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NOTE

Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test

Spencer v. World Vision, Inc., No. 08-35532, 2011 WL 208356
(9th Cir. Jan. 25, 2011) (per curiam).

ROGER W. DYER, JR.*

I. INTRODUCTION

While the United States Supreme Court has upheld the constitutionality of a law permitting religious organizations to exercise a religious preference when making employment decisions,¹ courts remain at odds over the proper test for determining whether an organization is “religious.” This conflict highlights the tension between Title VII of the Civil Rights Act and the First Amendment’s religion clauses.² When Congress passed Title VII, it took the first step toward its goal of “eliminat[ing] all forms of unjustified discrimination in employment.”³ Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.⁴ Title VII generally ap-

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1. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 329, 339 (1987). In *Amos*, there was no dispute about whether the organization was religious, so the Court did not address this issue. *Id.* at 330.

2. See U.S. CONST. amend I; 42 U.S.C. § 2000e-2(a) (2006). Congress enacted Title VII in part to eliminate employment discrimination on the basis of religion. *Feldstein v. Christian Sci. Monitor*, 555 F. Supp. 974, 976 (D. Mass. 1983). However, “churches have a constitutionally protected interest in managing their own institutions free of government interference.” Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981); see also *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (stating that the religion clauses “require[] that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief”).

3. *Feldstein*, 555 F. Supp. at 976.

4. 42 U.S.C. § 2000e-2. Employers “engaged in an industry affecting commerce” with fifteen or more employees must comply with Title VII. *Id.* § 2000e(b).

plies to religious organizations;⁵ however, in order to avoid offending the religion clauses, Congress added an exemption, codified in section 702 of the Act, for “religious corporation[s], association[s], educational institution[s], or societ[ies]” with respect to Title VII’s prohibition against religion-based discrimination.⁶

Section 702 is intended to protect religious organizations from unconstitutional government intrusions into their religious affairs.⁷ Yet in drafting Title VII, Congress provided little guidance on determining whether an entity qualifies as a religious organization.⁸ As a result, the courts were tasked with developing a workable standard.⁹ A circuit split has developed.¹⁰ Over the

5. *See, e.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986) (noting that Congress has “rejected proposals that provide[] religious employers a complete exemption from regulation under the [Civil Rights] Act [of 1964].” (alteration in original) (quoting *EEOC v. Pac. Press Publ’g Ass’n*, 676 F.2d 1272, 1276 (9th Cir. 1982)); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (“The language and the legislative history . . . compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin”); *Elbaz v. Congregation Beth Judea, Inc.*, 812 F. Supp. 802, 807 (N.D. Ill. 1992) (concluding that case law and the terms of the religious organization exemption establish that Title VII applies to religious organizations with respect to discrimination based on race, sex, or national origin). However, Title VII generally does not apply to the employment relationship between religious organizations and their ministers. *See, e.g.*, *Spencer v. World Vision, Inc.*, No. 08-35532, 2011 WL 208356, at *28 (9th Cir. Jan. 25, 2011) (per curiam) (Berzon, J., dissenting); *Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243-45 (10th Cir. 2010).

6. 42 U.S.C. § 2000e-1(a). The religious organization exemption was originally codified in section 702. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-1). In 1991, Congress added subsections, and the exemption was codified in section 702(a). Civil Rights Act of 1991, Pub. L. No. 102-666, § 109, 105 Stat. 1071, 1077 (codified at 42 U.S.C. § 2000e-1). For the purposes of this Note, section 702 refers specifically to the religious organization exemption and not section 702 as a whole.

7. *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991).

8. *See EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 617 (9th Cir. 1988).

9. *See id.* at 618.

10. *Compare Fike v. United Methodist Children’s Home of Va., Inc.*, 547 F. Supp. 286, 289-90 (E.D. Va. 1982), *aff’d*, 709 F.2d 284 (4th Cir. 1983) (applying the secularization test), *with Killinger v. Samford Univ.*, 113 F.3d 196, 199 (11th Cir. 1997) (applying the sufficiently religious test), *and EEOC v. Miss. Coll.*, 626 F.2d 477, 478-79 (5th Cir. 1980) (applying the sufficiently religious test), *and Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998), *aff’d*, 208 F.3d 219 (8th Cir. 2000) (applying the sufficiently religious test), *with EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993) (applying the primarily religious test), *and Townley Eng’g & Mfg. Co.*, 859 F.2d at 618 (applying the primarily religious test), *with LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007) (applying the *LeBoon* test), *and Hall v. Baptist Mem’l Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000) (applying the *LeBoon* test).

years, federal courts applied four different tests to determine whether organizations were religious.¹¹ However, in *Spencer v. World Vision, Inc.*, the U.S. Court of Appeals for the Ninth Circuit called into question the constitutionality of these competing tests and subsequently issued three separate opinions, with each judge proposing a new test.¹² Although the *Spencer* court correctly pointed out flaws in the tests applied by other circuits and offered new considerations that are helpful in applying section 702 to future cases, it failed to develop a standard that adequately protects the religious liberty of all religious organizations.

II. FACTS AND HOLDING

In *Spencer*, Silvia Spencer, Ted Youngberg, and Vicki Hulse (collectively, Employees) filed Title VII claims against their former employer, World Vision, Inc. (World Vision).¹³ World Vision is a nonprofit, self-described “Christian humanitarian organization” that provides humanitarian aid and services to impoverished people around the world.¹⁴ Employees alleged World Vision terminated their employment because of their religious beliefs.¹⁵ World Vision admitted that Employees were discharged because of their religious beliefs but claimed that as a “religious corporation,” it is exempt under section 702 from Title VII claims based on religious discrimination.¹⁶

Founded in 1950 by Dr. Robert Pierce, a pastor whose faith inspired him to begin sending monthly donations to a poor child in China, World Vision has grown into an international federation of national-level entities operating under one umbrella organization, World Vision International (WVI).¹⁷ WVI is not a traditional church or house of worship, nor is it affiliated with any particular religious denomination.¹⁸ However, the I.R.S. has classified it as a “church” for tax purposes.¹⁹ World Vision represents the U.S. branch of

11. *See infra* Part III.B.

12. *Spencer v. World Vision, Inc.*, No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam). Although each judge proposed a different test, a majority of the judges ultimately agreed on which test would be controlling in the Ninth Circuit. *Id.*; *see infra* Part IV.

13. *Spencer v. World Vision, Inc.*, 619 F.3d 1109, 1111 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam). Part II of this Note describes the facts of the court’s original opinion, which are nearly identical to those of the amended opinion.

14. *Id.* at 1110.

15. *Id.* at 1111.

16. *Id.*

17. *Id.* at 1110.

18. *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279, 1286-87 (W.D. Wash. 2008), *aff’d*, 619 F.3d 1109 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam).

19. *Id.* at 1286; *see* I.R.C. § 501(c)(3) (2006).

WVI.²⁰ World Vision solicits financial donations from within the U.S. for a variety of humanitarian efforts, including its renowned child sponsorship program.²¹ In addition to fundraising, World Vision collects and distributes supplies for overseas disaster relief, provides operational support to foreign relief centers, offers a wide-range of vocational training to international aid recipients, and educates people in the U.S. about the needs of the world's poor.²²

World Vision characterizes its humanitarian work as “a demonstration of God’s unconditional love.”²³ It believes that serving those in need “is a signpost of the good news of Jesus Christ[,] it is a means of building trust to those who may be skeptical[,] and it is a metaphor for a life transformed by Christ.”²⁴ World Vision identifies itself as a Christian organization on its website, applications for employment, and assorted mailings soliciting donations and thanking donors.²⁵ World Vision’s buildings are adorned with reli-

20. *Spencer*, 619 F.3d at 1110.

21. *Id.* at 1125; Brief of Appellee at 12, *Spencer*, 619 F.3d 1109 (No. 08-35532), 2008 WL 6795956. Individuals can sponsor a child by donating thirty-five dollars a month, which provides the child with assistance such as clean water, nutritious food, health care, education, and spiritual nurture. World Vision - Learn About Sponsorship, <http://www.worldvision.org/content.nsf/sponsor/learn-about-sponsorship> (last visited Feb. 15, 2011).

