

**BAD SERVICE: THE CASE FOR REMOVING THE § 501(C)(3)
TAX EXEMPTION FOR NONPROFITS THAT DISCRIMINATE ON
THE BASIS OF SEX**

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*Stacey Lyn Hall**

Abstract

Nonprofit organizations in the United States typically qualify for a significant federal income tax exemption under Internal Revenue Code § 501(c)(3). While this exemption is beneficial in many instances, it also means that nonprofits that discriminate on the basis of sex or gender identity receive the same substantial tax benefits as non-discriminatory nonprofits. To remedy this issue, the United States should implement a system to disqualify nonprofits that discriminate on the basis of sex from receiving the § 501(c)(3) tax exemption. Other scholars have addressed different forms of discrimination in the context of § 501(c)(3) nonprofits, including discrimination on the basis of race and sexual orientation. However, there has to date been little discussion of discrimination on the basis of sex and gender identity in the nonprofit sector.

This article will examine the history, meaning, and dynamics of the § 501(c)(3) tax exemption and illustrate the need for action through the examples of nonprofits engaged in sex discrimination when hiring employees, particularly for leadership positions. It will also propose an amendment to the IRC and the formation of a committee to investigate complaints of sex discrimination. Finally, it will discuss public policy and First Amendment arguments surrounding the issue.

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INTRODUCTION

Nonprofit organizations play an important role in nearly all aspects of society, from charity to education to the arts. There are nearly two million nonprofits currently registered in the United States, bringing in trillions of dollars in combined annual revenue. In recognition of the valuable role served by nonprofits, the United States government has granted tax-exempt status to qualifying nonprofits under § 501(c)(3) of the Internal Revenue Code (“IRC”). Of the 1.8 million nonprofits registered with the IRS, approximately 1.3 million have been granted § 501(c)(3) tax-exempt status. These organizations are not required to pay most federal taxes, a significant privilege not granted to other forms of corporations.

However, like all corporations, nonprofit organizations are not immune from the dangers of sex discrimination.¹ Despite serving the needs of diverse communities, many nonprofits have engaged in disturbing patterns of discrimination against women and gender minorities in hiring, compensation, and other aspects of workplace life. While these forms of discrimination are prohibited by Title VII of the Civil Rights Act of 1964, nonprofit organizations have little incentive to revise their practices. There is currently no provision in place to ensure that nonprofits engaging in illegal sex discrimination do not benefit from the § 501(c)(3) tax exemption. Consequently, nonprofits that discriminate on such a basis continue to enjoy the financial benefits of tax-exempt status, despite engaging in blatantly illegal employment practices.

To remedy this issue, Congress should remove the § 501(c)(3) tax exemption for nonprofit organizations that discriminate against women and gender minorities because those organizations violate statutory provisions against sex discrimination. Doing so will enable legitimate, non-discriminatory nonprofits to receive the exemption while preventing discriminatory “free riders” from benefitting from the exemption despite their illegal practices. Along the way, this change in the tax system will ideally encourage these nonprofits to change their practices to provide equal opportunities for individuals of all sexes and gender identities. This article will examine the history, meaning, and dynamics of the § 501(c)(3) tax exemption and illustrate the need for action through the examples of nonprofits engaged in sex discrimination when hiring employees, particularly for leadership positions.

¹ This article will use the term “sex discrimination” to refer to discrimination based on both biological sex and gender identity.

I. HISTORICAL BACKGROUND

Nonprofit organizations have provided critical assistance, education, and enrichment across the United States and beyond for centuries. Given the wide-ranging needs addressed by nonprofits both today and throughout American history, it is not surprising that the founders of these plentiful and important organizations have spanned diverse genders, sexualities, ethnicities, and other backgrounds. Before discussing the nuances of § 501(c)(3) and its application to nonprofit organizations, particularly those that discriminate on the basis of sex or gender identity, it is helpful to review both the history of nonprofits in the United States and the development of the modern American tax framework. This historical background provides insight into the importance and the nuances of nonprofits and tax legislation. In particular, the important roles of women and gender minorities in nonprofit history highlight the need for strong protections for these historically marginalized individuals in an increasingly expansive nonprofit sector.

A. *The History of American Nonprofits*

Nonprofit organizations have played a major role in the landscape of American society since before the Revolutionary War.² Some of the first nonprofits in the United States were “member-serving” nonprofits. These organizations included fraternal societies (such as the Freemasons), insurance groups, and labor organizations and were geared toward providing benefits specifically for members, rather than the public.³ More pertinent to the scope of this article, however, are “public-serving” nonprofits. Early colonists established numerous public-serving charitable organizations including hospitals, orphanages, schools, churches, and fire departments for their growing communities.⁴ As the early nation struggled to establish sufficiently strong state and federal governments, these charitable, public-serving nonprofit organizations addressed crucial social needs that would otherwise have gone unmet.⁵

The prevalence of nonprofit organizations exploded in the late nineteenth and early twentieth centuries.⁶ Prominent industrialists like Andrew Carnegie and John D. Rockefeller created private foundations to channel their vast fortunes into philanthropic missions such as education, the arts, and

² Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL., Winter 2008, at 105.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

healthcare.⁷ Carnegie, for example, donated over \$350 million to various social causes, including educational and cultural institutions, during his lifetime.⁸ Beyond the private philanthropic foundations of wealthy businessmen, other nonprofits sprouted during this time period as well. From the founding of United Way in 1887⁹, to the creation of the American Cancer Society in 1913, the turn of the twentieth century saw a major boom in American philanthropy.¹⁰

In more recent years, nonprofit organizations have continued to proliferate at a rapid pace. The number of American nonprofits, and the revenue brought in by these organizations, has skyrocketed over the past several decades. Between 1975 to 1995, American nonprofits saw a 380 percent increase in combined revenue.¹¹ In 2020, there were approximately 1.8 million nonprofits registered with the IRS.¹² Thirty-five percent of nonprofits were required to report their annual revenues that year, and they brought in a combined \$2.62 trillion in annual revenue.¹³

Importantly, the history of American nonprofits has not been defined solely by male philanthropists. Women have created and led many notable nonprofit organizations throughout history, serving causes from community recreation to healthcare. In the late nineteenth century, faced with a myriad of workplace hazards and minimal safety regulations, women in Nevada's silver mining towns created charitable organizations to provide aid for miners in need.¹⁴ In the 1880s, philanthropist Emily Bissell founded an athletic club to serve the needs of women and girls in Delaware,¹⁵ and Clara Barton founded

⁷ Nina J. Crimm, *A Case Study of a Private Foundation's Governance and Self-Interested Fiduciaries Calls for Further Regulation*, 50 EMORY L.J. 1093, 1102–03 (2001).

⁸ Daniel J. Linke, *A Lake, A Cake, And a Compliment? Woodrow Wilson's Fund-Raising Efforts with Andrew Carnegie*, PRINCETON UNIV. LIBR. CHRON. 659, 660 (2006).

⁹ *Our History*, UNITED WAY WORLDWIDE, <https://www.unitedway.org/about/history> (last visited Nov. 21, 2021).

¹⁰ *Our History*, AM. CANCER SOC'Y, <https://www.cancer.org/about-us/who-we-are/our-history.html> (last visited Nov. 21, 2021).

¹¹ Michael I. Sanders, *New Horizon for Nonprofits: How to Structure Joint Ventures with For-Profits*, 9 BUS. L. TODAY 53, 53 (2000).

¹² *How Many Nonprofits Are in the US?*, CAUSE IQ (Mar. 4, 2020), <https://www.causeiq.com/insights/how-many-nonprofits-in-the-us/>.

¹³ *Nonprofit Organizations in the U.S. – Statistics & Facts*, STATISTA (June 28, 2021), <https://www.statista.com/topics/1390/nonprofit-organizations-in-the-us/#dossierKeyfigures>.

¹⁴ Amanda B. Moniz, *The Storied History of Giving in America*, SMITHSONIAN MAG. (Nov. 23, 2020), <https://www.smithsonianmag.com/smithsonian-institution/storied-nuanced-history-giving-180976363/>.

