and identify ways to reshape policies, practices, and documentation in light of these protections. This section offers examples of what religious organizations can do in relation to some of the most broadly applicable religious liberty exemptions.

*Strengthen or Clarify the Organization's Relationship to a Religious Tradition or Religious Authority.* Many religious exemptions are only available to organizations that have a strong relationship to a larger religious body. For example, the "religious employer" test under the federal contraception mandate asks if an organization is an "integrated auxiliary" of a church. Under Title VII and Title IX of the federal Civil Rights Act, a religious organization may be eligible for an exemption if it can prove it is "controlled by a religious organization."

Religious organizations with ties to a specific church or tradition should pay careful attention to what courts focus on to decide who qualifies under these and similar tests. Minor changes to corporate documents—for example, allowing the denomination to appoint a few members to the organization's governing board—could make the connection more clear. Catholic organizations should consider whether they are under the oversight of a bishop, religious order, or an office within the Vatican. parachurch ministries and other entities that are not affiliated with a larger religious body should consider whether to align themselves with or place themselves under the authority of a church or denomination.

*Clarify the Organization's Status as an "Expressive Association."* Apart from the specific protections for religious groups, the First Amendment also protects expressive associations—groups that meet together to express First Amendment rights like speech or religious exercise. Cases cited in Section II show the sorts of questions courts ask in deciding whether a group counts as an expressive association. Religious organizations should make sure their corporate documents and other literature competently and clearly convey their expressive nature.

For many religious organizations, their expressive nature will be obvious. Other groups need to take more care, especially ones that an outsider might interpret as a mere social club, financial institution, or other secular entity. A religious organization should consider whether an outsider that looked at its website or corporate documents would quickly recognize its message and its importance to the organization's self-understanding and activities.

*Strengthen or Clarify the Organization's Mission-Driven Employment Criteria.* Religious employers generally hire at least some and often all employees according to mission. Doing so may sometimes pose potential conflicts with federal, state, and local employment non-discrimination laws. Therefore, this is an area for careful scrutiny in the audit.

Once a religious organization has thought through the connection between its mission and its employment criteria, it can identify potential conflicts with non-discrimination laws. Most such laws include exemptions that allow religious organizations, under some conditions, to select employees that share the organization's religious convictions and can model these convictions for others.

The following list provides an overview of such exemptions most relevant to religious employers. Religious organizations should review this list and then look to their documents and practices to see what they can do to improve their ability to claim these protections. Employers should make sure that, if religious beliefs and conduct is a job requirement for a given position, such standards are clear and consistent at every stage of the employment process: recruiting, interviewing, hiring, training, evaluating, promoting, disciplining, and terminating.

- **Ministerial exception.** For the reasons discussed in Section II, the most powerful protection for religious employers may be the ministerial exception,

rooted in the First Amendment's Free Exercise Clause and Establishment Clause. Although the precise contours of this doctrine will continue to be worked out in court decisions, the Supreme Court determined in 2012 that the exception will cover "those who serve in positions of leadership, those who perform important functions in worship services and in the performance of religious ceremonies and rituals, and those who are entrusted with teaching and conveying the tenets of the faith to the next generation."<sup>148</sup> For those positions that fall within this category, religious employers should look for opportunities to emphasize the leadership and teaching aspects of these positions, and the religious prerequisites (if any) that accompany the entrance into such positions, both on paper and in practice.

- **Bona fide occupational qualifications.** Federal and most state employment discrimination laws allow employers to make decisions on the basis of religion or sex when these criteria serve as BFOQ. Each organization should be clear about which positions it believes fall in this category. Documents should be specific about the necessary religious credentials, convictions, conduct, and background required for each position. The job description and actual job tasks should support the claim that someone without the right background and religious commitments could not fill the post.
- **Title VII's "religious organization" exemption.** The previous two categories are somewhat narrow: in most organizations relatively few employees qualify as "ministerial" and the Supreme Court had cautioned that the BFOQ exception is "extremely narrow." On the other hand, in many cases Title VII's "religious organization" exemption can apply to every employee in a religious organization.<sup>149</sup>

Title VII's exemption for "religious organizations" invites courts to look at a variety of factors in considering whether an employer is religious enough to make religious-based employment decisions. Religious organizations should consider the following:

- Do foundational documents state a religious mission or purpose?

- Is it owned, affiliated with, or financially supported by a formal religious organization such as a church or synagogue?
- Do the entity's regular activities include prayer or worship?
- Do public materials identify the organization as religious?
- Does the organization charge market rates for its goods or services?

The "religious organization" exemption applies only to "the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."<sup>150</sup> Thus, whenever a religious employer wishes to use religious criteria in hiring or evaluating an employee, the employer should consider whether it would be clear to an outsider that the employee's work is connected to the organization's religious identity and mission.

- **State and local exemptions.** Each religious organization should look for applicable state and local employment discrimination laws and should review each such law for religious liberty protections.
- **Schools may need to apply for a new Title IX exemption.** Religious schools must know whether they are subject to Title IX, whether they have a Title IX religious exemption, and whether their existing exemption is broad enough to cover the Department of Education's 2014 announcement that Title IX now bans discrimination based on gender identity.<sup>151</sup> Because Title IX exemptions are issue-specific, religious schools may decide to apply for a new exemption on this issue.