22. Brief of Appellee, *supra* note 21, at 3, 12. Most of World Vision’s services are not centered on “the direct inculcation of religious doctrine or propagation of religion,” though World Vision states that these opportunities occasionally arise in the course of providing services. Brief of Appellants at 29-30, *Spencer*, 619 F.3d 1109 (No. 08-35532), 2008 WL 6795953. World Vision does sponsor Bible camps intended to teach children about the Christian faith and distribute Bible instruction materials. Brief of Appellee, *supra* note 21, at 12-13. However, receiving aid and services is not conditioned on attending these Christian events or recipients subscribing to a particular faith. *Spencer*, 619 F.3d at 1122-23. Furthermore, most of the aid and services it provides, such as clean water, food, health care, and educational supplies, are the same as those provided by secular humanitarian organizations. *See id.* While World Vision partners with a wide array of religious groups, including mosques and Buddhist temples, it also partners with secular humanitarian and philanthropic organizations and the U.S. government. Brief of Appellants, *supra*, at 10. In terms of financing, World Vision is funded in part by both religious and secular entities, including the U.S. government. *Id.* at 10. In 2006, approximately eighty-four percent of cash contributions to World Vision came from churches and individuals who shared World Vision’s faith. *Id.* at 42. However, cash contributions made up less than half of World Vision’s total revenue. *Id.* Government grants and gifts-in-kind (contributions not coming from the government, churches, or individuals sharing World Vision’s faith, and thus presumably contributions from secular corporations) made up fifty-eight percent of World Vision’s total revenue. *Id.* at 42-43.

23. Brief of Appellee, *supra* note 21, at 5.

24. *Id.* at 14.

25. *Id.* at 3-6; *see* World Vision - About Us, <http://www.worldvision.org/content.nsf/about/aboutus-home> (last visited Feb. 15, 2011).

gious paintings, photographs, sculptures, and Bible verses.²⁶ World Vision's philosophy is articulated in its articles of incorporation:

The primary, exclusive and only purposes for which this corporation is organized are religious ones, to wit: to perform the functions of the Christian church including, without limitation, the following functions, to conduct Christian religious and missionary services, to disseminate, teach and preach the Gospel and teachings of Jesus Christ, to encourage and aid the growth, nurture [sic] and spread of the Christian religion and to render Christian service, both material and spiritual to the sick, the aged, the homeless and the needy.²⁷

This philosophy is reiterated in World Vision's mission statement and core values.²⁸

Employees' job duties at World Vision were not inherently religious.²⁹ Spencer was employed as a tech-support telecom specialist, providing services related to the upkeep and maintenance of the organization's technology and facilities.³⁰ Hulse worked as an administrative coordinator, performing miscellaneous office tasks.³¹ Youngberg was employed as a project manager, coordinating shipping and facility needs, such as preparing packages for shipping via UPS and coordinating furniture needs for World Vision offices.³² Employees testified that they regarded World Vision as a secular organization because its humanitarian efforts are focused on meeting the physical rather than spiritual needs of aid recipients.³³

World Vision requires all new employees to sign an acknowledgment form indicating that they "subscribe[] wholeheartedly" to World Vision's

26. *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279, 1288 (W.D. Wash. 2008), *aff'd*, 619 F.3d 1109 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam).

27. *Id.* at 1286-87 (correction in original).

28. World Vision's mission statement is "[t]o call people to a life-changing commitment to serve the poor in the name of Christ." Brief of Appellee, *supra* note 21, at 7. World Vision's Core Values state:

We are Christian. We acknowledge one God; Father, Son and Holy Spirit. In Jesus Christ the love, mercy and grace of God are made known to us and all people. From this over-flowing abundance of God's love we find our call to ministry. . . . We seek to follow Him – in His identification with the poor, the afflicted, the oppressed, the marginalized . . .

Id. (alteration in original).

29. Brief of Appellants, *supra* note 22, at 3-4.

30. *Id.* at 4.

31. *Id.* at 3-4.

32. *Id.* at 4.

33. *Id.* at 5-7; *see supra* note 22.

statement of faith, core values, and mission statement.³⁴ New employees must also attend a two-day orientation that focuses on serving Christ by serving the needs of the poor.³⁵ Further, employees are required to participate in daily devotions and weekly chapel services.³⁶ Employees fulfilled these requirements.³⁷ However, approximately two years before their termination Employees began conducting a small group Bible study in place of World Vision's weekly employee chapel session with permission from a supervisor and with no objection from World Vision.³⁸ Employees continued to participate in World Vision's daily devotions, even leading their own respective sessions.³⁹ Nonetheless, it was brought to the attention of World Vision management that Employees stopped attending the weekly chapel services.⁴⁰ World Vision investigated Employees and learned that they had come to hold contrary beliefs regarding the deity of Jesus and the existence of the Trinity.⁴¹ World Vision subsequently terminated Employees.⁴²

Employees filed charges of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC).⁴³ Spencer and Youngberg received right-to-sue letters from the EEOC and filed suit in the U.S. District Court for the Western District of Washington.⁴⁴ Hulse joined the suit as a plaintiff upon receiving her right-to-sue letter.⁴⁵ World Vision filed a motion to dismiss Employees' claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting its exemption from religious discrimination claims pursuant to section 702.⁴⁶ Employees then filed a Federal Rule of Civil Procedure 56(f) motion, which the district court granted, converting World Vision's 12(b) motion to a motion for summary judgment on the section 702 exemption issue.⁴⁷

34. *Spencer v. World Vision, Inc.*, 619 F.3d 1109, 1125 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam).

35. Brief of Appellee, *supra* note 21, at 8.

36. *Id.* at 9.

37. *See id.* at 21; *see also* Brief of Appellants, *supra* note 22, at 5.

38. Brief of Appellants, *supra* note 22, at 4-5.

39. *Id.* at 5.

40. Brief of Appellee, *supra* note 21, at 21 & n.3.

41. *Id.*; Brief of Appellants, *supra* note 22, at 5. World Vision learned that Employees rejected "the deity of Jesus Christ and disavowed the doctrine of the Trinity." *Spencer v. World Vision, Inc.*, 619 F.3d 1109, 1111 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam).

42. *Spencer*, 619 F.3d at 1111.

43. Brief of Appellants, *supra* note 22, at 1.

44. *Id.*

45. *Id.*

46. *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279, 1281 (W.D. Wash. 2008), *aff'd*, 619 F.3d 1109 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam).

47. *Id.*; *see* FED. R. CIV. P. 12(d).

The district court entered an order granting World Vision's motion for summary judgment and dismissing Employees' claims in their entirety with prejudice.⁴⁸ In doing so, the district court concluded that a multifactor test previously utilized by the Ninth Circuit "d[id] not provide an accurate framework" for determining whether World Vision is religious.⁴⁹ Instead, the court applied a different multifactor test developed by the Third Circuit in *LeBoon v. Lancaster Jewish Community Center Ass'n*,⁵⁰ reasoning that the factors considered in *LeBoon* provided more flexibility and were more applicable to the facts of the case.⁵¹ After applying the *LeBoon* test, the court determined that World Vision qualified as a religious corporation.⁵² Employees appealed.⁵³

In a plurality decision with one judge dissenting, a panel of the Ninth Circuit Court of Appeals affirmed the district court's decision, but not under the *LeBoon* rationale.⁵⁴ Judges Diarmuid F. O'Scannlain and Andrew J. Kleinfeld formed the plurality, and they agreed on everything except the proper test.⁵⁵ Consequently, all three judges issued separate opinions, each offering a new test for determining whether an organization is religious.⁵⁶ Judge O'Scannlain held that World Vision is a religious corporation and therefore exempt from religious discrimination claims arising under Title VII because it is nonprofit, its articles of incorporation state a religious purpose, it performs activities in furtherance of its stated purpose, and it holds itself out to the public as religious.⁵⁷ Judge Kleinfeld concurred.⁵⁸ However, he did not do so because World Vision is a nonprofit corporation, but rather because it does not charge more than a nominal fee for its services.⁵⁹ Judge Marsha L. Berzon dissented, arguing that the exemption is intended to apply only to churches and entities similar to churches.⁶⁰

48. *Spencer*, 570 F. Supp. 2d at 1289.

49. *Id.* at 1285.

50. 503 F.3d 217, 226-27 (3d Cir. 2007).

51. *Spencer*, 570 F. Supp. 2d at 1285; *LeBoon*, 503 F.3d at 226-27; *see also* EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988) (opining that section 702 was intended to apply to "[c]hurches, and entities similar to churches.").

52. *Spencer*, 570 F. Supp. 2d at 1289.

53. *Spencer v. World Vision, Inc.*, 619 F.3d 1109, 1111 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (*per curiam*).