¹⁵ *Id.*

the American Red Cross in Washington, D.C.¹⁶ A century later, inspired by similar efforts in California, young Chinese American women in New York founded and operated community health clinics to serve populations that had been frequently dismissed by established healthcare providers.¹⁷ The efforts of these women were instrumental in furthering these and countless other charitable causes, and their impact is still felt today. Indeed, in some sectors, women make up seventy-five percent of the nonprofit workforce, compared with less than twenty percent in the for-profit realm.¹⁸

Nor has the history of American nonprofits been shaped only by cisgender individuals. Transgender and nonbinary individuals have played key roles in American nonprofit history. In the 1970s, transgender activists and community service workers Sylvia Rivera and Marsha P. Johnson formed the Street Transvestite Action Revolutionaries (“STAR”), an organization dedicated to providing housing and support for homeless transgender individuals and others in need.¹⁹ In 1937, two-spirit Navajo artist Hastiin Klah co-founded the Museum of Navajo Ceremonial Art (now known as the Wheelwright Museum), a nonprofit museum in New Mexico dedicated to celebrating and protecting Navajo art and culture.²⁰ The work of these individuals continues to have an impact today, as shown by the proliferation of organizations dedicated to serving the needs of the LGBTQ+ community and beyond.²¹

B. *The History of Federal Tax Exemption Legislation*

Acknowledging the great social importance of nonprofits, the government began to grant these organizations certain privileges that for-profit

¹⁶ *Our History*, AM. RED CROSS, <https://www.redcross.org/about-us/who-we-are/history.html> (last visited Nov. 21, 2021).

¹⁷ Moniz, *supra* note 14.

¹⁸ Tiffani Lennon, *Benchmarking Women’s Leadership in the United States*, UNIV. DENVER – COLO. WOMEN’S COLL. 10 (2013), <https://www.issueelab.org/resources/26706/26706.pdf>.

¹⁹ Emma Rothberg, *Sylvia Rivera*, NAT’L WOMEN’S HIST. MUSEUM (Mar. 2021), <https://www.womenshistory.org/education-resources/biographies/sylvia-rivera>.

²⁰ *Hosteen Klah*, HEARD MUSEUM GUILD, <https://www.heardguild.org/hosteen-klah/> (last visited Oct. 3, 2022); *About > History*, WHEELWRIGHT MUSEUM AM. INDIAN, <https://wheelwright.org/about/history/> (last visited Nov. 21, 2021); *Klah, Hastiin*, ENCYCLOPEDIA.COM (Oct. 26, 2021), <https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/klah-hastiin>.

²¹ See *LGBTQIA+ Pride Month*, CHARITY NAVIGATOR, <https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=5013> (last visited Oct. 3, 2022).

organizations did not receive.²² Chief among these privileges is that of tax-exempt status. Beginning in the late nineteenth century, the IRC and related legislation shaped the foundations for the nonprofit tax exemption now codified in IRC § 501(c)(3).²³

The modern nonprofit tax exemption has its earliest roots in the Wilson-Gorman Tariff Act of 1894 (“1894 Act”), which established an exemption to its general two-percent corporate income tax for organizations “organized and conducted solely for charitable, religious, or educational purposes.”²⁴ The Supreme Court found the 1894 Act unconstitutional the year after its enactment.²⁵ However, its charitable exemption language formed the foundation for later legislation. For example, the Revenue Act of 1909 adopted the 1894 Act’s exemption language and added a requirement that “no part of the net income [of an exempt organization] inures to the benefit of any private stockholder or individual,” thereby clarifying the “nonprofit” nature of organizations qualifying for tax-exempt status.²⁶

In response to the ratification of the Sixteenth Amendment, which granted Congress the power to levy income taxes, Congress adopted the Revenue Act of 1913 (“1913 Act”), which set forth the earliest version of the federal income tax system.²⁷ This Act maintained the exemption language from the earlier Acts, officially codifying the nonprofit tax exemption within the modern federal income tax system.²⁸ Expanding upon the 1913 Act, the Revenue Act of 1917 adopted the first individual income tax deduction for charitable donations,²⁹ and this provision extended to estate tax deductions a year later with the Revenue Act of 1918.³⁰

In 1950, Congress enacted the first major limitation on the federal nonprofit tax exemption in response to concerns that nonprofits had obtained an unfair advantage over for-profit organizations by claiming tax-exempt status for their entire net income, including income not related to their charitable mission.³¹ The Revenue Act of 1950 (“1950 Act”) implemented the Unrelated Business Income Tax (“UBIT”), which taxed income unrelated to

²² Arnsberger et al., *supra* note 2, at 106; *see also* James R. Hines et al., *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1180 (2010).

²³ *Id.* at 108.

²⁴ *Id.* at 106–07.

²⁵ *Id.* at 107.

²⁶ *Id.*

²⁷ *See* Patrick E. Hobbs, *Entity Classification: The One Hundred-Year Debate*, 44 CATH. U. L. REV. 437, 459 (1995).

²⁸ *See id.*

²⁹ War Revenue Act of 1917, ch. 63, § 4, 40 Stat. 300, 302.

³⁰ Revenue Act of 1918, ch. 18, § 230(a)(1), 40 Stat. 1057, 1076.

³¹ Arnsberger et al., *supra* note 2, at 106.

the core charitable purposes of most nonprofit organizations.³² The UBIT also applied to income derived from “debt-financed real estate sale-lease-back activities,” in which tax-exempt nonprofits used loaned funds to purchase real estate and then leased the property back to its original owner, using the proceeds to pay off the loan debt.³³ In addition to imposing the UBIT, the 1950 Act disqualified “feeder organizations,” which operated non-charitable, commercial enterprises and funneled the proceeds to charitable organizations, from the federal income tax exemption.³⁴

Congress enacted the IRC in 1939.³⁵ The IRC constituted the first comprehensive body of federal tax law, codifying all federal income, estate, gift, excise, alcohol, tobacco, and employment taxes within a single cohesive document.³⁶ The IRC went through its first major overhaul with the Revenue Act of 1954, which established the modern tax code.³⁷ Section 501(c)(3) was added to the IRC through this overhaul, codifying the federal income tax exemption into the IRC and imposing limits on nonprofits’ ability to engage in political activities, including lobbying and campaigning for candidates for public office.³⁸

Under the Tax Reform Act of 1969 (“1969 Act”), certain aspects of the § 501(c)(3) tax exemption changed to reflect public concerns about the nonprofit sector.³⁹ The 1969 Act specifically addressed private foundations, which the Act defined as “charitable organization[s] that [do] not engage in inherently public activities, test for public safety, receive substantial support from a wide array of public sources, or operate in support of any organization that met any of these three requirements.”⁴⁰ Under the 1969 Act, private foundations became subject to a four-percent annual excise tax on investment income (later reduced to two percent under the Revenue Act of 1978).⁴¹ In addition, the 1969 Act required certain private foundations to distribute a minimum amount of their annual revenue for charitable purposes, imposing taxes and other penalties for private foundations that failed to do so.⁴² Beyond its requirements for private foundations, the 1969 Act increased charitable deduction limits for individual donors and clarified the types of contributions

³² *Id.* at 107.

³³ *Id.*

³⁴ *Id.*

³⁵ *Title 26, U.S. Code – History*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/reference/privacy_confidentiality/title_26_us_code_1.html (last visited Nov. 21, 2021).

³⁶ *Id.*

³⁷ Arnsberger et al., *supra* note 2, at 106.

³⁸ *Id.*

³⁹ Crimm, *supra* note 7, at 1118–19.

⁴⁰ Arnsberger et al., *supra* note 2, at 107–08.

⁴¹ Crimm, *supra* note 7, at 1120.

⁴² Arnsberger et al., *supra* note 2, at 108; Pub. L. No. 91-172 83 Stat. 487 (1969).

that qualified for such deductions.⁴³ Finally, the 1969 Act extended the UBIT to all § 501(c)(3) nonprofits, including churches.⁴⁴

The IRC went through another significant round of amendments in 1986, with additional amendments occurring in 1964, 1978, 1984, 1993, and 1997.⁴⁵ In 2006, the Pension Protection Act was passed, requiring § 501(c)(3) organizations to disclose their Forms 990-T for public inspection.⁴⁶ Most recently, the 2017 Federal Tax Cuts and Jobs Act imposed several changes affecting nonprofits, including increasing the standard deduction amount, doubling estate and gift tax exemptions, and limiting state and local tax deductions.⁴⁷ The Biden administration is anticipated to enact additional tax legislation, although the exact implications of such legislation on the nonprofit sector are as of yet uncertain.⁴⁸

II. THE MODERN NONPROFIT TAX EXEMPTION: § 501(C)(3)

With the immense growth in revenue of the nonprofit sector, the financial benefits of obtaining tax-exempt status have only grown more valuable.

