22-1440

United States Court of Appeals

for the

Fourth Circuit

LONNIE BILLARD,

Plaintiff/Appellee,

– v. –

CHARLOTTE CATHOLIC HIGH SCHOOL; MECKLENBURG AREA CATHOLIC SCHOOLS; ROMAN CATHOLIC DIOCESE OF CHARLOTTE,

Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT CHARLOTTE
No. 3:17-cv-00011
Hon. Max O. Cogburn Jr.

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER AND FORTY-SEVEN ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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Together with NWLC, the following *amici* join this brief:

1. ADL (Anti-Defamation League)
2. American Atheists
3. American Federation of Teachers, AFL-CIO
4. American Medical Women's Association
5. Athlete Ally
6. California Women Lawyers
7. COLAGE
8. Desiree Alliance
9. Education Law Center-PA
10. Equal Rights Advocates
11. Equality California
12. FORGE, Inc.
13. GLBTQ Legal Advocates and Defenders
14. GLSEN
15. Healthy and Free Tennessee
16. Human Rights Campaign
17. In Our Own Voice: National Black Women's Reproductive Justice Agenda
18. Jane's Due Process
19. Lawyers Club of San Diego
20. Legal Aid at Work
21. Muslims for Progressive Values
22. NARAL Pro-Choice America
23. National Association of Commissions for Women
24. National Association of Nurse Practitioners in Women's Health (NPWH)
25. National Association of Social Workers
26. National Center for Transgender Equality
27. National Crittenton
28. National Employment Lawyers Association
29. National Organization for Women Foundation
30. National Women's Political Caucus
31. New Voices for Reproductive Justice
32. People for the American Way
33. Religious Coalition for Reproductive Choice
34. Reproaction
35. SIECUS: Sex Ed for Social Change
36. Sikh Coalition
37. SisterReach
38. The Women's Law Center of Maryland
39. Tom Homann LGBTQ+ Law Association
40. Washington Employment Lawyers Association
41. Washington Lawyers' Committee for Civil Rights and Urban Affairs
42. Women Employed
43. Women Lawyers On Guard Inc.
44. Women's Bar Association of the District of Columbia
45. Women's Bar Association of the State of New York
46. Women's Law Project
47. WV FREE (West Virginia Focus: Reproductive Rights and Equity)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, each *amicus* hereby certifies that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Women's Law Center ("NWLC") is a nonprofit organization that advocates for gender justice in the courts, in public policy, and in broader society to ensure that women and girls, and all people, can live free of sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, reproductive rights and health, workplace justice, and education, with particular attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination, including women and girls of color and LGBTQ people. NWLC has participated in numerous federal and state cases, including before U.S. Courts of Appeals and the U.S. Supreme Court, to ensure that rights and opportunities are not restricted based on sex and that all workers, including LGBTQ workers, can enjoy the protections against sex discrimination as promised by law.

NWLC and the forty-seven additional *amici* submit this brief to ensure that this Court appropriately applies the broad civil rights protections afforded by Title VII and correctly cabins the scope of Title VII's limited exceptions. Permitting

[1] All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. NWLC also recognizes the substantial contributions of NWLC consulting attorney Harper Jean Tobin to the preparation of this brief.

religious employers to fire employees based on race, color, sex, or national origin—even, as here, for a role that Defendants stipulated is not religious in nature—would eviscerate these workers' civil rights protections. Such a holding would harm over a million workers, including LGBTQ workers, women, people of color, immigrants, disabled people, older workers, and those at the intersections of these identities who are most at risk if these federal civil rights protections are discarded in the context of religious employers. *Amici* respectfully submit this brief and ask the Court to affirm the district court's order and rule in favor of maintaining civil rights protections for Mr. Billard and the many others who work for religious employers.