54. *Id.* at 1119, 1126.

55. *Id.* at 1119.

56. *Id.*; *id.* at 1133 (Kleinfeld, J., concurring); *id.* at 134 (Berzon, J., dissenting).

57. *Id.* at 1126 (majority opinion); *see also infra* Part IV.A.

58. *Spencer*, 619 F.3d at 1126 (Kleinfeld, J., concurring); *see also infra* Part IV.B.

59. *Spencer*, 619 F.3d at 1132-33 (Kleinfeld, J., concurring).

60. *Id.* at 138 (Berzon, J., dissenting); *see also infra* Part IV.C.

Following the decision, Employees filed a petition for rehearing en banc.⁶¹ Judge Berzon voted to rehear the case en banc, and Judges O’Scannlain and Kleinfeld voted to deny rehearing.⁶² The remaining active judges on the Ninth Circuit Court of Appeals were informed of the matter, but none requested a vote on whether to rehear the case.⁶³ As a result, the court denied Employee’s petition.⁶⁴ However, the court amended its original decision and issued a majority per curiam opinion in which Judges O’Scannlain and Kleinfeld agreed that despite their difference over the appropriate test, Judge Kleinfeld’s test would be controlling in the Ninth Circuit.⁶⁵ The judges’ separate opinions remained substantively unchanged.⁶⁶

III. LEGAL BACKGROUND

A. *The Religious Organization Exemption*

Congress enacted Title VII of the 1964 Civil Rights Act to help eliminate employment discrimination on the basis of race, color, religion, sex, and national origin.⁶⁷ While Congress recognized the statutory right of individuals to be free from discrimination in employment, it also understood that this right would conflict with other rights, such as those protected under the First Amendment’s religion clauses.⁶⁸ In order to safeguard against unconstitutional government intrusions into the religious liberty of religious organiza-

61. Appellants’ Petition for Rehearing *En Banc*, *Spencer*, 619 F.3d 1109 (No. 08-35532).

62. *Spencer v. World Vision, Inc.*, No. 08-35532, 2011 WL 208356, at *1 (9th Cir. Jan. 25, 2011) (per curiam).

63. *Id.*; see FED. R. APP. P. 35.

64. *Spencer*, 2011 WL 208356, at *1. The court stated that no further requests for rehearing en banc could be filed. *Id.*

65. *Id.*; see also *id.* at *21 (Kleinfeld, J., concurring) (explaining Judge Kleinfeld’s test).

66. See *Spencer*, 2011 WL 208356; *Spencer*, 619 F.3d 1109.

67. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-703, 78 Stat. 241, 253-57 (codified as amended at 42 U.S.C. §§ 2000e to e-4 (2006)). Title VII states in pertinent part:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-2(a)(1) (subsection omitted).

68. *Little v. Wuerl*, 929 F.2d 944, 949 (3d Cir. 1991) (discussing section 702’s legislative history and purpose); see *supra* note 2.

tions to hire individuals of like-minded faith to carry out their religious mission, Congress provided section 702.⁶⁹

Section 702 initially allowed religious organizations to exercise a religious preference with respect to employees who performed work connected with their “religious activities.”⁷⁰ However, limiting the exemption to religious activities did not adequately protect religious liberty,⁷¹ and in 1972, Congress broadened section 702 to apply to all activities.⁷² Section 702 provides: “This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”⁷³ Section 702 makes clear that religious organizations may consider religion when making employment decisions,⁷⁴ but Title VII does

69. *Little*, 929 F.2d at 949; see 42 U.S.C. § 2000e-1(a); Civil Rights Act of 1964 § 702, 78 Stat. at 255.

70. Civil Rights Act of 1964 § 702, 78 Stat. at 255 (originally stating, “This title shall not apply . . . to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its *religious activities*”) (emphasis added).

71. CARL H. ESBECK ET AL., *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* 26-28 (2004). In order to determine whether an activity is religious, government agencies and courts would need to comb through the organization’s records and inner-workings in an effort to find evidence of an activity’s religious or secular nature. *Id.* at 28. This type of inquiry would result in impermissible government interference in the religious organization’s religious affairs. *Id.*; see also *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987) (“[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . [A]n organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.”); *id.* at 345 (Brennan, J., concurring) (noting that while “individual religious freedom dictates that religious discrimination be permitted only with respect to employment in religious activities[,] [c]oncern for the autonomy of religious organizations demands that we avoid the entanglement and the chill on religious expression that a case-by-case determination would produce”); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502-03 (1979) (“It is not only the conclusions that may be reached by [a court or government agency] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.”).

72. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (codified as amended at 42 U.S.C. § 2000e-1(a)).

73. 42 U.S.C. § 2000e-1(a).

74. *Id.*; see *Amos*, 483 U.S. at 329. *But see Amos*, 483 U.S. at 349 (O’Connor, J., concurring) (leaving open the question of whether it applies to for-profit organizations).

not define what constitutes “a religious corporation, association, educational institution, or society.”⁷⁵ Consequently, courts have tried to establish a test.

B. Competing Tests in the Federal Courts

Federal courts have applied at least four different tests for resolving whether an organization is “religious”: (1) the “secularization” test, (2) the “sufficiently religious” test, (3) the “primarily religious” test, and (4) the *Le-Boon* test.

1. The Secularization Test

In *Fike v. United Methodist Children’s Home of Virginia, Inc.*, the district court, on remand from the Fourth Circuit, considered whether a home for orphaned and troubled children qualified as a religious corporation.⁷⁶ The home was founded by and maintained a relationship with the Methodist Church.⁷⁷ The home held itself out to the public as religious and promoted religion through various activities.⁷⁸ Further, the home required its board of trustees to be members of the Methodist Church and to be confirmed by the Virginia Methodist Annual Conference.⁷⁹ The district court’s analysis, however, focused on whether the home continued to adhere to its original religious mission.⁸⁰

The district court found that while the home’s original mission was to provide a Christian home for orphans and other children, the home had secularized over time.⁸¹ According to the district court, religion was no longer as significant in the day-to-day lives of the children at the home as it once was.⁸²

75. See 42 U.S.C. § 2000e.

76. 547 F. Supp. 286, 288 (E.D. Va. 1982), *aff’d*, 709 F.2d 284 (4th Cir. 1983). The plaintiff in *Fike* filed a claim for religious discrimination after he was dismissed as director of the home because he was a Methodist layman and the home wanted to replace him with a Methodist minister. *Id.* at 287.

77. *Id.* at 288. During the time the plaintiff was employed at the home, its board of trustees drafted a “statement of church relatedness” officially declaring its relationship to the Methodist Church. *Id.* at 289.

78. *Id.* at 289.

79. *Id.*

80. *Id.* at 289-90. The court cited *McClure v. Salvation Army* for the proposition that the organization’s mission should be analyzed to see if the organization is religious or secular. *Id.* at 290; see also *McClure*, 323 F. Supp. 1100, 1102 (N.D. Ga. 1971), *aff’d*, 460 F.2d 533 (5th Cir. 1972) (“The original mission of The Salvation Army has remained unchanged. It is to seek the unsaved, [and] to secure the commitment of those who are determined to live a Christian life.”).

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

82. *Id.* The court found that Bibles are not automatically handed out to the children, though they are available upon request, and while there is a chaplain at the home,

Additionally, while the home originally accommodated children placed primarily by churches and private sources, more recently the home started accepting a significant number of “troubled youths” from the state.⁸³ The court opined that the home appeared to be downplaying its religiosity in order to receive public funding.⁸⁴

The *Fike* court reasoned that “[w]hile the purpose of caring for and providing guidance for troubled youths is no doubt an admirable and a charitable one, it is not necessarily a religious one.”⁸⁵ The district court found that the home was, “quite literally, Methodist only in name.”⁸⁶ Although the home had certain religious characteristics, the court determined that it was a secular organization.⁸⁷

2. The Sufficiently Religious Test

In contrast to the *Fike* court, the Eleventh Circuit in *Killinger v. Samford University* focused exclusively on an organization’s observable religious characteristics.⁸⁸ Like the children’s home in *Fike*, Samford University was founded by a religious group, the Alabama Baptist Convention.⁸⁹ It required its trustees to be practicing Baptists.⁹⁰ Moreover, the university’s charter stated that it was established for the religious purpose of “promot[ing] . . . Christian Religion throughout the world by maintaining and operating . . . institutions dedicated to the development of Christian character in high scholastic standing.”⁹¹ However, evidence showed the college took steps to distance itself from the Baptist Convention⁹² and recruited professors with the promise that it “intended in [the] future to foster diversity and liberality in

the chaplain does not engage the children in Bible study or prayer groups. *Id.* at 289. Further, attendance at religious services is voluntary. *Id.* at 290.