Codified in 1954,⁴⁹ IRC § 501 sets forth the qualifications and procedures that govern tax-exempt organizations. Subsection 501(c)(3) governs the most common nonprofit organizations—those serving “exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes,” commonly referred to as “charitable organizations.”⁵⁰ Section 501(c)(3) imposes several requirements on charitable organizations seeking tax-exempt status. For an organization to qualify for the exemption, its net earnings must not be paid to or otherwise benefit private parties or shareholders.⁵¹ In addition, the organization must limit its involvement in political lobbying or campaigning. Subject to limited exceptions, its activities must not substantially include “carrying on propaganda, or otherwise attempting, to influence legislation.”⁵² Nor may the

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Arnsberger et al., *supra* note 2, at 106.

⁴⁶ *Id.*

⁴⁷ *Tax Cuts and Jobs Act: A Comparison for Businesses*, I.R.S. (Aug. 31, 2021), <https://www.irs.gov/newsroom/tax-cuts-and-jobs-act-a-comparison-for-businesses>.

⁴⁸ *Tax Proposals by the Biden Administration*, TAX FOUND., <https://taxfoundation.org/biden-administration-tax-proposals/> (last visited Nov. 21, 2021).

⁴⁹ Arnsberger et al., *supra* note 2, at 106.

⁵⁰ 26 U.S.C. § 501(c)(3).

⁵¹ *Id.*

⁵² *Id.*

organization participate in campaigns to support or oppose any candidate for public office.⁵³

To obtain tax-exempt status under § 501(c)(3), most organizations must apply for an exemption through the IRS.⁵⁴ This application is easily completed online using Form 1023.⁵⁵ Churches and public charities with gross annual receipts of less than \$5,000 are not required to complete an application.⁵⁶ Once the IRS approves an organization's application and officially grants tax-exempt status under § 501(c)(3), that organization is no longer required to pay federal income taxes (except for UBIT taxes for income not related to the organization's core charitable purposes).⁵⁷ In many instances, tax-exempt status also exempts an organization from certain state tax requirements, although the exact provisions vary from state to state.⁵⁸ In addition to being exempt from paying federal income taxes, most charitable organizations under § 501(c)(3) are eligible for tax-deductible donations. This means that donors to those organizations may deduct the amount of their contribution from their tax returns (up to a certain portion of the donor's annual taxable income, depending on the type of contribution).⁵⁹

III. THE FEDERAL SEX DISCRIMINATION STATUTORY FRAMEWORK

The federal government has enacted statutory measures to combat sex discrimination. The most prominent of these measures is Title VII of the Civil Rights Act of 1964. These measures were traditionally directed toward redressing discrimination against cisgender women, but have recently been

⁵³ *Id.*

⁵⁴ *Application for Recognition of Exemption*, I.R.S. (Sept. 3, 2021), <https://www.irs.gov/charities-non-profits/application-for-recognition-of-exemption>.

⁵⁵ *Id.*; John Oliver's "Our Lady of Perpetual Exemption" church is an entertaining example of the ease of applying for and obtaining tax-exempt status. *See* OUR LADY PERPETUAL EXEMPTION, <http://www.ourladyofperpetualexemption.com> (last visited Feb. 28, 2022); *see also* Abby Ohlheiser, *Comedian John Oliver Takes on the Prosperity Gospel by Becoming a Televangelist*, WASH. POST (Aug. 17, 2015, 9:39 AM), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/08/17/comedian-john-oliver-takes-on-the-prosperity-gospel-by-becoming-a-televangelist/>.

⁵⁶ I.R.S., *supra* note 54.

⁵⁷ 26 U.S.C. § 501(c)(3).

⁵⁸ Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 971-72 (1999); *see, e.g.*, A.R.S. § 42-5159.

⁵⁹ 26 U.S.C. § 170; *see Charitable Tax Deductions*, I.R.S. (Aug. 18, 2021), <https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-contribution-deductions>.

interpreted to encompass individuals from different sexual orientations and gender identities as well.⁶⁰

A. Sex Discrimination and Title VII

Sex discrimination is defined by the U.S. Equal Employment Opportunity Commission (“EEOC”) as “[t]reating someone (an applicant or employee) unfavorably because of that person’s sex, including the person’s sexual orientation, gender identity, or pregnancy.”⁶¹ Sex discrimination encompasses a variety of conduct, including sexual harassment, frequent or severe offensive comments, and employment practices that negatively impact individuals of a certain sex or gender identity that are not required by the nature of the job or business in question.⁶²

The predominant federal statutory framework governing sex discrimination in the United States is Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from hiring, firing, or otherwise discriminating against individuals on the basis of “race, color, religion, sex, or national origin...” [emphasis added].⁶³ In addition to hiring and firing decisions, discriminatory conduct under Title VII encompasses a wide array of employment practices including, but not limited to, compensation (both base salary and fringe benefits), promotions, job assignments, and job training.⁶⁴

B. Application of Title VII to Gender Minorities

In the recent landmark case of *Bostock v. Clayton County*, the Supreme Court ruled in a six-to-three decision that Title VII’s prohibition of sex discrimination does not merely protect individuals on the basis of sex assigned at birth.⁶⁵ Rather, the Court held that such protections extend to sexual orientation and transgender identity as well.⁶⁶ Nearly half of U.S. states, including California, Illinois, and Nevada, have also enacted state-level

⁶⁰ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁶¹ *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/sex-based-discrimination> (last visited Nov. 21, 2021).

⁶² *Id.*

⁶³ Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1964).

⁶⁴ U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 62.

⁶⁵ *Bostock*, 140 S. Ct. at 1737.

⁶⁶ *Id.*

legislation expressly extending workplace sex discrimination protections to encompass gender identity.⁶⁷

The Supreme Court has not yet explicitly ruled on Title VII's application to gender minorities besides transgender individuals.⁶⁸ However, the language of Justice Gorsuch's majority opinion in *Bostock* strongly suggests that the holding would apply to these groups as well.⁶⁹ This conclusion is bolstered by the EEOC's inclusion of "gender identity" in its definition of sex discrimination.⁷⁰

IV. NONPROFITS AS EMPLOYERS UNDER TITLE VII

While the first type of organization to come to mind when most Americans hear "employer" is likely a for-profit corporation, many nonprofit organizations also fall under the regulation of Title VII.⁷¹ Title VII defines an "employer" as "[a] person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person..."⁷² Notably, corporations, including nonprofits, are considered separate "persons" under the law.⁷³ Like most mid- to large-sized organizations, nonprofits often employ a significant number of regular paid employees.⁷⁴ Thus, such nonprofits are undoubtedly "employers" for Title VII purposes.⁷⁵ And as employers, nonprofits must abide by Title VII's rules against discrimination.

⁶⁷ Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS ACTION FUND (June 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf?ga=2.226023058.927885031.1637545616-226882674.1637545616.

⁶⁸ Vin Gurrieri, *Questions About 'Nonbinary' Bias Linger After LGBT Ruling*, L. 360 (June 19, 2020, 9:06 PM), <https://www.law360.com/articles/1284955/questions-about-nonbinary-bias-linger-after-lgbt-ruling>.

⁶⁹ "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." *Bostock*, 140 S. Ct. at 1737.

⁷⁰ U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 61.

⁷¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1964).

⁷² *Id.*

⁷³ Bryant Smith, *Legal Personality*, 37 YALE L. J. 283, 285 (1928).

⁷⁴ Drake Forester, *Balancing Nonprofits and Paid Employees*, SCORE (Oct. 7, 2019), <https://www.score.org/resource/balancing-nonprofits-and-paid-employees>.

⁷⁵ Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1964).