**Take Steps to Avoid Controversy.** While evaluating the relevant religious liberty protections, religious organizations should not overlook some simple, practical things they can do to avoid controversy. Each religious organization should strive to treat its employees well, communicate its religious identity effectively, and apply its moral standards consistently.

*Treat Employees Fairly.* It is an axiom of the medical profession that patients do not sue physicians they like. The same could apply to the employer-employee relationship. For religious employers, treating employees fairly is a moral imperative; it is also a good risk-mitigation strategy. Employers can avoid difficult and controversial employment issues by being charitable and treating people well.

*Communicate the Religious Identity Effectively.* As important as it is that outsiders be able to recognize a group's religious mission, it is even more important that those who interact with the group see this mission and identity lived out in its day-to-day operations. Employees, volunteers, and those who receive aid should all understand what drives the organization: its religious identity and its religious calling. It is especially important that employees understand the nature of the job they are asked to perform, what the job requirements are, and how their performance will be judged. Religious employers should use staff meetings, retreats, and performance reviews to discuss the organization's convictions and moral standards and how they apply to the workplace.

*Apply Moral Standards Consistently.* Religious organizations have a hard time securing religious exemptions when judges suspect that they have not applied their religious convictions consistently. Increasingly, what religious employers describe as criteria deriving from their religious faith are seen by critics and courts as sex discrimination: distinguishing between historic marriage and same-sex relationships; teachings against contraception or abortion; or requiring employees or students to embrace that God made them male or female.

Facing such skepticism or hostility, religious organizations should have documents to support their argument that an employment action was based on a moral teaching that applies to all employees, not only those in a protected class. Ideally, religious organizations will be prepared to prove that they have a track record of applying their moral or religious tests even-handedly.

Consider two Christian schools, each sued by a former female teacher who was fired over sexual conduct that violated the school's morality clause. In the *Herx* case, discussed in Sections I and II, a Catholic school fired a female teacher for undergoing in-vitro fertilization treatments, but it had not disciplined a male teacher who went to a strip club for his birthday.<sup>152</sup> The school was denied the

ministerial exception and Title VII exemptions and the jury awarded the female \$1.9 million.<sup>153</sup>

In another case, a Christian school in Memphis released a teacher who had become pregnant outside marriage. When the teacher alleged sex discrimination, the school demonstrated that it had terminated at least four employees for premarital sex, male and female, even when no pregnancy resulted.<sup>154</sup> In light of the school's evidence, the trial court dismissed the case and the court of appeals affirmed.<sup>155</sup>

Each religious organization should consider how its confessional requirements might be interpreted and how it would respond to hostile charges. Consistent enforcement and better recordkeeping might prove the difference between securing a religious exemption and being placed at the mercy of an unsympathetic jury.

**Improve Protections for Religious Liberty.** Today, interfaith coalitions are more important than ever. Groups that have not worked together in the past are cooperating in new and promising ways. Every religious organization should look for ways to ally with religious groups that share similar concerns to talk about challenges facing religious organizations and explore possible solutions. Religious organizations should also build broad coalitions and work together to educate policymakers, corporations, professions, accrediting organizations, and the general public of the need for better religious liberty protections.<sup>156</sup>

Religious organizations should also become more involved in the associations that have oversight over them—whether over the religious entity as a whole or over individual programs or professionals. Religious groups should send representatives to meetings and look for opportunities to contribute and provide leadership. It is harder for people to cast religious organizations or individuals as bigots or bad actors when an organization is in the room and has established itself as a valuable, reasonable, contributing member of the larger group.

**Prepare to Withstand Challenges.** Even with the best planning, vulnerabilities will remain. After adjusting documents, reforming policies, updating employment practices, and taking other actions to reduce risk and improve the chances of qualifying for certain religious liberty protections, religious organizations will still carry some risk. Some ministries will be more vulnerable than others.

Religious organizations must decide how they will manage the risks and vulnerabilities they cannot eliminate. Sometimes the answer will be to shut

down a program or reject a funding source. Many religious organizations will prayerfully decide to count the cost and stay the course, discerning that there are worse things than being sued or stripped of a government contract. Here, too, careful planning can help prepare for the future and model how the ministry might continue to serve if it lost a lawsuit, license, accreditation, grant, contract, or perhaps even its nonprofit tax status. As part of the mission audit, religious organizations should review their insurance policies to understand when, and to what extent, they will have coverage if they are sued for adhering to religious convictions.<sup>157</sup> This may require contacting the insurer.

### **Conclusion**

Undertaking a mission audit is a crucial task for ministries and religious organizations today. Failure to address the issues discussed here adequately and in a timely manner can have enormous consequences for an organization's ability to fulfill its calling.

This *Special Report* explains why organizations should undertake an individual assessment that will help identify challenges and religious liberty protections specific to their organization type and location and then make adjustments to better protect the group from challenges. While a thorough audit is a time-intensive and resource-intensive process, such planning is necessary as a matter of stewardship and prudent leadership.