83. *Id.* at 288-89. The term “troubled youths” was used to refer to children who had been in legal trouble or were having “difficulty at home.” *Id.* at 288.

84. *Id.* at 290 & n.2.

85. *Id.* at 290.

86. *Id.* The court stated that “[f]or an organization to be considered ‘religious’ requires something more than a board of trustees who are members of a church.” *Id.* The Fourth Circuit Court of Appeals affirmed. *Fike v. United Methodist Children’s Home of Va., Inc.*, 709 F.2d 284, 287 (4th Cir. 1983). However, it found that the case did not involve religious discrimination, and thus it neither reached the question of whether the home was religious nor commented on the district court’s analysis. *Id.* at 286 (finding that because the plaintiff was Methodist and because they fired him to hire a Methodist minister, the plaintiff was not discharged because of his religion).

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

88. 113 F.3d 196, 199 (11th Cir. 1997).

89. *Id.*

90. *Id.*

91. *Id.* (last alteration in original).

92. *See id.* The university no longer empowered the Baptist Convention, as it once did, to appoint the university’s board of trustees. *Id.*

theological thought.”⁹³ The district court held that the university was religious, but it refused to decide whether the university’s actions conformed to the stated religious purposes in its charter citing First Amendment concerns.⁹⁴

On appeal, the Eleventh Circuit also avoided this question by focusing on the university’s religious characteristics.⁹⁵ The circuit court found that the university was a “religious educational institution” because (1) it was founded as a theological institution by the Baptist Convention and is a member of the Association of Baptist Colleges and Schools, (2) its trustees were required to be Baptists, (3) the university received approximately seven percent of its funding from the Baptist Convention, (4) its faculty who taught religion courses were required to subscribe to the Baptist Statement of Faith and Message, and (5) the school’s charter declared a religious purpose.⁹⁶ The Eleventh Circuit rejected the idea that the religious organization exemption requires “some kind of rigid sectarianism.”⁹⁷ While the school may not have been as religious as it once was, the circuit court held that the university was “doubtlessly a ‘religious educational institution.’”⁹⁸

The Fifth Circuit and a court in the Eighth Circuit applied a similar analysis in cases upholding the right of religious universities to employ individuals on the basis of religion.⁹⁹ These cases stand for the proposition that, at the very least, an organization that affiliates with a religious group, dec-

93. *Killinger v. Samford Univ.*, 917 F. Supp. 773, 775 (N.D. Ala. 1996), *aff’d*, 113 F.3d 196 (11th Cir. 1997).

94. *Id.* at 777. The district court refused to delve into the question of whether Samford University was a religious educational institution, stating that “[n]either this court nor any jury is qualified” to tell Samford that its activities are not in line with its stated purpose. *Id.* “In deference to the First Amendment, a court must indulge the presumption implicitly recognized by Congress in favor of what an institution says about itself when it claims status as a religious institution.” *Id.*

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

96. *Id.*

97. *Id.*

98. *Id.*

99. *EEOC v. Miss. Coll.*, 626 F.2d 477, 478-79 (5th Cir. 1980) (finding that all the circumstances showed that the college is a religious university: (1) it was affiliated with the Mississippi Baptist Convention, (2) ninety-five percent of the faculty were Baptist, (3) eighty-eight percent of the students were Baptist, (4) the curriculum included study of the Bible, (5) chapel was mandatory, and (6) the school expressly sought to provide “educational enrichment in a Christian atmosphere”); *Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185, 1187 (W.D. Mo. 1998), *aff’d*, 208 F.3d 219 (8th Cir. 2000) (per curiam). The district court in *Wirth* found the college to be a religious educational institution because (1) it was a nonprofit, (2) it was founded by the Presbyterian Church Synod, (3) it stated a religious mission, and (4) it was a member of multiple Christian college associations. *Id.* The Eighth Circuit Court of Appeals issued a short decision stating that “the district court properly rejected [the plaintiff’s] claims and . . . [w]e have nothing to add to the district court’s thorough opinions.” *Wirth v. Coll. of the Ozarks*, No. 99-2115, 2000 WL 261132, at *1 (8th Cir. Mar. 3, 2000) (per curiam).

lares a religious mission, and has some religious qualities will qualify for the exemption.¹⁰⁰ Courts applying the “sufficiently religious” test have focused on the organization’s observable religious characteristics and have not expressly balanced these against secular characteristics.¹⁰¹

3. The Primarily Religious Test

The Ninth Circuit adopted arguably the narrowest interpretation of section 702. The Ninth Circuit first addressed this issue in *EEOC v. Townley Engineering & Manufacturing Co.*¹⁰² In *Townley*, a for-profit manufacturing company invoked the section 702 exemption after the EEOC filed suit alleging religious discrimination against a former employee.¹⁰³ Since its inception, the company adhered to its founders’ covenant with God to operate as a Christian organization by requiring its employees to attend weekly devotional services during work hours.¹⁰⁴ Additionally, the company enclosed gospel tracts in its outgoing mail, printed Bible verses on numerous company documents, and provided financial support to churches, ministries, and missionaries.¹⁰⁵ The district court held that the company was not exempt from Title VII’s prohibition against religion-based discrimination because its articles of incorporation did not state a religious mission, and it was not a tax-exempt religious organization.¹⁰⁶

On appeal, the Ninth Circuit Court of Appeals agreed that the manufacturing company did not qualify as a religious corporation.¹⁰⁷ Reviewing the scarce legislative history of section 702, the court found that the exemption was not intended to be broadly construed and that “[a]ll assumed that only those institutions with extremely close ties to organized religions would be covered.”¹⁰⁸ The court stated, “Churches, and entities similar to churches, were the paradigm.”¹⁰⁹ With this in mind, the circuit court analyzed whether the “general picture” of the manufacturing company was “*primarily religious* or secular.”¹¹⁰ Noting that each case must turn on its own facts, the circuit court weighed the relevant secular and religious characteristics and held that the company was primarily secular because (1) it was for-profit, (2) produced

100. See cases cited *supra* note 99.

101. See *supra* note 99.

102. 859 F.2d 610 (9th Cir. 1988).

103. *Id.* at 617.

104. *Id.* at 612.

105. *Id.*

106. *EEOC v. Townley Eng’g & Mfg. Co.*, 675 F. Supp. 566, 568 (D. Ariz. 1987), *aff’d in part, rev’d in part*, 859 F.2d 610 (9th Cir. 1988).

107. *Townley*, 859 F.2d at 619.

108. *Id.* at 617-18.

109. *Id.* at 618.

110. *Id.* at 618 n.14 (emphasis added).

a secular product, (3) had no ties to organized religion, and (4) did not state a religious mission in its articles of incorporation.¹¹¹

The Ninth Circuit applied this “primarily religious” test for a second time in *EEOC v. Kamehameha Schools/Bishop Estate*.¹¹² In *Kamehameha*, a job applicant brought a discrimination suit against two schools after she was denied a teaching job because of her religion.¹¹³ The schools defended on the ground that as Protestant schools, they qualified as religious educational institutions exempt from Title VII under section 702.¹¹⁴ While the schools were not affiliated with a church or association of religious schools, they were established and maintained with funds from a charitable trust, and the donor’s will mandated that the teachers of the schools be Protestant.¹¹⁵ Further, the schools held themselves out as Protestant, required students to take religion classes, and offered Bible studies and worship services.¹¹⁶

Relying on *Townley*, the circuit court narrowly construed section 702 and found that while the schools’ original purpose was to provide religious instruction, in recent years greater emphasis was placed on teaching students general ethical principles and allowing them “to make their own moral judgments.”¹¹⁷ Furthermore, the two schools did not require prospective students to be Protestant or attempt to convert non-Protestant students.¹¹⁸ The circuit court weighed the schools’ secular and religious characteristics, including (1) ownership and affiliations, (2) purpose, (3) the religious composition of the faculty, (4) the religious composition of the student body, (5) student activities, and (6) curriculum.¹¹⁹ It concluded that the schools were primarily secular.¹²⁰ Thus, the circuit court held that the schools did not qualify for the section 702 exemption.¹²¹

Townley and *Kamehameha* stand for the proposition that all relevant religious and secular characteristics of an organization should be weighed in an effort to determine whether the organization is primarily religious or primarily secular and that section 702 should be construed narrowly, applying only to churches and entities like churches.¹²² The Ninth Circuit is the only circuit to expressly adopt this narrowness principle.