Importantly for the discussion of nonprofits as employers, certain jurisdictions consider certain non-compensated volunteers “employees” under Title VII.⁷⁶ In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court set forth a list of thirteen non-exhaustive factors to consider when determining whether a nonprofit volunteer is an employee.⁷⁷ These factors include

the hiring party’s right to control the manner and means by which the product is accomplished . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁷⁸

If enough factors are satisfied, a court may deem a nonprofit volunteer an employee regardless of their level of pecuniary compensation (or lack thereof).⁷⁹

Some jurisdictions have rejected the *Darden* test, opting instead for the simpler threshold remuneration test.⁸⁰ Under the threshold remuneration test, nonprofit workers must first demonstrate that they are being compensated by the nonprofit before they may proceed with a Title VII suit.⁸¹ For example, in *Juino v. Livingston Parish Fire Dist. No. 5*, the United States Court of Appeals for the Fifth Circuit determined that a volunteer firefighter for a nonprofit fire station had not established Title VII eligibility because she had not received sufficient compensation from the fire station.⁸² The court held that, under its formulation of the threshold remuneration test, “[R]emuneration need not be a salary, but must consist of ‘substantial benefits not merely incidental to the activity performed.’”⁸³ Therefore, whether a given nonprofit volunteer qualifies for Title VII protections, and thus whether the nonprofit may be liable

⁷⁶ Keiko Rose, *Volunteer Protection Under Title VII: Is Remuneration Required?*, 2014 U. CHI. LEGAL F. 605, 607 (2014).

⁷⁷ *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See, e.g., Juino v. Livingston Par. Fire Dist. No. 5*, 717 F.3d 431, 435 (5th Cir. 2013).

⁸¹ *Id.* at 436.

⁸² *Id.* at 439–40.

⁸³ *Id.*

for discrimination against them under Title VII, depends in large part upon the jurisdiction in question.

A. Religious Nonprofits as Employers

Religious nonprofits make up the largest category of nonprofit organizations in the United States, numbering over 300,000, or approximately sixteen percent of the American nonprofit sector.⁸⁴ These organizations include, among others, religious schools and universities, service groups, and, most prominently, churches. This article will use the Catholic Church and the Church of Jesus Christ of Latter-day Saints (“LDS Church”) as two illustrative examples of religious nonprofits engaged in sex discrimination, with a focus on sex discrimination in hiring for leadership positions.

i. Catholic Church

Most Catholic ecclesiastical leaders are compensated for their services.⁸⁵ As of 2017, Catholic priests in the United States earn a median annual salary of approximately \$20,000 to \$30,000, depending on geographical region.⁸⁶ In addition to this fairly modest salary, priests receive stipends for daily necessities.⁸⁷ Taking this additional compensation into account, the median annual taxable income for priests is approximately \$46,000.⁸⁸

Unsurprisingly, compensation for Catholic leaders increases somewhat according to seniority.⁸⁹ The median annual salary for bishops is commensurate with that of the priests in their dioceses, although bishops receive substantial “perks” in the form of housing, food, and transportation.⁹⁰ Cardinals at the Vatican receive a monthly salary between \$5,000 to \$6,000.⁹¹

⁸⁴ CAUSE IQ, *supra* note 12.

⁸⁵ Michael J. O’Loughlin, *How Much Do Catholic Priests and Their Lay Colleagues Make? A New Report Gives Answers*, AM. JESUIT REV. (Aug. 11, 2017), <https://www.americamagazine.org/faith/2017/08/11/how-much-do-catholic-priests-and-their-lay-colleagues-make-new-report-gives>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Kenneth Basilio, *How Much Is Pope Francis’ Salary in the Vatican?*, INT’L BUS. TIMES (Apr. 5, 2021, 7:02 AM), <https://www.ibtimes.com/how-much-pope-francis-salary-vatican-3174774>.

⁹⁰ Mick Forgey, *How Much Is a Bishop Worth?*, NAT’L CATH. REP. (Apr. 7, 2014), <https://www.ncronline.org/news/people/how-much-bishop-worth>.

⁹¹ These figures reflect salaries after cuts ordered by Pope Francis in March 2021 in response to the COVID-19 pandemic. Basilio, *supra* note 89. Philip Pullella, *Pope Orders Salary Cuts for Cardinals, Clerics, to Save Jobs of Employees*, REUTERS (last updated Mar. 24, 2021), <https://www.reuters.com/article/us-pope-salaries/pope->

The pope himself receives no salary.⁹² As with priests, the total compensation package for bishops, cardinals, and popes includes additional stipends for living expenses, which are often more substantial than those allotted to priests.⁹³ Retired clergy continue to receive monthly stipends after their active service has concluded.⁹⁴ The compensation received by these Catholic leaders clearly classifies them as employees for Title VII purposes.

ii. LDS Church

Unlike in the Catholic Church, many LDS leaders, particularly at the local level, are not compensated for their services and instead⁹⁵ serve on a volunteer basis.⁹⁶ For example, LDS bishops, who preside over local congregations (“wards”), and branch presidents, who preside over smaller congregations (“branches”), are not paid for their leadership.⁹⁷ However, applying the *Darden* factors to the role of a LDS bishop, it seems that a bishop may indeed qualify as an employee of the church for Title VII purposes.⁹⁸ It is true that several factors weigh against categorizing bishops as employees. The role of bishop does not require any specialized skill or education—indeed, bishops’ day jobs range from law to business to design.⁹⁹ Aside from certain tasks, such as presiding over church services, bishops are generally granted

orders-salary-cuts-for-cardinals-clerics-to-save-jobs-of-employees-
idUSKBN2BG1LG.

⁹² Basilio, *supra* note 89.

⁹³ Forgey, *supra* note 90.

⁹⁴ *Id.*

⁹⁵ Doug Andersen, *The Church’s Unpaid Clergy*, CHURCH JESUS CHRIST LATTER-DAY SAINTS (Sept. 3, 2009), <https://newsroom.churchofjesuschrist.org/blog/the-church-s-unpaid-clergy>.

⁹⁶ *Id.*

⁹⁷ *Lay Priesthood*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/topic/lay-priesthood> (last visited Nov. 21, 2021). For clarity, I will refer to bishops and branch presidents collectively as “bishops.”

⁹⁸ *Darden*, 503 U.S. at 323-24.

⁹⁹ See, e.g., *Elder Ray H. Wood of the Seventy*, CHURCH JESUS CHRIST LATTER-DAY SAINTS (May 1998), <https://www.churchofjesuschrist.org/study/ensign/1998/05/news-of-the-church/elder-ray-h-wood-of-the-seventy?lang=eng>; Taylor Stevens, *Mormon Church Excommunicates Sam Young, a Former Bishop Who Has Been Protesting Sometimes Sexually Explicit One-on-One Interviews Between Clergy and Youths*, SALT LAKE TRIB. (Sept. 16, 2018), <https://www.sltrib.com/religion/2018/09/16/mormon-church/>; Cameron Moll, *8 More Things I’m Learning as a Mormon Bishop*, MEDIUM (Oct. 22, 2016), <https://medium.com/@cameronmoll/8-more-things-im-learning-as-a-mormon-bishop-a498a981d9ac>.

discretion in deciding when and for how long to work.¹⁰⁰ Bishops are not compensated, do not receive employee benefits, and are not treated as employees by the church on tax filings.¹⁰¹

However, the bulk of the *Darden* factors weigh in favor of classifying bishops as employees. The LDS Church exerts a great deal of control over the “manner and means” by which bishops’ work is accomplished.¹⁰² It also provides many of the “instrumentalities and tools” needed for that work, including manuals, handbooks, meeting facilities, and furnishings.¹⁰³ Much of a bishop’s work, such as conducting services and meeting with congregation members, takes place on church property and constitutes part of the church’s “regular business.”¹⁰⁴ While shorter than the lifelong commitment of many Catholic leaders, LDS bishops’ tenure generally lasts for several years.¹⁰⁵ Although a bishop’s responsibilities are fairly fixed, the church’s hierarchical leadership structure provides senior church authorities with the authority to assign additional projects or responsibilities or to change policies if needed.¹⁰⁶ Bishops have discretion to appoint lower leaders and assistants, such as youth leaders and organists, although they are not permitted to compensate these individuals for their services.¹⁰⁷

¹⁰⁰ *Bishop*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/article/bishop> (last visited Nov. 21, 2021).