INTRODUCTION

Amici submit this brief in support of Plaintiff-Appellee Lonnie Billard, a former full-time teacher and substitute teacher who worked at Charlotte Catholic High School ("the School") for nearly fifteen years. Despite his exceptional record as a well-regarded English and Drama instructor, the School fired Mr. Billard after he posted on his personal Facebook account about his plans to marry a person of the same sex. Defendants-Appellants seek to deny Mr. Billard his workplace protections under Title VII of the Civil Rights Act of 1964, which prohibits sex

discrimination, including by religious employers.[2] Defendants' argument that it is permissible for religious employers to discriminate against LGBTQ employees contravenes Title VII and the Supreme Court's ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).[3]

Defendants' position would transform limited statutory exceptions to religious discrimination claims into a broad license to discriminate against employees based on other protected characteristics. If this Court were to adopt Defendants' view, all employees at religious schools in a range of roles—including clerical staff, food service personnel, custodial and maintenance staff, teachers, and others—could be denied Title VII's protections, regardless of the type of discrimination alleged. This would permit religious employers to discriminate based on any number of protected characteristics merely by citing their faith. Additionally, given the significant number of entities that mistakenly claim status

[2] *Amici* understand the "religious employers" covered by the exceptions discussed in this case to be limited to houses of worship and the entities they operate, such as religious schools.

[3] Notably, Defendants conceded that Mr. Billard, a substitute teacher of purely secular subjects, was not a "minister" for the purposes of the ministerial exception to Title VII. JA0031; JA1398. This exception is based on the idea that courts may not delve into employment-related decisions concerning ministerial staff. *See, e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020). Accordingly, further references to "employees" or "workers" of religious employers exclude ministerial employees or workers for the purposes of this brief.

as religious employers, a sweeping application of Title VII's limited exceptions would disregard Title VII's text and deprive a significant segment of the nation's workforce of civil rights protections that were enacted nearly sixty years ago.

Amici ask this Court to affirm the district court's decision in favor of Mr. Billard, which comports with the statutory text of Title VII and its limited exceptions, as well as the long line of Title VII caselaw protecting workers from discrimination by religious employers.

ARGUMENT

To protect Mr. Billard and the many other employees working for religious employers from workplace discrimination, this Court should affirm the district court's order granting partial summary judgment in Mr. Billard's favor. Title VII provides essential workplace civil rights protection for over a million employees of religious employers, including against sex discrimination. Incorrectly expanding the limited exceptions Congress created in Title VII would undermine the crucial protections it sought to guard, leaving a vast number of our nation's workers more vulnerable to discrimination by employers, unbound by the requirements of federal civil rights laws.

I. TITLE VII PROVIDES ESSENTIAL CIVIL RIGHTS PROTECTIONS FOR EMPLOYEES OF RELIGIOUS EMPLOYERS, INCLUDING AGAINST SEX DISCRIMINATION

A. Title VII Prohibits Defendants from Firing Mr. Billard Because of His Sex

When Defendants fired Mr. Billard because he planned to marry a man, they violated Title VII. Under *Bostock*, it is impossible to discriminate against an LGBTQ person based on sexual orientation without also discriminating based on sex. 140 S. Ct. at 1741. Defendants try to evade liability for their discriminatory conduct by recharacterizing Mr. Billard's personal social media post about his upcoming marriage as "advocacy" against Catholic doctrine. JA1383; Opening Br. 21. If Mr. Billard were a woman, however, Defendants would not consider an identical engagement announcement to be advocacy for or against the Catholic Church's teachings. JA1385. Because Mr. Billard's sex was a but-for cause of his termination, Defendants' conduct violates Title VII.

Whether Defendants would also fire a woman who expresses her intent to marry another woman is irrelevant: under Title VII, "an employer cannot escape liability by demonstrating that it treats males and females comparably as groups." *Bostock*, 140 S. Ct. at 1744. Instead, an employer who intentionally fires an LGBTQ employee "in part because of that individual's sex violates the law," even if the employer is willing to subject all male and female LGBTQ employees to the same rule. *Id.* Additionally, Defendants admitted that they would not fire a

heterosexual teacher who spoke positively about same sex marriage, further proving that Mr. Billard's termination was based on sexual orientation and thus constituted sex discrimination. JA1386.

In short, Defendants' conduct was sex discrimination under *Bostock*. In an attempt to avoid liability for firing Mr. Billard, Defendants ask this Court to create an unprecedented exception that would enable religious employers, which employ over a million employees nationwide, to exempt themselves from Title VII. This Court should not permit Defendants to evade the requirements that Congress laid out in Title VII to protect employees like Mr. Billard from workplace discrimination.