111. *Id.* at 619.

112. 990 F.2d 458 (9th Cir. 1993).

113. *Id.* at 459.

114. *Id.*

115. *Id.* at 459, 461.

116. *Id.* at 462-63.

117. *Id.* at 462.

118. *Id.* at 462-63.

119. *Id.* at 461-63.

120. *Id.* at 461.

121. *Id.* at 463-64.

122. *See id.* at 460.

4. The *LeBoon* Test

In *LeBoon*, the Third Circuit developed its own test by combining factors utilized by other circuits that formerly considered the religious organization exemption.¹²³ The circuit court in *LeBoon* agreed with the *Townley* court that the proper inquiry required weighing the organization's "significant religious and secular characteristics."¹²⁴ The Third Circuit considered nine factors:

(1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up of coreligionists.¹²⁵

The Third Circuit further added the caveat that "not all factors will be relevant in all cases, and the weight given each factor may vary from case to case."¹²⁶ Applying this test, the Third Circuit concluded that a nonprofit Jewish community center was a religious organization within the meaning of the section 702 exemption.¹²⁷ However, *LeBoon* expressly rejected the Ninth Circuit's narrowness principle and any interpretation that would limit the exemption to "churches, and entities similar to churches."¹²⁸ *LeBoon* also stated that the exemption should not be denied to institutions just because they engage in some secular activities, do not adhere to the "strictest tenets of their faiths," or do not hire only coreligionists.¹²⁹

123. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007). The Third Circuit combined factors utilized in *Killinger v. Samford University*, 113 F.3d 196, 199 (11th Cir. 1997), *Kamehameha*, 990 F.2d at 461, *EEOC v. Townley Engineering & Manufacturing Co.*, 859 F.2d 610, 618-19 (9th Cir. 1988), and *EEOC v. Mississippi College*, 626 F.2d 477, 478-79 (5th Cir. 1980). *Id.*

124. *LeBoon*, 503 F.3d at 226 (quoting *Townley*, 859 F.2d at 618).

125. *Id.*

126. *Id.* at 227.

127. *Id.* at 229.

128. *Id.* at 231 ("We do not . . . believe . . . that Congress assumed only '[c]hurches, and entities similar to churches' would be protected by the [702 exemption].") (quoting *Townley*, 859 F.2d at 618) (first alteration in original)).

129. *Id.* at 229-30.

The Sixth Circuit has also applied a standard similar to the *LeBoon* test, though it considered different factors than did the Third Circuit.¹³⁰ While the *LeBoon* court and the Sixth Circuit departed from the Ninth Circuit's narrowness principle, they adopted its general analysis.¹³¹ Both agreed with the Ninth Circuit that the proper inquiry involved weighing the organization's religious and secular attributes.¹³²

With the aforementioned cases in mind, the Ninth Circuit, in *Spencer v. World Vision, Inc.*, considered whether World Vision qualified as a religious corporation under section 702.¹³³ The court reevaluated its primarily religious test since the district court applied the *LeBoon* test and determined that World Vision qualified for the exemption.¹³⁴

IV. INSTANT DECISION

In *Spencer*, a majority of the judges were unable to agree on a single test for determining if an organization qualifies for the religious organization exemption.¹³⁵ The case was heard by Judges O'Scannlain, Kleinfeld, and Berzon.¹³⁶ Judges O'Scannlain and Kleinfeld agreed that World Vision constituted a religious corporation, but they differed on the appropriate test for reaching that decision.¹³⁷ In contrast, Judge Berzon construed section 702 narrowly in finding that World Vision was not a religious organization.¹³⁸

While Judges O'Scannlain and Kleinfeld disagreed over the proper test, they amended the opinion after denying Employees' petition for rehearing en banc and issued a per curiam majority opinion clarifying that Judge Klein-

130. See *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000). Rejecting the Ninth Circuit's narrowness principle, the Sixth Circuit considered the college's (1) founders, (2) affiliation, (3) mission statement, (4) curriculum, (5) the religious makeup of the faculty, staff, and students, and (6) ownership and found that the college was a religious educational institution. *Id.* at 625. "The fact that the college trains its students to be nurses and other health care professionals does not transform the institution into one that is secular." *Id.*

131. See *id.*

132. *Id.*

133. No. 08-35532, 2011 WL 208356, at *1 (9th Cir. Jan. 25, 2011) (per curiam).

134. *Id.* at *2 (O'Scannlain, J., concurring).

135. See *Spencer v. World Vision, Inc.*, 619 F.3d 1109 (9th Cir. 2010), *amended and superseded by* No. 08-35532, 2011 WL 208356 (9th Cir. Jan. 25, 2011) (per curiam).

136. *Id.* at 1110.

137. *Id.* at 1119. Judge Kleinfeld agreed with Judge O'Scannlain in all respects except for the test. *Id.* at 1126 (Kleinfeld, J., concurring). Judge O'Scannlain would require organizations to be organized as nonprofits. *Id.* at 1119 (plurality opinion). Conversely, Judge Kleinfeld would consider whether the organization charges a nominal fee for its services. *Id.* at 1132 (Kleinfeld, J., concurring).

138. *Id.* at 1150-51 (Berzon, J., dissenting).

feld's test is controlling in the Ninth Circuit.¹³⁹ Adopting the Kleinfeld test, the majority proclaimed that an organization can qualify for the section 702 exemption if:

it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.¹⁴⁰

Under this test, the majority concluded that World Vision qualified for the section 702 exemption.¹⁴¹

A. Judge O'Scannlain's Concurrence

Judge O'Scannlain began his analysis by reviewing the Ninth Circuit's precedent in regard to the section 702 exemption as well as the *LeBoon* test.¹⁴² Employees argued that the district court violated Ninth Circuit precedent when it applied the *LeBoon* test as opposed to the test laid out in *Kamehameha*.¹⁴³ They reasoned that *LeBoon* explicitly rejected the Ninth Circuit's narrow reading of section 702 limiting the exemption to "[c]hurches, and entities similar to churches."¹⁴⁴ Judge O'Scannlain rejected Employees' interpretation of the Ninth Circuit's precedent, concluding that the courts in *Townley* and *Kamehameha* did not limit their analysis to whether an organization seeking exemption under section 702 was a "church," but rather the court "weighed all relevant religious and secular characteristics to determine whether the company at issue was 'primarily religious or secular' in nature."¹⁴⁵

Judge O'Scannlain also dismissed the language in *Townley* stating that Congress intended that the exemption apply only to "[c]hurches, and entities similar to churches" as dicta, and more of a "suggestion" rather than a strict rule."¹⁴⁶ According to Judge O'Scannlain, Congress could have expressly

139. *Spencer*, 2011 WL 208356, at *1; see also *id.* at *21 (Kleinfeld, J., concurring) (explaining Judge Kleinfeld's test)

140. *Id.* at *1 (majority opinion).

141. *Id.*

142. *Id.* at *2-4 (O'Scannlain, J., concurring).

143. *Id.* at *4.

144. *Id.* (alteration in original) (quoting *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)).

145. *Id.* (quoting *Townley*, 859 F.2d at 618-19).

146. *Id.* (quoting *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 230 (3d Cir. 2007)); see also *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458, 460 n.5 (9th Cir. 1993) ("[T]he test the court adopted in *Townley* does not depend on an analysis of legislative history.").

limited the exemption to churches and similar houses of worship.¹⁴⁷ However, Congress clearly chose not to, and therefore “some religious corporations, associations, and societies that are not churches must fall within the exemption.”¹⁴⁸ Additionally, Judge O’Scannlain voiced concerns over the constitutionality of Employees’ interpretation of section 702.¹⁴⁹ He pointed out that the “Free Exercise Clause ‘clearly’ protects ‘organizations less pervasively religious than churches.’”¹⁵⁰ Further, the Establishment Clause commands “neutrality among religious groups.”¹⁵¹ By limiting the exemption to churches, it would exclude religious groups simply because they are not traditional houses of worship.¹⁵² He argued that such an interpretation would not be neutral.¹⁵³ In short, Judge O’Scannlain reached the conclusion that the district court did not violate Ninth Circuit precedent when it considered the *LeBoon* factors because the primarily religious test commands the court to consider all significant religious and secular characteristics, not just those articulated in *Townley* and *Kamehameha*.¹⁵⁴

Despite finding that the district court did not violate Ninth Circuit precedent, Judge O’Scannlain took issue with its application of the *LeBoon* test.¹⁵⁵ He reasoned that the “membership” prong of the *LeBoon* test considering whether the organization is comprised of coreligionists could provide incentive to organizations looking to discriminate on the basis of religion.¹⁵⁶ Essentially, he argued that if having a membership consisting of only coreligionists would increase the chance that the organization would be classified as religious, then such an organization would have incentive to discriminate.¹⁵⁷

Judge O’Scannlain also expressed concern over the constitutionality of other *LeBoon* factors.¹⁵⁸ Specifically Judge O’Scannlain worried that any inquiry by a court into whether the products or services provided by an organization are religious or secular or whether an organization’s purpose is religious or secular would result in excessive government entanglement in reli-

147. *Spencer*, 2011 WL 208356, at *4 (O’Scannlain, J., concurring).