Religious organizations should carefully choose the legal counsel that will guide them through this process. A thorough mission audit is best undertaken with counsel that is familiar with religious organizations and with religious liberty issues, as such familiarity will help guide the organization through the complex moral and practical options facing religious bodies.

## Appendix: Resources

### Surveys of Relevant Laws

National Conference of State Legislatures, “Insurance Coverage for Contraception Laws,” February 2012, <http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx> (accessed September 24, 2015).

National Conference of State Legislatures, “State Religious Freedom Restoration Acts,” June 5, 2015, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (accessed September 24, 2015).

National Conference of State Legislatures, “2015 State Religious Freedom Restoration Legislation,” July 15, 2015, <http://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.aspx> (accessed September 24, 2015).

National Conference of State Legislatures, “Discrimination Laws Regarding Off-Duty Conduct,” October 18, 2010, <http://www.ncsl.org/documents/employ/off-dutyconductdiscrimination.pdf> (accessed September 24, 2015).

National Conference of State Legislatures, “State Employment-Related Discrimination Statutes,” July 2015, <http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf> (accessed October 19, 2015).

National Conference of State Legislatures, “Employment Discrimination Based on Sexual Orientation,” February 6, 2014, <http://www.ncsl.org/research/labor-and-employment/employment-discrimination-sexual-orientation.aspx> (accessed September 24, 2015).

Guttmacher Institute, “State Policies in Brief: Insurance Coverage of Contraceptives” June 1, 2015, [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf) (accessed September 14, 2015).

Human Rights Campaign “Maps of State Laws & Policies,” [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (accessed September 14, 2015).

Human Rights Campaign, “Municipal Equality Index 2014: A Nationwide Evaluation of Municipal Law,” <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/MEI-2014.pdf> (accessed September 14, 2015).

For a more comprehensive account of challenges to religious liberty, the Liberty Institute has published a 400-page e-book surveying “hostility to religion in America.” See Liberty Institute, *Undeniable: The Survey of Hostility to Religion in America* (Plano, TX: The Liberty Institute, 2014), <https://www.libertyinstitute.org/file/LIB0914-LIB-Book-Contents-with-Index.pdf> (accessed September 14, 2014).

### Resources from Religious Liberty Organizations

A number of religious liberty organizations have created templates and other materials that aim to help religious organizations address some of these challenges identified in this *Special Report*:

- Alliance Defending Freedom, “Protecting your Ministry,” <http://www.alliancedefendingfreedom.org/content/campaign/2014/church/SOGI-Handbook.pdf> (accessed September 15, 2015).
- Christian Legal Society, “Church Guidance for Same-Sex Issues,” <http://clsnet.org/church-guidance-webinar?erid=696813&trid=64a5d082-a4e9-498d-8243-75c03054fd48> (accessed September 15, 2015).
- Liberty Institute, “Religious Liberty Audit,” <https://www.libertyinstitute.org/audit> (accessed September 15, 2015).

These same religious liberty organizations may also be able to provide religious organizations with some volunteer legal help, either through staff attorneys or through networks of attorneys who have volunteered to donate time pro bono.

- Alliance Defending Freedom, “Get Legal Help,” <https://www.alliancedefendingfreedom.org/legal-help> (accessed September 15, 2015).
- Christian Legal Society, “Referral Directory,” <http://clsnet.org/referrals> (accessed September 15, 2015).
- Liberty Institute, “Request Legal Help,” <https://www.libertyinstitute.org/take-action/request-legal> (accessed September 15, 2015).