B. Title VII Protects Employees of Religious Employers from Myriad Forms of Workplace Sex Discrimination

Title VII protects employees in a wide range of contexts, including when they work for religious employers. *See EEOC v. Sw. Baptist Theological Seminary*, 651 F.2d 277, 286–87 (5th Cir. 1981) (holding that a seminary must comply with Title VII-related EEOC filing requirements for its non-ministerial employees). Defendants ask the Court to strip away Title VII's protections from LGBTQ employees, but doing so endangers workplace protections against many other forms of sex discrimination. Additionally, such a change would radically transform the availability of employment protections for many workers and also leave them

without a civil rights remedy for discrimination based on race, color, or national origin.

Title VII protects all employees from workplace discrimination based on sex. For example, Title VII ensures that workers with identical jobs are not provided different benefits or subject to disparate policies based on their sex, regardless of any sex-based generalized observations or statistics purporting to justify that differential. *See City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (finding that the defendant violated Title VII where it required its female employees to make larger pension contributions than its male employees based on differences in life expectancy); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding that Title VII does not permit "one hiring policy for women and another for men" where each had pre-school-age children); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197–98 (7th Cir. 1971) (holding that an airline's no-marriage rule for stewardesses violated Title VII where no similar rule applied to male employees); *Allen v. Lovejoy*, 553 F.2d 522, 524–25 (6th Cir. 1977) (finding that the defendants' policy of requiring married women to sign forms using their husbands' last names violated Title VII).

In the context of religious employers, the Ninth Circuit has specified that a religious school cannot deny certain benefits to married women based on preconceptions about the roles women play in their marriages, even if those

preconceptions are rooted in religion. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1364–65 (9th Cir. 1986) (holding that a Christian school's policy of denying health insurance benefits to married women because of its belief that "in any marriage, only the man can be the head of the household" violated Title VII). The same court also found that religious employers could not deny employees certain monetary allowances based on sex. *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1274–76 (9th Cir. 1982) (holding that a religious publishing house violated Title VII by denying a female employee monetary allowances paid to similarly situated male employees), *abrogated on other grounds by Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990).

Title VII also prohibits employers from discriminating against employees because of pregnancy or the capacity to become pregnant. *See* 42 U.S.C. § 2000e(k); *Cline v. Cath. Diocese of Toledo*, 206 F.3d 651, 667 (6th Cir. 2000) (holding that an employer violates Title VII if it enforces a policy solely against women, "due purely to the fact that '[w]omen can become pregnant [and] [m]en cannot'" (alterations in original) (quoting *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 344 (E.D.N.Y. 1998))); *see also Int'l Union, United Auto., Aerospace & Agr. Implement Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206–07 (1991) ("Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those

parents. . . . Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization."); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676–84 (1983) (finding that an employer's health insurance plan violated Title VII because it provided better benefits to the employer's own pregnant employees than to the pregnant spouses of its employees).

Additionally, Title VII prohibits sexual harassment, and it protects workers from retaliation for opposing sex discrimination by reporting it or for participating in efforts to address discrimination. *E.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986); *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 273 (2009). Like Title VII's other protections against discrimination based on race, color, or national origin, these protections against sex discrimination apply to religious employers. *E.g.*, *Patsakis v. Greek Orthodox Archdiocese of Am.*, 339 F. Supp. 2d 689, 690 (W.D. Pa. 2004) (allowing sexual harassment claims to proceed against a church); *Elbaz v. Congregation Beth Judea, Inc.*, 812 F. Supp. 802, 803 (N.D. Ill. 1992) (allowing claim for retaliatory discharge based on sex and national origin discrimination complaints to proceed against a congregation).