¹⁰¹ The LDS Church does not release its financial data in the United States; however, its file with the United Kingdom’s Charity Commission (updated in 2020) indicates that it has 218 employees and 61,000 volunteers in the country. Considering that the church has only 323 congregations in the UK, bishops must be included in the “volunteer” count. *The Church of Jesus Christ of Latter-day Saints*, CHARITY COMM’N FOR ENGLAND & WALES, <https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/242451> (last visited Nov. 21, 2021). In addition, the church’s most recent Australian Annual Information Statement (2020) declares no paid employees in the country but 1,200 volunteers. Bishops must therefore be included in the “volunteer” count. *The Church of Jesus Christ of Latter-day Saints*, AUSTRALIAN CHARITIES & NOT-FOR-PROFITS COMM’N, <https://www.acnc.gov.au/charity/617a15e21be05c22911ff6942738d4c6#ais-52f6d35f88a04bd07dfe9b3e942a8f18> (last visited Nov. 21, 2021).

¹⁰² *General Handbook: Serving in the Church of Jesus Christ of Latter-day Saints*, CHURCH JESUS CHRIST LATTER-DAY SAINTS (July 2021), <https://www.churchofjesuschrist.org/study/manual/general-handbook/title-page?lang=eng>.

¹⁰³ *Id.*

¹⁰⁴ *Bishop*, *supra* note 100.

¹⁰⁵ *Id.*

¹⁰⁶ *Organizational Structure of the Church*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/topic/organizational-structure-of-the-church> (last visited Sept. 5, 2022).

¹⁰⁷ Daniel H. Ludlow, *Bishop* in ENCYCLOPEDIA MORMONISM 123 (Elly Dickason et al. eds., 1992).

Regardless of whether local LDS leaders qualify as employees for Title VII purposes, senior ecclesiastical LDS leaders clearly fall within that definition. According to a leaked internal memo from 2014, top LDS leaders, including the church's twelve apostles and prophet, were paid an annual "living allowance" of \$120,000.¹⁰⁸ Mission presidents, who preside over missionaries grouped by geographical area, are also compensated for living expenses.¹⁰⁹ Therefore, whether under the *Darden* test or the remuneration threshold test, this compensation qualifies these positions for Title VII protection.

B. Non-Religious Nonprofits as Employers

Churches and religious institutions are not the only nonprofit employers. Non-religious charitable organizations may also qualify as employers under Title VII. This possibility is neatly demonstrated through the case of *Volling v. Antioch Rescue Squad*. In *Volling*, a female volunteer for the Antioch Rescue Squad, a nonprofit emergency ambulance service, had been sexually harassed by fellow volunteers during her shifts.¹¹⁰ The volunteer sued the ambulance service alleging sex discrimination under Title VII.¹¹¹ The court found that the plaintiff's volunteer work satisfied the majority of the *Darden* factors and qualified her as an "employee" for Title VII purposes.¹¹² Therefore, non-religious nonprofits may be held liable for sex discrimination of volunteers under Title VII, provided that the jurisdiction's test for Title VII eligibility has been satisfied.

V. SEX DISCRIMINATION IN NONPROFITS

The nonprofit sector undoubtedly accomplishes significant societal good and addresses the needs of countless communities throughout the nation. However, despite the benefits they bring to the communities they serve, many large and powerful nonprofit organizations have disturbing legacies of sex discrimination that continue to plague their employees today. This pattern is particularly evident in hiring decisions that exclude women and gender minorities from serving in influential roles within these organizations. This

¹⁰⁸ Rod Decker & Larry D. Curtis, *MormonLeaks Web Page Posts Documents About 'Living Allowance' of LDS General Authorities*, KUTV (Jan. 9, 2017), <https://kutv.com/news/local/mormonleaks-web-page-posts-information-about-living-allowance-of-lds-general-authorities>.

¹⁰⁹ *Mission President's Handbook*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, https://mormonleaks.io/wiki/documents/0/03/Mission_Presidents_Handbook_2006.pdf (last visited Nov. 21, 2021).

¹¹⁰ *Volling v. Antioch Rescue Squad*, 999 F. Supp. 2d 991, 995 (N.D. Ill. 2013).

¹¹¹ *Id.*

¹¹² *Id.* at 1001.

section will examine this pattern through four examples of nonprofits engaged in sex discrimination against women and gender minorities in hiring: the Catholic Church, the LDS Church, Saint Louis University, and Southeastern Oklahoma State University.

A. Catholic Church

One prominent example of a nonprofit engaged in sex discrimination against women in hiring decisions is the Catholic Church. Throughout its long history, the Catholic Church has barred women from being ordained to the priesthood.¹¹³ Ordination is a necessary prerequisite to eligibility for ecclesiastical leadership positions, including roles as priests, bishops, cardinals, and popes.¹¹⁴ Therefore, Catholic women are shut out from such leadership roles.¹¹⁵ They are instead confined to serving in limited roles that do not require ordination, such as teachers, ushers, nuns, and finance committee members.¹¹⁶ In a recent proclamation, Pope Francis formally expanded the range of roles open to women to include reading the Bible during Mass, serving at the altar, and distributing communion to the congregation.¹¹⁷ However, women are still not permitted to be ordained or to become priests, deacons, or higher leaders.¹¹⁸

Sex discrimination by the Catholic Church is not limited to discrimination against women. Especially in recent years, as the visibility of the LGBTQ+ community and the discussion of LGBTQ+ rights have increased in American society, transgender and nonbinary individuals have faced discrimination in leadership hiring decisions as well. Similarly to its treatment of women, the Catholic Church does not permit the ordination of transgender and nonbinary individuals. Accordingly, it does not permit these individuals to serve in ecclesiastical leadership positions. While there are isolated instances of small, heterodox Catholic sects ordaining transgender and nonbinary individuals to the priesthood in recent years,¹¹⁹ the mainstream Catholic

¹¹³ Elisabetta Polovedo, *Pope Formalizes Women's Roles, But Priesthood Stays Out of Reach*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/world/europe/pope-women.html>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Margaret Talbot, *The Women Who Want to Be Priests*, NEW YORKER (June 28, 2021), <https://www.newyorker.com/magazine/2021/06/28/the-women-who-want-to-be-priests>.

¹¹⁷ Polovedo, *supra* note 113.

¹¹⁸ *Id.*

¹¹⁹ Brian Fraga, *Trans Men 'Unknowingly Admitted' to Catholic Seminaries, Bishops' Committee Alleges*, NAT'L CATH. REP. (Sept. 24, 2021), <https://www.ncronline.org/news/trans-men-unknowingly-admitted-catholic->

Church disavows this practice.¹²⁰ According to the church's 1983 Code of Canon Law, bishops must admit to the seminary and to the priesthood "only men who possess the requisite physical and psychological qualities."

The church currently uses sacramental records, including baptismal records, to verify a candidate's biological sex before permitting his ordination.¹²¹ Citing the Code of Canon Law, in a September 2021 memo to American bishops submitted through the church's Committee on Canonical Affairs and Church Governance, Milwaukee Archbishop Jerome Listeki raised the possibility of the church implementing more stringent sex verification practices. These practices, such as DNA testing and certification by medical professionals, would ensure that only individuals assigned male at birth are ordained to the priesthood.¹²² This clearly indicates an intention on the part of the Catholic Church to limit ordination and the ensuing leadership possibilities to cisgender men. Such limitation is a textbook example of sex discrimination against nonbinary and transgender individuals.

B. LDS Church

Another example of sex discrimination against women and gender minorities in hiring decisions is found in the LDS Church. As in the Catholic Church, women in the LDS Church are not permitted to be ordained to the priesthood¹²³ and therefore cannot serve as ecclesiastical leaders, including as prophets, apostles, and bishops.¹²⁴ Accordingly, LDS women are relegated to roles that do not require ordination, such as teachers, youth leaders, and childcare workers.¹²⁵ These roles do not afford much decision-making power, and the women holding them must report to the local bishop, who approves, supervises, and finances most of their operations.¹²⁶

The LDS Church also bars transgender and nonbinary individuals from being ordained to the priesthood, and, therefore, from serving in leadership

seminaries-bishops-committee-alleges; Lou Chibbaro, Jr., *Trans Woman Ordained as 'Catholic' Priest*, WASHINGTON BLADE (Apr. 3, 2019), <https://www.washingtonblade.com/2019/04/03/trans-woman-ordained-as-catholic-priest/>.

¹²⁰ Fraga, *supra* note 119; Chibbaro, *supra* note 119.

¹²¹ Fraga, *supra* note 119.