## Endnotes

1. Frank Bruni, "Bigotry, the Bible, and the Lessons of Indiana," *The New York Times*, April 3, 2015, [http://www.nytimes.com/2015/04/05/opinion/sunday/frank-bruni-same-sex-sinners.html?\\_r=0](http://www.nytimes.com/2015/04/05/opinion/sunday/frank-bruni-same-sex-sinners.html?_r=0) (accessed September 10, 2015).
2. Kerry Picket, "Hillary On Abortion: 'Deep-Seated Cultural Codes, Religious Beliefs And Structural Biases Have To Be Changed,'" *The Daily Caller*, April 23, 2015, <http://dailycaller.com/2015/04/23/hillary-on-abortion-deep-seated-cultural-codes-religious-beliefs-and-structural-biases-have-to-be-changed/> (accessed September 10, 2015).
3. Mark Oppenheimer, "Now's the Time To End Tax Exemptions for Religious Institutions," *Time*, June 28, 2015, <http://time.com/3939143/nows-the-time-to-end-tax-exemptions-for-religious-institutions/> (accessed September 10, 2015).
4. Religion & Politics, "Why Law Professor Douglas Laycock Supports Same-Sex Marriage and Indiana's Religious Freedom Law," April 1, 2015, <http://religionandpolitics.org/2015/04/01/why-law-professor-douglas-laycock-supports-same-sex-marriage-and-indianas-religious-freedom-law/> (accessed September 10, 2015).
5. Louise Melling, "ACLU: Why We Can No Longer Support the Federal 'Religious Freedom' Law," *The Washington Post*, June 26, 2015, [http://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5\\_story.html?postshare=5541435322367805](http://www.washingtonpost.com/opinions/congress-should-amend-the-abused-religious-freedom-restoration-act/2015/06/25/ee6aaa46-19d8-11e5-ab92-c75ae6ab94b5_story.html?postshare=5541435322367805) (accessed September 10, 2015).
6. For a more comprehensive account of challenges to religious liberty, the Liberty Institute has published a 400-page e-book surveying "hostility to religion in America." See Liberty Institute, *Undeniable: The Survey of Hostility to Religion in America* (Plano, TX: Liberty Institute, 2015), <https://www.libertyinstitute.org/file/LIB0914-LIB-Book-Contents-with-Index.pdf> (accessed September 10, 2015).
7. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).
8. In response to Justice Samuel Alito's question, Solicitor General Donald Verrilli admitted that this is "certainly going to be an issue.... I don't deny that." Transcript of Oral Argument at 38:6-15, *Obergefell v. Hodges* (2015) (No. 14-556).
9. Oppenheimer, "Now's the Time to End Tax Exemptions for Religious Institutions."
10. The "contraceptive methods" approved by the FDA include Plan B (the morning-after pill), Ella (the week-after pill), and the Copper intrauterine device, each of which can "prevent[] attachment (implantation) to the womb (uterus)." U.S. Food and Drug Administration, "Birth Control: Medicines to Help You," <http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm> (accessed September 10, 2015).
11. Sarah Torre, "Obamacare's Many Loopholes: Forcing Individuals and Taxpayers to Fund Elective Abortion Coverage," Heritage Foundation *Backgrounder* No. 2872, January 13, 2014, <http://www.heritage.org/research/reports/2014/01/obamacares-many-loopholes-forcing-individuals-and-taxpayers-to-fund-elective-abortion-coverage>
12. For the section of the ACA requiring coverage for "preventive care and screenings" for women, see 42 U.S. Code § 300gg-13(a).
13. See Health Resources and Services Administration, "Women's Preventive Services Guidelines," U.S. Department of Health and Human Services, <http://www.hrsa.gov/womensguidelines/> (accessed September 10, 2015).
14. 26 U.S. Code §§ 4980D(b)(1) and (e)(1). If the employer fails to sponsor a health plan altogether, the fine is \$2,000 per employee per year. 26 U.S. Code §§ 4980H(a) and (c)(1).
15. An amicus brief and white paper authored by Lewis Roca Rothgerber attorneys for the Catholic Benefits Association explains in detail why the accommodation substantially burdens religious exercise. Brief for the Catholic Benefits Association as *Amicus Curiae*, *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Burwell*, No. 15-105 (Aug. 24, 2015), <http://www.catholicbenefitsassociation.com/cbn/en/resources/LittleSisters-SupremeCourt-Amicus-Brief.pdf> (accessed October 5, 2015), and L. Martin Nussbaum, Eric Kniffin, and Ian Spier, "Catholic Benefits Association White Paper: The Mechanics and Effects of the 'Accommodation' to the HHS CASC Mandate for Non-Exempt Catholic Employers with Self-Funded Plans," Lewis Roca Rothgerber, July 10, 2015, <http://www.catholicbenefitsassociation.com/cbn/en/resources/effects-of-accommodations-exhibits.pdf> (accessed September 10, 2015).
16. See The Becket Fund for Religious Liberty, "HHS Mandate Information Central," <http://www.becketfund.org/hhsinformationcentral/> (accessed September 10, 2015).
17. See The Becket Fund for Religious Liberty, "Supreme Court Protects Religious Ministries for 6th Time from IRS Fines," April 27, 2015, <http://www.becketfund.org/mccscotusorder/> (accessed September 10, 2015).
18. National Conference of State Legislatures, "Insurance Coverage for Contraception Laws, Feb. 2012," <http://www.ncsl.org/research/health/insurance-coverage-for-contraception-state-laws.aspx> (accessed September 10, 2015), and "Guttmacher Institute, State Policies in Brief: Insurance Coverage of Contraceptives," June 1, 2015, [http://www.guttmacher.org/statecenter/spibs/spib\\_ICC.pdf](http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf) (accessed September 10, 2015).
19. When the Supreme Court held oral argument in the *Hobby Lobby* case, Justice Anthony Kennedy asked Solicitor General Donald Verrilli whether the government's arguments in favor of the HHS Mandate would apply equally to a similar mandate for elective abortions. Verrilli eventually conceded, "you're right." But, he quickly added, such fears are speculative because there "is no law like that on the books." Transcript of Oral Argument at 75:1-24, *Burwell v. Hobby Lobby Stores, Inc.* (2014) (No. 13-354).