Title VII further protects employees from the harmful consequences of sex stereotypes that punish workers for being their authentic selves. *See Price*

Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (finding that the defendant violated Title VII where it denied an employee partnership because it believed she was insufficiently feminine in the ways she walked, talked, dressed, wore her makeup, styled her hair, and wore her jewelry). Title VII also prohibits sex-based employment decisions rooted in paternalistic presumptions about applicants' preferred roles. *See Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235–36 (5th Cir. 1969) ("Title VII . . . vests individual women with the power to decide whether or not to take on unromantic tasks."). Similarly, Title VII protects employees from discrimination based on customers' prejudices or attitudes about the appropriate roles of the sexes. *See Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388–89 (5th Cir. 1971) (rejecting the argument that an employer can discriminate based on sex because of customer preferences or the "cosmetic effect" of having members of a particular sex in certain roles).

The above examples highlight how Title VII has sought to eliminate sex discrimination in its many forms and create more just workplaces across the country.

II. INCORRECTLY EXPANDING TITLE VII'S LIMITED EXCEPTIONS WOULD THREATEN CRUCIAL PROTECTIONS AGAINST WORKPLACE DISCRIMINATION

Permitting Defendants to circumvent Title VII's protections could have far-reaching and harmful consequences for employees of religious employers.

Defendants' position would require the Court to take an impermissibly expansive approach regarding Title VII's limited religious exceptions. As outlined above, Title VII has protected employees in our nation's workforce, including the sizable number of workers at religious employers, for nearly sixty years. Upending those protections would radically transform the workplace for employees who have relied on Title VII's crucial civil rights protections for decades.

A. Title VII's Exceptions Are Limited in Scope

Title VII contains two statutory exceptions for religious entities, and Congress purposefully drafted these exceptions to be limited in scope. Section 702 of Title VII reads, in relevant part, "This subchapter shall not apply to an employer with respect to . . . a religious . . . educational institution . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such . . . educational institution . . . of its activities." 42 U.S.C. § 2000e-1(a). Section 703 of Title VII provides, in relevant part, that "it shall not be an unlawful employment practice for a school . . . to hire and employ employees of a particular religion if such school . . . is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation." 42 U.S.C. § 2000e-2(e)(2). Both exceptions allow religious employers to, for example, give a preference in employment to those who share their faith. *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166

(4th Cir. 1985) ("The statutory exemption applies to one particular reason for employment decision—that based upon [religion].").

However, neither exemption permits religious entities to discriminate against their workers because of race, color, sex, or national origin. *Id.* at 1168; *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) ("Section 2000e-1(a) does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin."); *accord Cline*, 206 F.3d at 658; *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993); *Fremont Christian Sch.*, 781 F.2d at 1366; *Pac. Press Publ'g Ass'n*, 676 F.2d at 1276.

Accordingly, a religious school violates Title VII where it fires a substitute English and Drama teacher because of his sex. This comports with the statutory text and caselaw that prohibit religious entities from attempting to use their religious affiliation to justify discrimination based on race, color, sex, or national origin. If Congress wanted to provide an expansive exemption for religious institutions, it could have drafted this language more broadly; however, it did not. *Rayburn*, 772 F.2d at 1166–67 ("It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not."). Notably, Congress considered and rejected a different version of section 702 that completely exempted religious institutions from all of Title VII's

prohibitions. *Pac. Press Publ'g Ass'n*, 676 F.2d at 1276–77. It chose instead the enacted text, which provides religious employers latitude solely with regard to religion. *Id.*

To incorrectly broaden Title VII's exceptions, despite the text's provisions and precedents set by this Court and others, would render Congress's chosen language meaningless and put over a million employees of religious employers across the country in jeopardy of facing discrimination without a federal civil rights remedy.

B. Courts Have Properly Rejected Religion-Based Defenses to a Range of Discrimination Claims Under Title VII

Because Title VII's exception for religious employers encompasses only claims of religious discrimination, courts have properly rejected religion-based defenses to Title VII claims of workplace sex discrimination.[4] As noted above, in *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986), a Christian school's policy of denying health insurance benefits to married women violated Title VII's prohibition against sex discrimination despite the school's belief that

[4] Title VII's prohibition on discrimination because of sex against non-ministerial employees of religious employers have also survived constitutional challenges. *E.g.*, *Fremont Christian Sch.*, 781 F.2d at 1367–70. Mr. Billard's response brief expounds on this in further detail, *see* Resp. Br. 42–49, but *amici* note that as a "permissible content-neutral regulation of conduct," Title VII does not infringe employers' First Amendment rights. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993).