148. *Id.*

149. *Id.*

150. *Id.* (quoting *Townley*, 859 F.2d at 620 n.15).

151. *Id.*

152. *Id.* (citing Thomas M. Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL’Y 63, 69-75 (2006) (discussing “parachurch” organizations as one type of religious organization that would not qualify for the exemption if section 702 only applied to houses of worship)).

153. *Id.*

154. *Id.* at *4-5.

155. *Id.* at *5.

156. *Id.*

157. *Id.*

158. *Id.* at *6.

religious affairs.¹⁵⁹ Further, he argued the “ownership and affiliation” factor of the *LeBoon* test could be constitutionally problematic as it could favor denominational affiliations over smaller nondenominational organizations that are nonetheless religious.¹⁶⁰ While the Ninth Circuit had considered whether certain characteristics of the organizations at issue in *Townley* and *Kamehameha* were religious or secular, Judge O’Scannlain noted that the characterizations were not those of the court, but those supplied by the parties.¹⁶¹ It was appropriate for the court to accept the parties’ stipulations, as acceptance entailed no judicial entanglement in religion.¹⁶² Judge Kleinfeld agreed with Judge O’Scannlain’s analysis until this point.¹⁶³ However, they parted ways over the test.¹⁶⁴ Judge O’Scannlain offered the following test:

a nonprofit entity qualifies for the section [702] exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious.¹⁶⁵

According to Judge O’Scannlain, this test “minimizes any untoward differentiation among religious organizations and any unseemly judicial inquiry into whether an activity is religious or secular in nature” because it focuses on “neutral factors.”¹⁶⁶ He also stated that looking at the organization’s foundational documents to establish whether the organization is “organized for a self-identified religious purpose” is essential because determining whether an organization is religious and entitled to the exemption “cannot be based on its conformity to some preconceived notion of what a religious organization should do, but must be measured with reference to the particular religion identified by the organization.”¹⁶⁷ To not do so, he argued, could infringe upon the organization’s religious liberty.¹⁶⁸

159. *Id.* at *6-7. Judge O’Scannlain noted, “In *Amos*, the Court found exactly this sort of inquiry problematic in the context of determining whether a particular employee’s duties were religious or secular.” *Id.* at *6.

160. *Id.* at *7.

161. *Id.* at *8.

162. *Id.* Judge O’Scannlain asserted that “[i]n *Townley*, the secular nature of the company’s product was ‘admitted[.]’ and that in *Kamehameha* “the religious or secular nature of any particular activity or purpose was [not] in dispute.” *Id.* (second alteration in original).

163. *Id.* at *9.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at *11 (quoting *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226-27 (3d Cir. 2007)).

168. *Id.* at *9.

Judge O'Scannlain also stated that requiring the organization to be a nonprofit lends support to its claim that it is not secular.¹⁶⁹ It provides strong evidence that the organization is motivated by something other than money.¹⁷⁰ Further, Judge O'Scannlain argued that requiring the organization to hold itself out to the public as religious will deter organizations that are not truly religious from invoking section 702's exemption because the classification as religious will dissuade some people from utilizing its services or buying its products.¹⁷¹ He stated that "[s]uch market responses will act as a check on institutions that falsely identify themselves as religious" and ensure that the exemption continues to be narrowly applied.¹⁷²

Applying his test to World Vision, Judge O'Scannlain concluded that World Vision is a religious corporation exempt from Title VII's prohibition on religious discrimination.¹⁷³ First, Judge O'Scannlain recognized that World Vision is a nonprofit organization.¹⁷⁴ Second, according to the judge, World Vision's self-identified religious purpose is evidenced by its founding documents, such as its articles of incorporation and mission statement.¹⁷⁵ Third, Judge O'Scannlain found World Vision's original religious purpose was "to serv[e] God by serving man" through providing services and aid to those in need, and it is still engaged in humanitarian activities that are "consistent with, and in furtherance of, those [religious] purposes."¹⁷⁶ The judge determined the fact that World Vision does not proselytize or condition its services on a recipient's religion does not change the result because World Vision believes in showing, rather than telling, others about its faith through good deeds.¹⁷⁷ He further found its religious beliefs dictate that it provides aid and services without regard to the religion of the recipients.¹⁷⁸ Finally, Judge O'Scannlain determined World Vision holds itself out to the public as religious through its website, assorted mailings, and other communications to the public.¹⁷⁹

169. *Id.* at *9-10.

170. *Id.* at *10 (citing *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring) ("The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation.")).

171. *Id.* (citing *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002)).

172. *Id.* (quoting *Univ. of Great Falls*, 278 F.3d at 1344).

173. *Id.* at *15.

174. *Id.* at *10.

175. *Id.* at *11.

176. *Id.* at *12.

177. *Id.*

178. *Id.*

179. *Id.* at *13-14.

B. Judge Kleinfeld's Concurrence

Judge Kleinfeld agreed with Judge O'Scannlain in most respects.¹⁸⁰ Both agreed that the *LeBoon* “multifactor test does not work well because it is inherently too indeterminate and subjective.”¹⁸¹ However, he disagreed with Judge O'Scannlain over the proper test.¹⁸² Judge Kleinfeld viewed the O'Scannlain test as too broad primarily because of its focus on the organization's nonprofit status.¹⁸³ He worried that it would permit organizations to use their nonprofit status and church affiliations to “advance discriminatory objectives outside the context of religious exercise.”¹⁸⁴ Further, Judge Kleinfeld worried that the nonprofit requirement could have the effect of excluding small, unincorporated congregations.¹⁸⁵

Judge Kleinfeld rejected Judge O'Scannlain's argument that an organization's status as a nonprofit provides support that it is not a purely secular organization.¹⁸⁶ According to Judge Kleinfeld, any entity can incorporate as a nonprofit if it chooses to organize for a self-identified religious purpose and subsequently memorializes this purpose in its articles of incorporation.¹⁸⁷ Judge Kleinfeld did not believe that the purpose of the exemption – to address free exercise concerns – is furthered by allowing organizations of this type to discriminate, for whatever reason, against individuals on the basis of religion.¹⁸⁸

Judge Kleinfeld discussed nonprofit hospitals as an example of why the O'Scannlain test is too inclusive.¹⁸⁹ In Judge Kleinfeld's opinion, “the nonprofit hospital differs from a for-profit hospital only in that the board does not have to concern itself with pesky stockholders and does not have to pay income taxes on the excess of revenues over expenses and depreciation.”¹⁹⁰ He further observed that the purpose of the exemption is not furthered by applying the exemption to religious hospitals because medical personnel “can per-

180. *Id.* at *16 (Kleinfeld, J., concurring).

181. *Id.*

182. *Id.*

183. *Id.* at *19.

184. *Id.* at *16. Judges Kleinfeld and Berzon agreed that “under Judge O'Scannlain's test, the mining equipment company in *Townley* could discriminate by religion simply by incorporating itself as a nonprofit and getting 501(c)(3) status.” *Id.* at *19.

185. *Id.* at *19.

186. *Id.*

187. *Id.* “Nonprofit status would require that it pay out the surplus of revenue over other expenses as salaries instead of as dividends, but most closely held corporations do that anyway. Nonprofit status affects corporate governance, not eleemosynary activities. . . . ‘For profit’ and ‘nonprofit’ have nothing to do with making money.” *Id.*

188. *Id.* at *21.

189. *Id.* at *20.