20. In each of the last four years, Washington State has been one legislative chamber away from passing the Reproductive Parity Act, which would require group health plans in that state to cover surgical abortions. See Scott Ward and Patrick Purtill, "Contraception Mandate Turning into Abortion Mandate?" *USA Today*, April 29, 2014, <http://www.usatoday.com/story/opinion/2014/04/29/obamacare-supreme-court-abortion-contraception-mandate-column/8464175/> (accessed September 10, 2015). See also Washington State Legislature, Bill Information, HB 1647—2015-16, <http://app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=1647#historyv> (accessed September 10, 2015).
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22. See *Hosanna-Tabor Evangelical v. EEOC*, 132 S. Ct. 694, 702-07 (2012). "The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."
23. See Human Rights Campaign, "Maps of State Laws & Policies," [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (accessed September 10, 2015).
24. See Human Rights Campaign, "Municipal Equality Index 2014: A Nationwide Evaluation of Municipal Law," <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/MEI-2014.pdf> (accessed September 10, 2015).
25. For the section of the U.S. Code making it illegal to discriminate in employment "because of such individual's race, color, religion, sex, or national origin," see 42 U.S. Code § 2000e-2(a). See also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (sexual orientation not a protected class), and *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (transsexuals not a protected class).
26. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989).
27. See, for example, *Barnes v. City of Cincinnati*, 401 F.3d 729, 747 (6th Cir. 2005) (affirming jury verdict for "pre-operative male-to-female transsexual"); *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 459-60 (5th Cir. 2013) (affirming jury verdict for male homosexual); and *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (affirming summary judgment for transsexual).
28. EEOC Decision No. 2012-24738-FAA-03 (July 17, 2015). The EEOC argues that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences" and that "sexual orientation...cannot be defined or understood without reference to sex." While it remains to be seen whether courts will be persuaded by the EEOC's interpretation of Title VII, the EEOC's decision gives it broad authority to investigate, conciliate, and litigate on behalf of LGBT individuals.
29. When religious groups have been accused of discriminating against LGBT persons, they often try to explain that they do not discriminate against people based on their sexual orientation or gender identity; their standards only require that *everyone* comply with religiously informed standards of *conduct*. Religious organizations should be prepared that courts and civil rights commissions may reject this distinction and find that expecting same-sex-attracted people to remain celibate is itself discrimination on the basis of sex or sexual orientation. See *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL4760453, at \*5-7 (Colo. App. Aug. 13, 2015). "Masterpiece thus distinguishes between discrimination based on a person's status and discrimination based on conduct closely correlated with that status. However, the United States Supreme Court has recognized that such distinctions are generally inappropriate."
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36. OSHA, "A Guide to Restroom Access for Transgender Workers," June 1, 2015, <https://www.osha.gov/Publications/OSHA3795.pdf> (accessed September 14, 2015).
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41. *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013) (photographer violates public accommodations statute by refusing to photograph gay wedding).
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63. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).
64. *Ibid.*, p. 2625 (Roberts, C.J., dissenting).
65. 29 U.S. Code § 1002(33), and 29 U.S. Code § 414(e). "Church plans" are health insurance or pension plans established by a church or a convention of churches.
66. A Senate report from 1973 records the concern that "the examination" of a church's "books and records" could be regarded as "an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rpt. 93-383, 93rd Cong., 1st Sess., August 21, 1973, p. 81. Indeed, without the exemption, religious organizations that sponsor such plans would have to annually provide the federal government with detailed financial and actuarial statements, would be open to more lawsuits about a religious group's internal affairs, and could be forced to make investments that violate the organization's religious tenets. See Brief for The Becket Fund for Religious Liberty as *Amicus Curiae*, pp. 12-15, *Overall v. Ascension Health*, No. 13-cv-11396 (Oct. 9, 2013), <http://law.ucla.edu/~media/39A5815B71124C4593131B82501470DB.ashx> (accessed September 12, 2015).
67. Dennis G. Bouxsein, "Pension Plans of Church-Affiliated Organizations Face New Challenges," *Chicago Daily Law Bulletin*, January 26, 2015, [http://www.uhlaw.com/pension\\_plans\\_of\\_church\\_affiliated\\_organizations\\_face\\_new\\_challenges](http://www.uhlaw.com/pension_plans_of_church_affiliated_organizations_face_new_challenges) (accessed September 12, 2015).
68. "Archdiocese Releases Statement on Church Teachings, Practice in High Schools," Catholic San Francisco, February 4, 2015, <http://www.catholic-sf.org/ns.php?newsid=25&id=63175> (accessed September 12, 2015). The document asked Catholic teachers not to join groups that call themselves Catholic "but support or advocate issues or causes contrary to the teachings of the Church." Non-Catholic teachers were asked "not to visibly contradict, undermine, or deny" Catholic teaching.
69. Matthew Schmitz, "Meet the Opponents of San Francisco's Archbishop," *First Things*, April 17, 2015, <http://www.firstthings.com/blogs/firstthoughts/2015/04/meet-the-opponents-of-san-franciscos-archbishop> (accessed September 24, 2015), and full-page advertisement by opponents taken out in San Francisco Chronicle, "A Respectful Appeal to Pope Francis from the Catholic Community of San Francisco," <https://s3.amazonaws.com/s3.documentcloud.org/documents/1875993/cr-archbishopletter.pdf> (accessed September 14, 2015).
70. The San Francisco Board of Supervisors unanimously passed a resolution denouncing the Archbishop's document as "contrary to shared San Francisco values" and threatening legal action. Lee Romney, "S.F. Archdiocese Teachers Overwhelmingly Reject Moral Strictures," *Los Angeles Times*, March 4, 2015, <http://www.latimes.com/local/lanow/la-me-ln-sf-archdiocese-teachers-20150304-story.html> (accessed September 12, 2015).
71. Eight state legislators wrote a letter that said the Archbishop's standards were "divisive" and would "foment a discriminatory environment." California legislators' letter to Archbishop Cordileone, February 17, 2015, <http://asmdc.org/members/a19/attachments/ScannedLettertoSFArchbishop.pdf> (accessed September 14, 2015), and Lee Romney, "Lawmakers Urge S.F. Archbishop to Withdraw Teacher Morality Clauses," *Los Angeles Times*, February 17, 2015, <http://www.latimes.com/local/lanow/la-me-ln-sf-archbishop--morality-clauses-20150217-story.html> (accessed September 14, 2015).
72. "From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions." Douglas Laycock, "Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause," *Notre Dame Law Review*, Vol. 81 (2006), pp. 1793 and 1837. This tradition of choosing not to burden religious practice played a vital role in developing the modern understanding that government should remain neutral in religious affairs. *Id.* at 1839.