"in any marriage, only the man can be the head of the household." 781 F.2d at 1364–65. Similarly, in *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982), a religious publishing house violated Title VII by denying a female employee monetary allowances paid to similarly situated male employees. 676 F.2d at 1274–76. Both cases rejected arguments that Title VII's statutory exceptions applied, noting that "religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex" and that Congress and courts have specifically "rejected proposals that provide[] religious employers a complete exemption from regulation under the [Civil Rights] Act [of 1964]." *Fremont Christian Sch.*, 781 F.2d at 1366 (alterations in original) (quoting *Pac. Press Publ'g Ass'n*, 676 F.2d at 1276).

Drawing on these principles, a district court in this Circuit recently ruled that section 702 did not bar a data analyst's lawsuit alleging that a Catholic social services organization violated Title VII when it terminated his same-sex spouse's health insurance benefits. *Doe v. Cath. Relief Servs.*, No. 20-CV-1815, 2022 WL 3083439, at *4–5 (D. Md. Aug. 3, 2022). The court correctly held that "controlling Fourth Circuit precedent holds that § 702(a) does not exempt religious organizations from the bar on forms of discrimination based on protected characteristics other than religion," citing *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189 (4th Cir. 2011), and *Rayburn v. Gen. Conf. of Seventh-Day*

Adventists, 772 F.2d 1164 (4th Cir. 1985).[5] *Id.* at *5. It also noted that "the reading urged by [defendant] would cause a relatively narrowly written exception to swallow all of Title VII, effectively exempting religious organizations wholesale." *Id.*

Here, the district court similarly adhered to the longstanding rule that the section 702 and 703 exemptions to Title VII do not authorize sex discrimination. It recognized that Defendants' request to broaden these exceptions "could lead to legal outcomes that completely erase Title VII's protections for protected groups working for religious institutions." JA1392; *see also* JA1393 ("Defendants' argument would let religious employers completely bypass Title VII liability, if they could prove their discrimination was related to a religious justification. This would erase protections against racial discrimination, sexism, gender discrimination, sexual orientation discrimination, and xenophobia by employers against hundreds of thousands of employees."). The district court also noted that this would allow employers to discriminate, for example, against interracial marriages by invoking religious beliefs—an unacceptable result under Title VII. JA1393.

[5] Notably, Defendants' primary support for an expansive reading of sections 702 and 703 comes from a concurrence in *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931 (7th Cir. 2022), which is not controlling precedent in the Seventh Circuit, let alone in this Circuit. *See* Opening Br. 31, 35.

Accordingly, religious employers may not discriminate against applicants or employees based on sex, including LGBTQ individuals. Religious employers cannot decide to ignore sex harassment directed at LGBTQ employees, to pay female employees less than male employees for similar work, or to limit health coverage benefits for pregnant employees. Such differential treatment based on sex goes well beyond Title VII's limited religious exceptions.

C. Improperly Expanding Title VII's Limited Exceptions Would Threaten Civil Rights Protections for over a Million Workers

The radical shift in Title VII's parameters sought by Defendants would risk hollowing out the extensive protections against employment discrimination on the basis of sex and other protected characteristics for a significant portion of the nation's workforce.

1. Ruling for Defendants Would Put over a Million Employees at Risk of Losing Protections Under Title VII

Title VII's protections apply to millions of people in the United States, including over a million people who work for religious employers. In 2019, "religious organizations" (e.g., churches, mosques, temples, and other places of worship) employed an estimated 1.73 million people nationwide.[6] *Religious*

[6] This figure, which comes from the Bureau of Labor Statistics and uses the North American Industry Classification System, does not include workers for religious organizations that operate educational institutions, health or social service institutions, merchandise stores, publishing houses, radio or television stations,

Organizations, DataUSA, https://datausa.io/profile/naics/religious-organizations (last visited Nov. 30, 2022). But of these, only 35.4% were clergy, and many workers at religious organizations have occupations that are unrelated to ministerial functions. For example, 17.7% work in sales and office occupations (e.g., secretaries and office clerks) and 13.1% work in service occupations (e.g., janitors and housekeeping cleaners). *Id.* Accordingly, there are hundreds of thousands of workers at religious organizations who are entitled to protections under Title VII and other federal civil rights laws.