190. *Id.*

form their tasks equally well regardless of their religious beliefs.”¹⁹¹ Instead of requiring organizations to be nonprofits, Judge Kleinfeld would ask

whether [the organization seeking exemption] [1] is organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] *does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts*.¹⁹²

Judge Kleinfeld changed the nonprofit requirement in Judge O’Scannlain’s test to a nominal-charge factor because “[l]ooking at how an institution charges offers an objective test for sorting out which institutions are designed to exchange goods or services for money[] from those designed to give them away except perhaps for nominal charges in order to serve a religious objective.”¹⁹³ Applying this test, Judge Kleinfeld concluded that because World Vision does not charge recipients for its aid and services, performs humanitarian work in furtherance of its religious purpose, and holds itself out as religious, it qualifies as a “religious corporation” under section 702.¹⁹⁴

C. Judge Berzon’s Dissent

In her dissent, Judge Berzon attacked both the O’Scannlain and Kleinfeld tests for potentially permitting religiously influenced organizations to exercise a religious preference with respect to secular jobs.¹⁹⁵ Judge Berzon argued that the majority incorrectly departed from rules established in *Townley* and *Kamehameha* requiring the courts to weigh the organization’s relevant religious and secular characteristics to determine if it is primarily religious¹⁹⁶ and to construe section 702 narrowly to apply only to organizations with “‘extremely close ties to organized religion.’”¹⁹⁷

191. *Id.*

192. *Id.* at *21 (emphasis added).

193. *Id.* Judge Kleinfeld excludes “educational institutions” from this requirement, reasoning that schools “may charge market rates as tuition” because “they have their own phrase in the exemption . . . so they do not have to fall within the harder to define phrases in the exemption for ‘religious corporation, association, . . . or society.’” *Id.*

194. *Id.* at *20-21.

195. *Id.* at *22 (Berzon, J., dissenting). This is exactly what Congress mandated in 1972 when it passed the amendment to section 702. See *supra* Part III.A.

196. *Spencer*, 2011 WL 208356, at *24 (Berzon, J., dissenting) (citing *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988)). Judge Berzon pointed out that contrary to Judge O’Scannlain’s assertion, in *Kamehameha* “the characterization of particular attributes as religious or secular was, in fact, hotly contested

According to Judge Berzon, it is essential that the religious and secular aspects of the organization's purpose and activities are analyzed to determine whether it is primarily religious.¹⁹⁸ She stated that "[p]reserving the proper balance and distance between church and state necessarily involves courts in examining activities that are avowedly connected to religion, particularly where the organization invokes religion to seek an exemption from otherwise applicable law."¹⁹⁹ However, Judge Berzon believed that the O'Scannlain and Kleinfeld tests would require the court to accept the organization's own characterization of whether it is primarily religious or secular.²⁰⁰

Judge Berzon would apply section 702 only to "church[es] or other group[s] organized for worship, religious study, or the dissemination of religious doctrine."²⁰¹ She believed this was the legislature's intent.²⁰² Judge Berzon opined that because World Vision is not affiliated with a particular church and its humanitarian activities are on their face secular, World Vision is not a religious corporation.²⁰³

V. COMMENT

In *Spencer*, the Ninth Circuit departed from its prior precedent and that of other federal circuits that previously addressed this issue.²⁰⁴ The decision creates greater uncertainty for organizations that seek to invoke the exemption but are located in circuits that have yet to consider section 702. A decision by these circuits to adopt any of the tests laid out in *Spencer* would have significant ramifications for religiously ambiguous entities. While *Spencer* correctly points out flaws in the competing tests and offers new considerations that are helpful in applying section 702 to future cases, the tests offered by the *Spencer* court pose a number of problems. The *LeBoon* test is the better approach, though some modification is necessary.

by the parties." *Id.* "The Schools had *not* conceded that their purpose had shifted from religious to secular, nor that the religious components of the curriculum were 'minimal.' Rather, those conclusions were derived from our careful analysis of observable religious and secular attributes." *Id.* at *25.

197. *Id.* at *24 (quoting *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993)).

198. *Id.*

199. *Id.* at *33. "The consequence would be a broadened impact on the religious freedom of employees and prospective employees, who would feel compelled to reshape their religious beliefs so as to assure their economic survival." *Id.* at *38.

200. *Id.* at *30.

201. *Id.* at *26.

202. *Id.* Judge Berzon stated that the terms "religious corporation," "religious association," and "religious societies" all have "a long common law and statutory history" meaning "a church or similar entity organized for the purpose of worship." *Id.* at *28.

203. *Id.* at *36-38.

204. *See supra* Parts III.B, IV.A-B.

Judge O'Scannlain's test is in one respect too narrow and in another too broad. On one hand, the O'Scannlain test's requirement that entities seeking exemption under section 702 be organized as nonprofit corporations²⁰⁵ would exclude for-profit entities organized solely for religious purposes and motivated by sincerely held religious beliefs simply because of their financial structure. Section 702 exists to ensure that religious organizations can pursue their religious mission without government obstruction.²⁰⁶ Under Judge O'Scannlain's test, a for-profit Christian radio station could be forced to hire an atheist disc jockey. Requiring the radio station to relay its religious message through someone who does not believe in it, or perhaps is even hostile toward it, will impede the radio station's religious mission. Although there is merit in Judge O'Scannlain's contention that an organization's nonprofit status "makes colorable a claim that it is not purely secular,"²⁰⁷ applying a test that categorically excludes all for-profits will run counter to the purpose of section 702. Nonprofit status may be helpful in ultimately concluding whether an organization qualifies for the religious organization exemption, but qualifying for the exemption should not be conditioned on meeting this requirement.

On the other hand, Judge O'Scannlain's test would presumably exempt a nonprofit company that provides products and services with no conceivable connection to religion provided that its foundational documents indicate it was organized for a self-identified religious purpose, it regularly holds worship services or sponsors religious events, and its communications to potential customers indicate its religious values.²⁰⁸ As Judges Kleinfeld and Berzon correctly pointed out, "under Judge O'Scannlain's test, the [manufacturing] company in *Townley* could discriminate by religion simply by incorporating itself as a nonprofit . . ."²⁰⁹

Judge O'Scannlain countered this argument by reasoning that requiring the organization to hold itself out as religious will deter companies from engaging in this type of practice,²¹⁰ however, the manufacturing company in *Townley* did hold itself out as religious.²¹¹ While a company should not be deemed secular merely because the products and services it provides are the same as those provided by secular companies, there should be some conceivable connection between the products and services and the company's stated religious purpose. It is reasonable to conclude that individuals who share the

205. *Spencer*, 2011 WL 208356, at *9 (O'Scannlain, J., concurring).

206. See ESBECK ET AL., *supra* note 71, at 27.

207. *Spencer*, 2011 WL 208356, at *10 (O'Scannlain, J., concurring) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 345 (1987) (Brennan, J., concurring)).

208. See *id.* at *9.

209. *Id.* at *19 (Kleinfeld, J., concurring); *accord id.* at *34 (Berzon, J., dissenting).

210. *Id.* at *10 (O'Scannlain, J., concurring).

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

sincerely held religious belief that it is their duty to care for those in need could be motivated by their faith to form a company dedicated to building schools or digging clean water wells for poor people, even though these are not inherently religious products or services. However, it is hard to imagine a religious purpose served by manufacturing mining equipment or in what way one's faith could motivate him to produce mining equipment. Given that the nonprofit factor of the O'Scannlain test has the potential for exempting clearly secular organizations and excluding clearly religious organizations, qualifying for the religious organization exemption should not be conditioned on meeting this requirement.

Judge Kleinfeld's test presents one of the same problems as Judge O'Scannlain's test – the test is too narrow. Judge Kleinfeld agreed with Judge O'Scannlain in that the organization must declare a religious purpose in its foundational document, perform activities in furtherance of that religious objective, and hold itself out to the public as religious.²¹² However, Judge Kleinfeld attempted to “fix” Judge O'Scannlain's test by replacing the nonprofit requirement with the “nominal fee” requirement.²¹³

While this change seems to eliminate the possibility that a primarily secular company could qualify for the exemption by simply integrating a few religious references into its founding documents and some superfluous religious components in its activities, it fails to recognize that an entity can be organized for religious purposes and still demand fair market value for its services or products. Under the Kleinfeld test, religious hospitals, daycares, summer camps, and publishing companies would not qualify for the exemption if they charge beneficiaries more than a nominal fee.²¹⁴ The Kleinfeld test's nominal-charge factor would interfere with these organizations' religious liberty.