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73. See Appellees' Brief, 57-62, *Stormans, Inc. v. Selecky*, No. 12-35221, 13-35223 (9th Cir. Nov. 14, 2012), <http://www.adfmedia.org/files/StormansOpeningBrief.pdf> (accessed September 16, 2015).
74. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). In legal terminology, such laws are subject to "strict scrutiny," which is "the most demanding test known to constitutional law."
75. *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1256 (10th Cir. 2008).
76. *Larson v. Valente*, 456 U.S. 228, 244 (1982).
77. 534 F.3d 1245 (10th Cir. 2008).
78. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).
79. Carl H. Esbeck, "The Establishment Clause as a Structural Restraint on Governmental Power," *Iowa Law Review*, Vol. 1, No. 10 (1998), p. 84, n. 34.
80. See *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952).
81. See *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Hawaii 1994).
82. *United States v. Ballard*, 322 U.S. 78 (1944), and *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002).
83. *Hosanna-Tabor Evan. Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702 (2012).
84. *Ibid.*, pp. 707-708.
85. *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 171 (5th Cir. 2012).
86. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015). As *Conlon* and these other ministerial exception cases show, courts look beyond job titles to what a religious organization expects of a given position. Section III of this *Special Report* offers suggestions on how a religious organization can make it easier for a court to recognize that someone is a ministerial employee.
87. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).
88. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).
89. *Ibid.*, p. 644.
90. *Ibid.*
91. *Ibid.*, pp. 650 and 653 (quoting from the Boy Scouts' Reply Brief at 5). On July 27, 2015, the Boy Scouts of America amended its Adult Leadership Policy to remove the national restriction on openly gay adult leaders and employees. Troops sponsored by religious organizations may continue to use religious criteria, including beliefs about sexual morality, in selecting their leaders. Boy Scouts of America, "Boy Scouts of America Amends Leadership Policy," July 27, 2015, <http://www.scoutingnewsroom.org/blog/boy-scouts-of-america-amends-adult-leadership-policy/> (accessed November 2, 2015). The Human Rights Campaign criticized the Boy Scouts' new policy because it believes that "including an exemption for troops sponsored by religious organizations undermines the historic nature of today's decision. Discrimination should have no place in the Boy Scouts, period." Todd Leopold, "Boy Scouts Change Policy on Gay Leaders," CNN, July 28, 2015 <http://www.cnn.com/2015/07/27/us/boy-scouts-gay-leaders-feat/> (accessed November 2, 2015).
92. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).
93. See *Dale*, 530 U.S. at 648, and *Roberts*, 468 U.S. at 622.
94. Edwin Meese III et al., *The Heritage Guide to the Constitution* (Washington, DC: The Heritage Foundation, 2005), p. 308.
95. For a helpful, brief overview of state constitutional provisions and their judicial interpretation, see Paul Benjamin Linton, "Religious Freedom Claims and Defenses under State Constitutions," *University of St. Thomas Journal of Law and Public Policy*, Vol. 7 (2013), pp. 103 and 105.
96. H.R. 1308, 103d Cong. (1993) (enacted).
97. See Brief for Members of Congress in support of Respondents as *Amicus Curiae*, pp. 9-11, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (Jan. 2014), <http://www.becketfund.org/wp-content/uploads/2014/01/13-354-bsac-Members-of-Congress.pdf> (accessed September 15, 2015).
98. President William J. Clinton, "Remarks on Signing the Religious Freedom Restoration Act of 1993," November 16, 1993, <http://www.presidency.ucsb.edu/ws/?pid=46124> (accessed September 15, 2015).
99. *Ibid.*
100. 42 U.S. Code §§ 2000bb to 2000bb-4.
101. 134 S. Ct. 2751 (2014).
102. 135 S. Ct. 853 (2015).