Additionally, hundreds of thousands of employees work for hospitals that refer to themselves as religious employers. Nongovernment, nonprofit hospitals, including hospitals controlled by religious organizations, employed more than 3.9 million full-time personnel in 2020. Am. Hosp. Ass'n, *AHA Hospital Statistics* 10, 209–10 (2022 ed.). In 2017, Catholic hospitals alone employed 752,739 employees, many of whom do not share the religious beliefs of their employer. *See U.S. Catholic Health Care*, Cath. Health Ass'n U.S., https://www.chausa.org/docs/default-source/default-document-library/cha_2019_miniprofile.pdf?sfvrsn=0 (last visited Nov. 30, 2022). This number of workers is

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bingos, or casinos. *North American Industry Classification System (NAICS) Canada 2012: 813110 - Religious Organizations US*, Stat. Can., https://www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=118464&CVD=118471&CPV=813110&CST=01012012&CLV=5&MLV=5 (last modified Mar. 23, 2018).

expanding because the increase in hospital mergers has led to a larger percentage of religiously affiliated hospitals and health care facilities. In early 2019, for example, Catholic Health Initiatives and Dignity Health finalized a mega-merger; the deal created CommonSpirit Health, a nonprofit Catholic health system that maintains more than 700 care locations in 21 states and has 150,000 employees and 25,000 physicians. *CommonSpirit Health Launches as New Health System*, Dignity Health (Feb. 1, 2019), https://www.commonspirit.org/news-and-perspectives/news/commonspirit-health--launches-as-new-health-system.

Particularly relevant here, religiously affiliated elementary and secondary schools employed 325,980 teachers in the fall of 2019 and employed a total of 478,790 full-time staff during the 2011–2012 school year,[7] including principals, assistant principals, teachers, teacher aides, guidance counselors, librarians and media specialists, library and media center aides, nurses, student support staff, secretaries and clerical staff, food service personnel, and custodial and

[7] The most recent year for which comprehensive full-time staff data is available. This figure has likely grown since then. During the 2011–2012 school year, religiously affiliated elementary and secondary schools employed a total of 284,860 teachers. *Digest of Education Statistics: Table 205.60*, Nat'l Ctr. Educ. Stat. (June 2013), https://nces.ed.gov/programs/digest/d19/tables/dt19_205.60.asp?current=yes. By the fall of 2019, that number grew by more than 14% to 325,980. *Digest of Education Statistics: Table 205.40*, Nat'l Ctr. Educ. Stat. (Oct. 2021), https://nces.ed.gov/programs/digest/d21/tables/dt21_205.40.asp?current=yes. If other full-time staff grew by the same amount, there would have been 547,904 total full-time staff in 2019.

maintenance personnel. *Digest of Education Statistics: Table 205.40*, Nat'l Ctr. Educ. Stat. (Oct. 2021), https://nces.ed.gov/programs/digest/d21/tables/dt21_205.40.asp?current=yes; *Digest of Education Statistics: Table 205.60*, Nat'l Ctr. Educ. Stat. (June 2013), https://nces.ed.gov/programs/digest/d19/tables/dt19_205.60.asp?current=yes. And these figures do not include employees of the approximately 900 religiously affiliated postsecondary institutions in the United States. *See Digest of Education Statistics: Table 303.90*, Nat'l Ctr. Educ. Stat. (June 2017), https://nces.ed.gov/programs/digest/d16/tables/dt16_303.90.asp.

All told, between the hundreds of thousands of workers with non-ministerial positions employed by houses of worship and religiously affiliated hospitals and schools, at least a million—and potentially many more—non-ministerial workers stand to lose their Title VII protections if Defendants' arguments are adopted.