Judge Kleinfeld's conclusion that nonprofit religious hospitals should not qualify for the exemption in part because religious beliefs have no bearing on medical personnel's ability to perform their duties is contrary to the language of section 702.²¹⁵ Section 702 permits religious organizations to consider religion when making employment decisions with respect to the carrying on of their “activities.”²¹⁶ If the organization is in fact religious, it is irrelevant whether the job duties involved in a particular activity are inherently religious or whether they could be carried out equally well by a nonreligious employee. A Jewish custodian is capable of performing custodial duties just as well as a Mormon custodian, but if the employer is a Mormon organization then section 702 permits the employer to require that its custodian also be a

212. See *Spencer*, 2011 WL 208356, at *21 (Kleinfeld, J., concurring).

213. *Id.*

214. Judge Kleinfeld expressly excluded religious schools from the requirement that they charge no more than nominal fees. *Id.*

215. See *id.* at *20; see also 42 U.S.C. § 2000e-1 (2006).

216. 42 U.S.C. § 2000e-1(a).

Morman.²¹⁷ Judge Kleinfeld also neglected to consider that although providing medical care is often performed in a secular context, when the medical personnel are motivated by sincerely held religious beliefs to provide medical care, it is a religious activity.

Furthermore, Judge Kleinfeld's assertion that nonprofit religious hospitals should not be exempt under section 702 because they operate in substantially the same manner as for-profit secular hospitals, even if true, does not demonstrate why religious hospitals should not qualify for the exemption.²¹⁸ If a nonprofit hospital is a religious hospital, then it is entitled to employ members of its religion to carry out its religious mission.²¹⁹ A hospital can be religious if caring for sick and injured people is a sincerely held belief within the religion and the hospital exists as a means of putting that religious belief into action. This is true regardless of how the hospital is incorporated, how it operates, or what it charges for its services. Asking whether an organization charges more than a nominal fee for its services does not reveal its true purpose and motivation. Therefore, courts should avoid the nominal-charge factor.

In her dissent, Judge Berzon took a narrow view of section 702 in finding that it only applies to "church[es] or other group[s] organized for worship, religious study, or the dissemination of religious doctrine" and that because World Vision's humanitarian aid is the same as that provided by secular humanitarian organizations it is not religious.²²⁰ Judge Berzon is correct in concluding that the products and services provided by an entity must be considered.²²¹ However, they should be considered in their proper context. While humanitarian aid can be secular, it is religious when performed by individuals motivated by religious faith. As Judge Kleinfeld astutely noted, "the idea that performance of activities that are often performed in a secular context cannot be religious. . . . is mistaken. When the Pope washes feet on the Thursday before Easter, that is not secular hygiene, and the Pope is not a pedicurist."²²² Judge Berzon's contention that World Vision is not a religious organization because the humanitarian aid it provides – food, clean water, education – is the same that would be provided by a secular organization completely dismisses the fact that caring for the poor and needy is deeply ingrained in most religions.

217. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 329-30, 339 (1987) (finding that section 702 permitted nonprofit gymnasium affiliated with the Church of Jesus Christ of Latter-day Saints to discharge building engineer for failing to obtain a certificate indicating that he was a member of the Church).

218. *Spencer*, 2011 WL 208356, at *20 (Kleinfeld, J., concurring); *see also supra* Part IV.B.

219. *See supra* Part III.A.

220. *Spencer*, 2011 WL 208356, at *26, *37 (Berzon, J., dissenting).

221. *Id.* at *24.

222. *Id.* at *19 (Kleinfeld, J., concurring).

To expand on this point, consider the secularization test applied by the *Fike* court.²²³ The proper inquiry was not whether the children's home actively tried to convert or expose the children to its religion or whether caring for troubled youths is necessarily a religious undertaking.²²⁴ The *Fike* court should have more closely examined whether religious faith motivated the children's home to provide guidance and care to "troubled youths." Caring for children in need without regard to their religion or background can be a religious venture if the caretakers are motivated by faith. The religious or secular nature of these services is dependent upon why the organization is providing the care and guidance. That is the question courts must consider.

The difficulty lies in determining the organization's actual motive. This has prompted judges to seek out objective criteria, like whether the organization operates as nonprofit, charges a nominal fee, or is a church or something similar.²²⁵ However, requiring the organization to meet these objective criteria has the effect of disqualifying entities organized for purely religious purposes and motivated by faith. This is an unacceptable consequence. In contrast, a multifactor test that considers, but does not require, objective criteria would be acceptable. This type of analysis would have the benefit of allowing for factors such as nonprofit status, which provides evidence of an organization's religious nature, to figure into the court's inquiry without making the organization's fate dependent upon it.

The *LeBoon* test comes closest to providing a workable standard.²²⁶ It incorporates factors that encompass the religious characteristics considered by the circuits that have utilized the "sufficiently religious" and "primarily religious" tests, as well as factors present in the O'Scannlain and Kleinfeld tests.²²⁷ However, not all of the *LeBoon* factors are desirable.

Judge O'Scannlain correctly pointed out a problem with utilizing the *LeBoon* "membership" factor.²²⁸ A factor analyzing whether the organization's membership is comprised of those of like-minded faith incentivizes organizations seeking classification as religious to discriminate on the basis of religion from the outset. Organizations that might otherwise be willing to hire secular employees for certain positions would feel compelled to hire religious employees to increase their chances of qualifying for the exemption. Further, the membership factor does not serve the objective of determining whether the organization is truly a religious organization, as it is only evidence that the organization considers itself a religious organization. In apply-

223. See *supra* Part III.B.1.

224. *Fike v. United Methodist Children's Home of Va., Inc.*, 547 F. Supp. 286, 290 (E.D. Va. 1982), *aff'd*, 709 F.2d 284 (4th Cir. 1983); see also *supra* note 86.

225. See *supra* Part IV.A (nonprofit); *supra* Part IV.B (nominal fee); *supra* Part IV.C (church).

226. See *supra* Part III.B.4.

227. See *supra* Parts III.B.2, IV.A-B.

228. *Spencer*, 2011 WL 208356, at *5 (O'Scannlain, J., concurring).

ing the multifactor approach to future cases, courts should dismiss the membership factor.

The *LeBoon* test's factor analyzing whether the organization produces a secular product or provides a secular service could be valuable provided that courts recognize that some activities may be religiously motivated in some contexts and secularly motivated in others. Considering the secular product/service factor in this manner would address Judge O'Scannlain's excessive entanglement concerns with respect to too closely analyzing an organization's products or services to determine whether they are religious or secular, as they would not have to be strictly defined. If the organization's activities are clearly secular notwithstanding what the organization claims as its faith-motivated religious mission, then it is not a religious organization. But if its activities could feasibly be considered religiously motivated, as humanitarian activities certainly could, then the organization should not be categorically disqualified. Further, an organization should not be denied the exemption because it engages in some secular activities, provided that its overall mission remains religious.

The remaining factors in the *LeBoon* test²²⁹ are capable of helping courts determine whether an organization is religious. In applying the test, courts should analyze all relevant religious and secular characteristics; however, qualifying for the exemption should not be dependent on meeting any one particular factor or combination of factors or whether the organization is similar to a church. All of the characteristics must be considered in light of the facts to determine whether the organization is truly motivated by religious beliefs. The test is not as easily applied as one that automatically disqualifies organizations that do not meet certain objective criteria, but such a test is necessary to ensure that the government does not obstruct religious organizations in their quest to carry out their religious missions.

229. The factors courts should consider include:

- (1) whether the entity operates for a profit, (2) whether it produces a secular product [or provides a secular service], (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, [and] (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution.

LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007). Additional factors may be relevant and some of the aforementioned factors may be irrelevant depending on the circumstances.

VI. CONCLUSION

The Ninth Circuit's decision in *Spencer* and subsequent split from other circuits that have addressed the issue, including its own precedent, is a step backward. By adopting a test that puts economic structure at the forefront of the analysis,²³⁰ many religious organizations will not qualify for the section 702 exemption. Thus, the *Spencer* court failed to devise a workable standard in many situations. Courts should instead consider a multifactor approach similar to the *LeBoon* test.²³¹ While this test is not perfect, it provides the most assurance that religious organizations will not be chilled in their religious rights.

230. See *supra* Parts IV.A-B.

231. *LeBoon*, 503 F.3d at 226; see also *supra* note 229.