¹²² *Id.*

¹²³ Cory Crawford, *The Struggle for Female Authority in Biblical and Mormon Theology*, 48 DIALOGUE: J. MORMON THOUGHT, no. 2, 2015, 1.

¹²⁴ *Id.* at 2.

¹²⁵ *Callings in the Church* in GEN. HANDBOOK: SERVING CHURCH JESUS CHRIST LATTER-DAY SAINTS 257, 261 (2022); *Organizations and Callings*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/callings/?lang=eng> (last visited Nov. 21, 2021).

¹²⁶ Ludlow, *supra* note 107, at 123.

positions.¹²⁷ In an official Church document titled “The Family: A Proclamation to the World,” the church defines “gender” as “sex assigned at birth.”¹²⁸ This definition does not account for diverse gender identities including transgender and nonbinary. The same document consistently recognizes only binary gender identities, using terms such as “son,” “daughter,” “male,” and “female.”¹²⁹ Beyond these basic linguistic choices, the LDS Church also officially dissuades its transgender and nonbinary members from transitioning, whether medically, surgically, or socially.¹³⁰ If a member chooses to transition, they will face significant restrictions on their ability to participate in the Church. These restrictions include being forbidden from receiving the priesthood or from being appointed to certain callings.¹³¹ Without the ability to receive and exercise the priesthood, openly transgender and nonbinary LDS members are ineligible for service as church leaders. This treatment of transgender and nonbinary individuals in the LDS Church is a clear example of sex discrimination.

C. Saint Louis University

Sex discrimination in hiring is not limited to religious nonprofit organizations. Indeed, such discrimination also occurs in the educational nonprofit sector, which constitutes the second-largest category of nonprofits in terms of contributions received.¹³² The 2016 case of Cornelia Horn, a former professor at Saint Louis University, provides an insightful illustration of the issue of sex discrimination against women in higher education nonprofit hiring practices.

¹²⁷ *What Is the Church’s Position on Transitioning?*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/transgender-understanding-yourself/what-is-the-churchs-position-on-transitioning?lang=eng> (last visited Nov. 21, 2021).

¹²⁸ *The Family: A Proclamation to the World*, CHURCH JESUS CHRIST LATTER-DAY SAINTS (Sept. 23, 1995), <https://www.churchofjesuschrist.org/study/scriptures/the-family-a-proclamation-to-the-world/the-family-a-proclamation-to-the-world?lang=eng>; *How Does the Church Define Gender?*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/transgender-understanding-yourself/how-does-the-church-define-gender?lang=eng> (last visited Nov. 21, 2021).

¹²⁹ *The Family: A Proclamation to the World*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, *supra* note 128.

¹³⁰ *What Is the Church’s Position on Transitioning?*, CHURCH JESUS CHRIST LATTER-DAY SAINTS, *supra* note 127.

¹³¹ *Id.*

¹³² *Giving USA 2021: The Annual Report*, GIVING USA, https://givingusa.org/wp-content/uploads/2021/06/GUSA2021_Infographic_Digital.pdf (last visited Jan. 13, 2021).

Horn was an assistant professor in the university's male-dominated Department of Theology for eight years.¹³³ During that time, she alleged repeated instances of sexual harassment, including "demeaning" verbal and written comments from male colleagues.¹³⁴ Horn reported these instances to university officials, leading to a formal investigation.¹³⁵ She applied for tenure several months after filing her report, supporting her application with positive ratings and recommendations by her supervising dean and a college hiring committee.¹³⁶ Despite her Department ultimately approving her application, Horn's tenure application was rejected, allegedly due to her sex and her efforts to speak out against the department's sexually discriminatory culture.¹³⁷ A jury ultimately found in Horn's favor, ruling that the university had discriminated against her on the basis of her sex.¹³⁸

D. Southeastern Oklahoma State University

As with sex discrimination in religious nonprofits, sex discrimination in the hiring practices of education nonprofits is also directed against gender minorities. The case of *Tudor v. Southeastern Oklahoma State University* demonstrates this issue.

In *Tudor*, a professor at Southeastern Oklahoma State University, a public nonprofit university, had worked at the university for approximately three years when she began to transition from male to female.¹³⁹ After transitioning, the professor applied for tenure three times and was denied on all three occasions, despite having excellent qualifications and recommendations.¹⁴⁰ Ultimately, the university declined to renew the professor's employment contract upon its expiration.¹⁴¹ The court affirmed a verdict for the professor, holding that the university had discriminated against her on the basis of her gender identity in violation of Title VII.¹⁴²

¹³³ Colleen Flaherty, *Denied Tenure for Being a Woman?*, INSIDE HIGHER ED (Sept. 20, 2016), <https://www.insidehighered.com/news/2016/09/20/jury-finds-saint-louis-u-denied-tenure-female-professor-based-her-gender>.

¹³⁴ *Horn v. St. Louis Univ.*, No. 1222-cc09870 (Mo. 22nd Cir. Sept. 15, 2016).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Tudor v. Se. Okla. State Univ.*, Nos. 18-6102, 18-6165, 2021 U.S. App. LEXIS 27404, at *2-3 (10th Cir. Sep. 13, 2021).

¹⁴⁰ *Id.* at *4-6.

¹⁴¹ *Id.* at *7.

¹⁴² *Id.* at *25.

VI. RECOMMENDATIONS

Sex discrimination in hiring is undeniably a major hurdle in achieving full equality in nonprofit employment. Fortunately, this issue is not without a readily achievable remedy. To ensure equal employment opportunities for all individuals, regardless of sex or gender identity, Congress should disqualify nonprofits that exhibit an ongoing pattern of discrimination on the basis of sex or gender identity in their hiring practices from eligibility for tax exemption under § 501(c)(3). To implement this change, the IRC should be amended to expressly state that nonprofits that exhibit an ongoing pattern of discrimination on the basis of sex in their hiring practices will be disqualified from receiving tax-exempt status under § 501(c)(3).

In addition to amending the language of the IRC, the IRS should create an internal department or committee to tackle the tasks of responding to complaints and investigating organizations' hiring practices. This committee should be mainly composed of tax professionals with strong familiarity with nonprofit organizations. The committee may wish to retain a small number of current nonprofit leaders to advise them in analyzing cases. This could assist in providing an inside perspective on industry norms and practices because current nonprofit managers may be able to spot deviations from generally accepted, non-discriminatory hiring practices more easily.

After amending the IRC and forming the investigative committee, the IRS must carry out the requisite disqualifications for current tax-exempt nonprofits and nonprofits seeking initial qualification for the tax exemption. There are several pathways to accomplish this goal for nonprofits currently registered with the IRS. First, the IRS could conduct a comprehensive review of the hiring practices of all currently registered nonprofits. Given the vast number of nonprofits currently in existence, this process would entail a substantial investment of time and resources. To improve the efficiency of this process, the IRS could instead implement a dedicated complaint program. Such a program would allow private individuals to file a formal complaint with the IRS, alleging sex discrimination in the hiring practices of a specific nonprofit organization. Most of these claims would likely be filed by employees who themselves have experienced sex discrimination. However, the process could also accept claims from internal whistleblowers, such as human resources representatives familiar with an organization's hiring practices, as well as third-party witnesses. Thus, rather than reviewing the practices of nearly two million organizations, the IRS can handle sex discrimination cases on a case-by-case basis, revoking the tax exemptions of only those organizations that have been flagged through the formal complaint process and found, after investigation, to engage in an ongoing pattern of sex discrimination in hiring.

This change in IRS procedures will be more straightforward for nonprofits not already registered with the IRS. This means that when the IRS reviews a new nonprofit organization's application for tax-exempt status, they will also investigate the organization's hiring, compensation, and termination practices. If an investigation reveals evidence of an ongoing pattern of sex discrimination, the organization's application should be denied.

While this article has focused predominantly on sex discrimination in hiring practices, discrimination occurs in a range of aspects of nonprofit employment, including compensation, promotion, and termination. In addition, discrimination occurs on bases other than sex or gender identity, including race, religion, and national origin. The language and provisions of the preceding framework can be molded to encompass all forms of discrimination in all aspects of nonprofit employment to maximize its impact on reducing discrimination in nonprofit employment.