2. Expanding Title VII's Exceptions Would Exacerbate Already Rampant Discrimination Against Women, LGBTQ People, and People of Color, Among Others

Discrimination inflicts significant economic and other harms on its victims and on society—harms that are only worsened without the protections afforded by civil rights remedies. *See, e.g.*, U.S. Comm'n on C.R., *Working for Inclusion: Time for Congress to Enact Federal Legislation to Address Workplace Discrimination Against Lesbian, Gay, Bisexual, and Transgender Americans* 14 (2017), https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf

("Workplace discrimination . . . can cause job instability and high turnover, resulting in greater unemployment and poverty rates . . . ."); *see also The Equality Act of 2021: Expanding Antidiscrimination Protections for LGBTQ People and Women*, Nat'l Women's L. Ctr. (Jan. 2021), https://nwlc.org/wp-content/uploads/2021/01/Equality-Act-2021-1.28.21.pdf. Given the growing number of workers at employers that may seek to claim broader religious exemptions, Title VII plays a critical role in protecting these workers from discrimination. Expanding Title VII's limited exceptions would exacerbate harm to those who are most vulnerable to workplace discrimination, such as women, LGBTQ people, immigrants, people of color, and those at the intersections of these and other marginalized identities.

In the context of religious employers, women would overwhelmingly pay the price of an inappropriate expansion of Title VII's exceptions, because women compose the vast majority of elementary and secondary school teachers and healthcare workers. *See Labor Force Statistics from the Current Population Survey: Household Data Annual Averages*, U.S. Bureau Lab. Stat., https://www.bls.gov/cps/cpsaat11.htm (last modified Jan. 20, 2022). And women continue to face outsized risks of discrimination and entrenched inequities in the workplace. For example, women in the United States who work full time, year round are typically paid only eighty-four cents for every dollar paid to their male counterparts. *The Wage Gap by State for Women Overall*, Nat'l Women's L. Ctr.

(Sept. 16, 2022), https://nwlc.org/resource/wage-gap-state-women-overall/. The gender pay gap is even starker for Black women and Latinas, who typically make only sixty-four cents and fifty-seven cents, respectively, for every dollar paid to their white, non-Hispanic male counterparts. *The Wage Gap: The Who, How, Why, and What to Do*, Nat'l Women's L. Ctr. 1 (Sept. 2021), https://nwlc.org/wp-content/uploads/2021/11/2021-who-what-why-wage-gap.pdf. Additionally, sexual harassment remains far too common in workplaces across the country. From 2018 to 2021, sexual harassment charges constituted more than one quarter of all harassment charges reported to the Equal Employment Opportunity Commission, with women filing nearly 80% of those charges. *Sexual Harassment in Our Nation's Workplaces*, U.S. Equal Emp. Opportunity Comm'n (Apr. 2022), https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces.

LGBTQ people have also long experienced widespread employment discrimination. A study by the National Center for Transgender Equality found that 27% of transgender individuals who held or applied for a job reported being fired, denied a promotion, or not hired for a job they applied for because of their gender identity or expression. Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 148 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. An aggregation of studies found that lesbian, gay, and bisexual workers commonly

reported experiencing employment discrimination, with as many as 68% reporting such discrimination and as many as 41% reporting that it took the form of verbal or physical abuse or vandalism in their workplace. M.V. Lee Badgett et al., Williams Inst., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, at i (2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bias-Workplace-SOGI-Discrim-Jun-2007.pdf.

Additionally, race discrimination, including in the workplace, remains all too prevalent in the United States. More than half of Black workers indicate they have been discriminated against in applying for jobs (56%) or in compensation or promotion (57%). Nat'l Pub. Radio et al., *Discrimination in America: Experiences and Views of African Americans* 1 (Oct. 2017), https://media.npr.org/assets/img/2017/10/23/discriminationpoll-african-americans.pdf. More than three in ten Latinos report having experienced workplace discrimination in hiring (33%) or in compensation or promotion (32%). *Poll Finds One-Third of Latinos Say They Have Experienced Discrimination in Their Jobs and When Seeking Housing*, Harv. T.H. Chan Sch. Pub. Health (Nov. 1, 2017), https://www.hsph.harvard.edu/news/press-releases/poll-latinos-discrimination/. Almost one-third of Native Americans report being discriminated against in hiring (31%) or in compensation or promotion (33%). *Poll Finds More Than One-Third of Native Americans Report Slurs, Violence, Harassment, and Being Discriminated Against in the Workplace*,