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103. These cases emphasize that the RFRA offers robust protection to religious organizations. First, courts must accept a sincere plaintiff's articulation of religious convictions at face-value. *Hobby Lobby*, 134 S. Ct. at 2778 (holding that courts may not second-guess religious plaintiffs on "difficult and important question[s] of religion and moral philosophy" because doing so essentially "tell[s] the plaintiffs that their beliefs are flawed"). Second, in order to survive strict scrutiny the government cannot simply invoke a "compelling interest," but must apply that interest to the circumstances at hand. The government is not due "unquestioning deference" but must prove that restricting religious liberty actually advances its interests. *Holt*, 135 S. Ct. at 864. In *Holt v. Hobbes*, the Supreme Court held that the Arkansas Department of Corrections had failed to show that forcing a Muslim prisoner to shave a half-inch beard was necessary to advance its asserted interests in rooting out contraband and preventing prisoners from disguising their identity. The government must also pass the "exceptionally demanding" least restrictive means test by showing "that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion." *Holt*, 135 S. Ct. at 864 (quoting *Hobby Lobby*, 134 S. Ct. at 2780).
104. See Eugene Volokh, "Religious Exemptions—A Guide for the Confused," *The Washington Post*, March 24, 2014, <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/24/religious-exemptions-a-guide-for-the-confused/> (accessed September 16, 2015).
105. See National Conference of State Legislatures, State Religious Freedom Restoration Acts, June 5, 2015, <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (accessed September 15, 2015).
106. John McCormack, "Indiana's Religious Freedom Restoration Act, Explained," *The Weekly Standard*, March 27, 2015, [http://www.weeklystandard.com/blogs/indianas-religious-freedom-restoration-act-explained\\_900641.html?nopager=1](http://www.weeklystandard.com/blogs/indianas-religious-freedom-restoration-act-explained_900641.html?nopager=1) (accessed September 15, 2015).
107. Laycock, "Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause," *Notre Dame Law Review*, Vol. 81 (2006), pp. 1793 and 1837, citing James E. Ryan, "Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment," *Virginia Law Review*, Vol. 78 (1992), p. 1445 and n.215.
108. 45 Code of Federal Regulations § 147.131(a), citing 26 U.S. Code §§ 6033(a)(3)(i) and (iii).
109. "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act," *Federal Register*, Vol. 76, No. 46 (August 3, 2011), p. 621 (amending 45 Code of Federal Regulations § 147.130).
110. Cal. Ins. Code § 10123.196(d).
111. N.C. Gen Stat. Ann. § 58-3-178(e).
112. Ark. Code Ann. §§ 23-79-1102(3)(A)-(C).
113. 42 U.S. Code § 2000e-1(a).
114. *LeBoon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217 (3d Cir. 2007).
115. *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011).
116. 42 U.S. Code § 2000e-1(a).
117. *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991).
118. *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 627 (6th Cir. 2000).
119. See *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996); *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); and *EEOC v. Pac. Press Pub'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982).
120. *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 141 (3d Cir. 2006).
121. 42 U.S. Code § 2000e-2(e)(1).
122. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).
123. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (quotations omitted).
124. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985).
125. 42 U.S. Code § 2000e-2(e)(2). See also *Killinger v. Samford University*, 113 F.3d 196 (11th Cir. 1997) (divinity school founded and supported by the Alabama Baptist State Convention); *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000) (college founded by three states' Baptist Conventions, which receives financial support from Baptist organizations and stresses religious identity in its mission statement and orientation materials); *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991) (parochial school operated by parish); *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (school wholly owned and operated by Assembly of God Church); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (publishing house affiliated with and overseen by Seventh Day Adventist Church; published only religious materials); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. Unit A 1981) (seminary owned and operated by the Southern Baptist Convention); *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980) (college owned and operated by the Mississippi Baptist Convention); *Fike v. United Methodist Children's Home of Va., Inc.*, 547 F.Supp. 286 (E.D.Va. 1982) (exemption does not apply because even though the home was affiliated with the Methodist Church, it has abandoned its sectarian orientation and become a secular organization).
126. 42 U.S. Code § 2000e-2(e)(2).
127. 20 U.S. Code § 1681(a)(3).
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128. 20 U.S. Code § 1681(a)(3). See also U.S. Department of Education, “Explanation of HEW Form 639 A,” March 1977, <http://freepdfhosting.com/88b629f888.pdf> (accessed September 12, 2015).
129. 34 Code of Federal Regulations § 106.12.
130. See 42 U.S. Code § 2000a(b).
131. Cal. Civ. Code § 51(b).