This framework is only the first step in addressing the issue of discrimination in nonprofit organizations. The exact contours of the requisite investigatory practices, such as the number of instances of discrimination sufficient to establish an "ongoing pattern," will need to be shaped by practical experience and administrative efficiency needs. This number may vary depending on factors such as the nonprofit organization's sector, size, revenue, or structure. In addition, this framework will only apply to nonprofits that qualify as "employers" under Title VII, thereby restricting its effectiveness in addressing discrimination by organizations with fewer than fifteen employees. However, this basic framework will undoubtedly help to enable the tax exemption to serve its intended purpose, particularly among the largest and wealthiest nonprofits.

VII. DISCUSSION

The federal government loses a substantial amount of revenue through the § 501(c)(3) federal income tax exemption. As a whole, the nonprofit sector received over \$410 billion in tax-deductible charitable donations in 2017.¹⁴³ The total value of all nonprofit hospital tax exemptions is estimated at \$24.6 billion.¹⁴⁴ And according to a 2006 New York Times analysis, religious nonprofit organizations received approximately 200 exemptions from federal

¹⁴³ CHARITY NAVIGATOR, *supra* note 21.

¹⁴⁴ Sara Rosenbaum et al., *The Value of the Nonprofit Hospital Tax Exemption Was \$24.6 Billion in 2011*, 34 HEALTH AFFS. 1225, 1229 (2015).

legislation that aggregated to an estimated loss of approximately \$40 billion in federal income taxes that year.¹⁴⁵

The loss of such significant tax revenue alone may merit a reevaluation of federal tax exemptions. In recent decades, nonprofit operations have become increasingly similar to those of traditional for-profit corporations, extending to such ventures as publishing houses,¹⁴⁶ sports leagues,¹⁴⁷ theme parks,¹⁴⁸ and hospitals,¹⁴⁹ which are clearly not solely charitable in nature. As the line between nonprofit and for-profit blurs, it becomes increasingly unfair to exempt these organizations from paying their share of taxes. Doing so functionally passes the tax burden not only onto for-profit corporations engaged in essentially the same activities, but likely also onto private citizens who are saddled with the shortfall.¹⁵⁰ However, a reconsideration of the federal income tax exemption for such organizations becomes even more urgent when the ongoing patterns of discrimination in their hiring practices are considered.

It is certainly true that not all nonprofit organizations discriminate on the basis of sex when hiring employees. Many churches permit the ordination of female, transgender, and nonbinary individuals, hire these individuals to serve as pastors, preachers, and other leaders, and encourage equal treatment for leaders of all backgrounds.¹⁵¹ Many secular nonprofits focus primarily on combatting discrimination in the workplace and beyond.¹⁵² And still other nonprofits encourage diversity in their leadership and pride themselves on treating women, men, and minorities fairly and equally.¹⁵³ However, the problem of sex discrimination by nonprofits against women and gender

¹⁴⁵ Nicholas A. Mirkay, *Losing Our Religion: Reevaluating the Section 501(c)(3) Exemption of Religious Organizations that Discriminate*, 17 WM. & MARY BILL RTS. J. 715, 715 (2009).

¹⁴⁶ E.E.O.C. v. Pac. Press Publ'g. Ass'n, 676 F.2d 1272, 1274 (9th Cir. 1982).

¹⁴⁷ Thomas L. Hazen & Lisa L. Hazen, *Punctilios and Nonprofit Corporate Governance - A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14 UNIV. PA. J. BUS. L. 347, 350 (2012).

¹⁴⁸ Mirkay, *supra* note 145, at 717.

¹⁴⁹ *Id.* at 730.

¹⁵⁰ *Id.* at 731.

¹⁵¹ *Faith Leaders Applaud Episcopal Church's Approval of Rite to Bless Same-Sex Unions and the Ordination of Transgender People*, NAT'L LGBTQ TASK FORCE, <https://www.thetaskforce.org/faith-leaders-applaud-episcopal-churchs-approval-of-rite-to-bless-same-sex-unions-and-the-ordination-of-transgender-people/> (last visited Nov. 21, 2021).

¹⁵² *See, e.g., Women at Work: Organizations & Agencies*, CORNELL UNIV. LIBR., <https://guides.library.cornell.edu/c.php?g=32333&p=198011> (last visited Jan. 13, 2022).

¹⁵³ *Best Nonprofits to Work For: Flexibility, Benefits, and Feeling Appreciated Key Top Nonprofits*, NONPROFIT TIMES (Apr. 1, 2019), https://www.thenonprofittimes.com/npt_articles/flexibility-benefits-and-feeling-appreciated-key-top-nonprofits/.

minorities in hiring is still widespread. Organizations engaging in such discrimination should not be permitted to enjoy the privilege of tax exemption when their internal practices illegally discriminate on the basis of sex or gender identity.

A. Public Policy Concerns

The history of § 501(c)(3), its predecessors in statute and practice, and its foundation in charity law indicate that its creators expected that the exemption's beneficiaries would serve the public good.¹⁵⁴ Contrary to this expectation, nonprofits that discriminate on the basis of sex or gender identity when hiring, particularly for leadership positions, serve the interests of certain portions of the public while actively working against the interests of others. This discrimination bars women and gender minorities from obtaining the career and personal development benefits that stem from hiring and promotion into leadership positions.¹⁵⁵ It also impairs the leadership representation of a nonprofit's intended beneficiary base. When only cisgender men are permitted to serve as leaders, the diversity of thought and perspectives in leadership suffers immensely. This in turn contributes to a group of leaders that is not capable of making the best decisions for the diverse communities they claim to serve. This pattern can hardly be said to serve the public good.

For decades, the United States has recognized the propriety of revoking tax exemptions for nonprofit organizations that discriminate. In the case of *Bob Jones University v. United States*, the Supreme Court held that the tax exemption of a religious university that discriminated on the basis of race could rightfully be revoked.¹⁵⁶ The Court stated that the IRS could properly revoke the tax-exempt status of nonprofit organizations whose actions violate "established public policy."¹⁵⁷ From Supreme Court cases like *Bob Jones University* and its recent decision recognizing the right of same-sex couples to marry in *Obergefell v. Hodges*,¹⁵⁸ to the Civil Rights Act of 1964, the United States federal government has consistently emphasized that discrimination,

¹⁵⁴ *Activities that Are Illegal or Contrary to Public Policy*, I.R.S. (1985), <https://www.irs.gov/pub/irs-tege/eotopicj85.pdf>.

¹⁵⁵ *14 Important Benefits of a More Diverse Leadership Team*, FORBES (June 24, 2021), <https://www.forbes.com/sites/forbescoachescouncil/2021/06/24/14-important-benefits-of-a-more-diverse-leadership-team/>.

¹⁵⁶ *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

¹⁵⁷ *Id.*

¹⁵⁸ John B. Parker, *Paving a Path Between the Campus and the Chapel: A Revised Section 501(c)(3) Standard for Determining Tax Exemptions*, 69 EMORY L.J. 321, 324 (2019).

whether on the basis of race, sex, nationality, gender identity, or otherwise, violates the nation's "established public policy."¹⁵⁹

Beyond representation and diversity concerns, nonprofit organizations that discriminate on the basis of sex or gender identity are violating federal (and often state) law. The § 501(c)(3) federal income tax exemption for nonprofits is meant to serve the public good, and "violations of law are the antithesis of the public good."¹⁶⁰ By violating Title VII's provisions against sex discrimination, these organizations cannot in good faith be permitted to enjoy a privilege reserved for those that serve the public good. Thus, to ensure that the § 501(c)(3) tax exemption serves its intended purpose, nonprofits that discriminate on the basis of sex or gender identity in their hiring practices should be barred from receiving the exemption.

B. First Amendment Arguments

Some proponents of the § 501(c)(3) federal income tax exemption have argued that the First Amendment prohibits the government from interfering with the tax-exempt status of nonprofits, particularly churches and religious nonprofits.¹⁶¹ This argument rests on the grounds that church actions are matters of free speech and free exercise of religion that should be unimpeded by government intervention.¹⁶² This argument, however, fundamentally ignores the purposes of the First Amendment. The argument particularly fails in the light of the illegality of sex discrimination in hiring.

The First Amendment prohibits the government from intervening with matters of religious opinion or belief.¹⁶³ This prohibition, however, refers to beliefs, not actions. For example, the government could not legally force a church to stop preaching about creationism or intelligent design and instead to educate its members about evolution. However, the government can—and should—prohibit churches from refusing to hire an otherwise-qualified individual for a leadership position on the grounds that she is a woman. The question of priesthood ordination does admittedly raise an interesting question regarding the distinction between religious beliefs and discriminatory religious conduct. A church could argue that its core beliefs (protected by the First Amendment) strictly state that only men are allowed by God to be ordained to the priesthood. Therefore, such a church could argue that women and gender

¹⁵⁹ *Bob Jones Univ.*, 461 U.S. at 586.

¹⁶⁰ I.R.S., *supra* note 154.

¹⁶¹ See Meghan J. Ryan, *Can the IRS Silence Religious Organizations?*, 40 IND. L. REV. 73, 83 (2007).

¹⁶² Nicholas A. Mirkay, *Is It "Charitable" to Discriminate? The Necessary Transformation of Section 501(c)(3) into the Gold Standard for Charities*, 2007 WIS. L. REV. 45, 88-89 (2007).

¹⁶³ *Id.* at 727.

minorities are not qualified for church leadership because they cannot receive the priesthood under those religious beliefs. The Supreme Court, however, has limited churches' ability to rely on such gray areas in the distinction between religious beliefs and otherwise illegal conduct in a line of significant cases spanning over a century.

i. Religious Beliefs vs. Actions

The landmark 1879 decision of *Reynolds v. United States* introduced the idea that the First Amendment does not grant religious groups unlimited freedom of conduct. In *Reynolds*, a member of the early LDS Church who had married multiple women in accordance with the church's doctrine at the time was charged with violating a federal anti-polygamy law.¹⁶⁴ The defendant argued that his conduct was protected by the First Amendment's Free Exercise Clause and claimed that the anti-polygamy law was therefore unconstitutional.¹⁶⁵ The court rejected this argument, stating that, despite the First Amendment's broad protection of religion, the government reserved the right to regulate practices—religious or otherwise—that are “in violation of social duties or subversive of good order.”¹⁶⁶

Sixty-two years later, the Supreme Court expanded its *Reynolds* holding to apply to state laws in *Cantwell v. Connecticut*. In *Cantwell*, three Jehovah's Witnesses were charged with several state offenses in connection with their door-to-door proselytizing activities.¹⁶⁷ In a clear articulation of the limits of Free Exercise Clause first set forth in *Reynolds*, the *Cantwell* court rejected the defendants' arguments that their actions were protected by the First Amendment.¹⁶⁸ The court held that “the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.”¹⁶⁹ In other words, religious *beliefs* are immune from governmental interference, but religious *actions* are not and can be restricted when they violate other provisions of law.

Like the polygamy addressed in *Reynolds* and the proselytizing addressed in *Cantwell*, the sex discrimination in hiring clearly constitutes an “action,” not a mere “belief.” Therefore, it can be regulated by Congress through, among other means, revocation of tax-exempt status, without running afoul of the First Amendment. If an organization engages in actions that

¹⁶⁴ *Reynolds v. United States*, 98 U.S. 145, 161-62 (1879).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 164.

¹⁶⁷ *Cantwell v. Connecticut*, 310 U.S. 296, 301 (1940).

¹⁶⁸ *Id.* at 303–04.

¹⁶⁹ *Id.*

fundamentally violate public policy—and, more importantly, federal law—it should be held accountable. One major way to enforce such accountability is to remove the significant financial privileges granted to these organizations by the § 501(c)(3) tax exemption.

ii. “Compelling Governmental Interests”

The Supreme Court expanded on its reasoning from *Reynolds* and *Cantwell* in the 1990 case of *Employment Division v. Smith*, adding a new dimension known as the “compelling governmental interests” test. In *Smith*, the Oregon Department of Human Resources denied unemployment benefits to two former employees of a private drug rehabilitation facility who were fired for consuming peyote, an illegal hallucinogenic drug, during a religious ceremony.¹⁷⁰ The department based its decision on a state law that barred employees fired for “workplace misconduct” from receiving unemployment benefits.¹⁷¹ The court upheld the state law and sided with the department, rejecting the plaintiffs’ argument that the law infringed upon their First Amendment right to the free exercise of religion.¹⁷²

In the *Smith* court’s view, the state had a “compelling governmental interest” in curtailing the use of hallucinogenic drugs, which justified its restriction on the plaintiffs’ religious drug use.¹⁷³ The court stated that “if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”¹⁷⁴ When a compelling state interest supports curtailing certain speech or expression, the First Amendment does not bar the government from doing so. This rule was codified in the Religious Freedom Restoration Act of 1993, which provided that the government may “substantially burden” a person’s exercise of religion only if the burden is both (1) in furtherance of a compelling governmental interest, and (2) the least restrictive means of furthering that interest.¹⁷⁵

There is arguably an even more compelling state interest in stopping workplace discrimination than there is limiting polygamy, proselytizing, and drug use. Sex discrimination has a major negative impact on those who endure it. Employees, employers, their clienteles, and society as a whole all benefit

¹⁷⁰ *Emp. Div. v. Smith*, 494 U.S. 872, 874 (1990).

¹⁷¹ *Id.*

¹⁷² *Id.* at 890.

¹⁷³ *Id.* at 883.

¹⁷⁴ *Id.* at 878.

¹⁷⁵ Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq. (1993).

from employees' maximal wellbeing.¹⁷⁶ These benefits are heightened in the nonprofit sector, as employees who are happy and cared for at work can best accomplish their employers' goals of serving their communities. Further, Title VII's statutory prohibitions are the "least restrictive" means of furthering the government's interest in ending sex discrimination in the workplace. Alternative means of ending discrimination, such as dictating employer handbook policies or conducting state audits of workplaces, would be less effective and highly intrusive into workplace environments. Providing a clear, singular statutory framework governing discrimination ensures that the interests of employees—and the state's derivative interest in employees' wellbeing—are served while granting employers the greatest possible freedom to develop their own internal policies and to operate free from unnecessary government interference.

Title VII clearly prohibits nonprofit employers from discriminating in their hiring practices on the basis of sex.¹⁷⁷ While this provision originally referred to discrimination on the basis of biological sex, in the aftermath of *Bostock*, it applies equally against discrimination on the basis of gender identity.¹⁷⁸ Title VII is not inapplicable to an organization that otherwise qualifies as an "employer" solely because the organization happens to be a religious institution. The First Amendment does not protect all speech or expression, nor does it remove all consequences for speech or expression. If an organization's actions or policies violate anti-discrimination laws, the organization opens itself to liability for that conduct. Thus, churches cannot fall back on their core beliefs to avoid accountability for sex discrimination in hiring.

Like the polygamy in *Reynolds*, the proselytizing in *Cantwell*, and the drug use in *Smith*, sex discrimination in hiring clearly constitutes an "action," not a mere "belief." Therefore, Congress can regulate it through, among other means, revocation of tax-exempt status, without running afoul of the First Amendment. If an organization engages in actions that fundamentally violate public policy—and, more importantly, federal law—it should be held accountable. One major way to enforce such accountability is to remove the significant financial privileges granted to these organizations by the § 501(c)(3) tax exemption.

¹⁷⁶ See, e.g., Cassandra A. Okechukwu et al., *Discrimination, Harassment, Abuse, and Bullying in the Workplace: Contribution of Workplace Injustice to Occupational Health Disparities*, 57 AM. J. INDUS. MED. 573 (2013); see also David R. Williams et al., *Understanding How Discrimination Can Affect Health*, 54 HEALTH SERV. RSCH. 1374 (2019).

¹⁷⁷ Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1964).

¹⁷⁸ *Bostock*, 140 S. Ct. at 1737.

CONCLUSION

The United States has a long way to go before achieving true equality for all Americans. However, by eliminating the § 501(c)(3) tax exemption for nonprofit organizations that discriminate on the basis of sex or gender identity in their hiring practices, Congress can take a major step toward accomplishing this worthy goal. Nonprofits that illegally discriminate should not enjoy the immense financial benefits that come from not having to pay federal income taxes. Indeed, forcing such nonprofits to either end their discriminatory practices or lose these tax benefits will provide a tempting incentive for social change. Faced with such an ultimatum, these organizations may well be compelled to change their policies and provide equal opportunities for all employees, regardless of sex or gender identity. This will help American society progress toward full and true equality under the law.