132. Conn. Gen. Stat. §§ 46a-64(a) and 46a-81(d). Under Connecticut law, “private organizations” are generally exempt, but “once such an organization has determined to eschew selectivity,” “it may not discriminate among the general public.” *Corcoran v. German Soc. Soc’y Frohsinn, Inc.*, 916 A.2d 70, 73 (Conn. App. 2007).
133. N.M. Stat. §§ 28-1-7(F) and 28-1-9.
134. N.M. Stat. § 28-1-2.
135. 20 U.S. Code § 1999b(a)(4)(A). See also U.S. Department of Education, “Eligibility Requirements,” [http://www2.ed.gov/admins/finaid/accred/accreditation\\_pg13.html](http://www2.ed.gov/admins/finaid/accred/accreditation_pg13.html) (accessed September 14, 2015).
136. These positions may qualify for the ministerial exception or the bona fide occupational qualification exception.
137. Expectations that apply to most or all employees usually fall under the Title VII religious organization exception.
138. Brief for Respondents at 8, *Burwell v. Hobby Lobby Stores, Inc.* (2014) (No. 13-354), <http://www.becketfund.org/wp-content/uploads/2014/02/13-354-bs.pdf> (accessed September 14, 2015).
139. The Supreme Court was split 5-4 on the overall question of whether the HHS Mandate violated Hobby Lobby’s rights under the RFRA. However, Justices Breyer and Kagan distanced themselves from the primary dissent’s position that for-profits cannot bring RFRA claims. *Ibid.*, at 2806 (Breyer, J., and Kagan, J., dissenting).
140. 633 F.3d at 748 (Berzon, J., dissenting).
141. Calvin College, “Faculty Membership Requirements: A Guide for Prospective Faculty,” <https://www.calvin.edu/admin/provost/facdocs/fac-requirements.htm> (accessed September 14, 2015).
142. University of Notre Dame, “Faculty and Staff: Core Values,” <http://www.nd.edu/faculty-and-staff/> (accessed September 14, 2015).
143. Torre and Anderson, “Adoption, Foster Care, and Conscience.”
144. See William J. Levada, “The San Francisco Solution,” *First Things*, August 1997, <http://www.firstthings.com/article/1997/08/003-the-san-francisco-solution> (accessed September 14, 2015).
145. *Ibid.*
146. For a listing of schools that refuse to participate in federal student-aid programs, see Jack Healy, “To Keep Free of Federal Reins, Wyoming Catholic College Rejects Student Aid,” *The New York Times*, April 11, 2015, [http://www.nytimes.com/2015/04/12/us/to-keep-free-of-federal-reins-wyoming-catholic-college-rejects-student-aid.html?\\_r=0](http://www.nytimes.com/2015/04/12/us/to-keep-free-of-federal-reins-wyoming-catholic-college-rejects-student-aid.html?_r=0) (accessed September 16, 2015) (listing schools that refuse to participate in federal student-aid programs); see also Grove City College, “Supreme Court Case,” <http://www.gcc.edu/about/whoweare/Pages/Supreme-Court-Case.aspx> (accessed September 16, 2015); (“In order to preserve and protect its independence, Grove City College refused federal student aid beginning in the mid-1980s.”).
147. Laycock, “Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause,” *Notre Dame Law Review*, Vol. 81, pp. 1793 and 1837 (2006), (citing James E. Ryan, “Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment,” *Virginia Law Review*, Vol. 78 (1992), pp. 1445 and n.215).
148. *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring).
149. See Dianna B. Johnston, EEOC Assistant Legal Counsel, informal discussion letter, March 8, 2004, [http://www.eeoc.gov/eeoc/foia/letters/2004/religious\\_org\\_bfoq.html](http://www.eeoc.gov/eeoc/foia/letters/2004/religious_org_bfoq.html) (accessed September 14, 2015). “Thus, if [an employer] is a ‘religious organization’ within the meaning of Title VII, it may prefer to hire co-religionists in any position.”
150. 42 U.S. Code § 2000e-1(a).
151. U.S. Department of Education, “Questions and Answers on Title IX and Sexual Violence,” April 29, 2014, p. 5, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (accessed September 14, 2015).
152. *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, No. 1:12-CV-122, 2015 WL 1013783, at \*1-2 (N.D. Ind. Mar. 9, 2015).
153. *Ibid.*, and *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014) (rejecting diocese’s Title VII and ministerial exception defenses).
154. *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 412, 414 (6th Cir. 1996).
155. *Ibid.* at 415.

156. Scholars at The Heritage Foundation have published studies and articles that may be helpful to religious organizations seeking to understand the religious liberty implications of proposed legislation related to sexual orientation and gender identity. See, e.g., Ryan Anderson, "ENDA Threatens Fundamental Civil Liberties," Heritage Foundation *Backgrounder* No. 2857, November 1, 2013, <http://www.heritage.org/research/reports/2013/11/enda-threatens-fundamental-civil-liberties>; Ryan Anderson, "How So-Called 'Equality Act' Threatens Religious Freedom," The Daily Signal, July 23, 2015, <http://dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/>; and Ryan T. Anderson and Leslie Ford, "Protecting Religious Liberty in the State Marriage Debate," Heritage Foundation *Backgrounder* No. 2891, April 10, 2014, <http://www.heritage.org/research/reports/2014/04/protecting-religious-liberty-in-the-state-marriage-debate>.
157. See David French, "For Churches That Won't Perform Same-Sex Weddings, Insurance Begins to Look Iffy," *National Review*, July 8, 2015, <http://www.nationalreview.com/article/420928/churches-gay-marriage-insurance> (accessed September 14, 2015).



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