Harv. T.H. Chan Sch. Pub. Health (Nov. 14, 2017), https://www.hsph.harvard.edu/news/press-releases/poll-native-americans-discrimination/. And a quarter or more of Asian Americans report being discriminated against in hiring (27%) or in compensation or promotion (25%). *Poll Finds That at Least One Quarter of Asian Americans Report Being Personally Discriminated Against in the Workplace and Housing*, Harv. T.H. Chan Sch. Pub. Health (Dec. 4, 2017), https://www.hsph.harvard.edu/news/press-releases/poll-asian-americans-discrimination/.

In the face of this rampant discrimination, women, LGBTQ people, people of color, and those at the intersections of these and other identities need greater, not fewer, civil rights remedies. Defendants' request for a dramatic reduction of Title VII's core workplace civil rights protections would leave employees who are already at risk of discrimination without a civil rights remedy.

3. There Is No Limiting Principle to Defendants' Expansive Interpretation of Title VII, Which Would Permit Forms of Discrimination by Religious Employers That Have Been Prohibited for Decades

Defendants argue that they are exempt from Title VII if they articulate a reason for firing an employee that relates to the employee's religious belief, observance, or practice. Opening Br. 24–25. Not so. Courts have long held that the appropriate framework is the "but-for causation" test. *Bostock*, 140 S. Ct. at 1739. This "means a defendant cannot avoid liability just by citing some *other* factor that

contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* In other words, Defendants cannot avoid Title VII liability by claiming that they fired Mr. Billard because of his religious belief and practice regarding marriage if sex was a but-for cause of their decision.

Here, the district court correctly held that "Defendants cannot escape Title VII liability by recharacterizing Plaintiff's announcement of his engagement as 'advocacy,'" because "Plaintiff's engagement was only considered advocacy because of sex." JA1385. On appeal, Defendants do not dispute the district court's findings that if "Plaintiff were a woman who posted on Facebook that she was getting married to her husband, Defendants would not have interpreted her announcement as 'advocacy' for or against the Catholic Church." JA1385. Nor do they dispute that "while they fired Plaintiff for his actions, they would only have reprimanded"—not fired—"a straight teacher who spoke positively about same-sex marriage." JA1386. It is uncontested, then, that Mr. Billard's sex was a but-for cause of his termination.

Courts routinely resolve these types of lawsuits without infringing on religious employers' First Amendment rights. *E.g.*, *DeMarco*, 4 F.3d at 171 ("[I]n those cases where a defendant proffers a religious purpose for its allegedly discriminatory employment action, a plaintiff will usually be able to challenge as

pretextual the employer's justification without calling into question the value or truthfulness of religious doctrine."). For example, an entire line of caselaw permits employees who were fired because they became pregnant to sue religious employers for sex discrimination, even where the employer contends that the employee was fired for violating ostensibly sex-neutral rules against in vitro fertilization or premarital sex, if the employee produces evidence that such policies are not applied equally to male and female employees.[8] *See Cline*, 206 F.3d at 658–59, 667; *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1149 (D. Or. 2017); *Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1171,

[8] Defendants cite *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130 (3d Cir. 2006), for the proposition that sex-discrimination claims against religious employers are barred where the employer offers a religious justification for its decision, even if the plaintiff alleges worse treatment than similarly situated employees of the opposite sex. Opening Br. 29–30. This grossly distorts the holding of that case. In *Curay-Cramer*, the court held that it could not assess the relative severity of the plaintiff's conduct—signing a pro-choice advertisement in a newspaper—against the alleged comparators' conduct—being Jewish and opposing the war in Iraq—without "meddling in matters related to a religious organization's ability to define the parameters of what constitutes orthodoxy." 450 F.3d at 141. Defendants conspicuously ignore the portion of *Curay-Cramer* that held, "Requiring a religious employer to explain why it has treated two employees who have committed essentially the same offense differently poses no threat to the employer's ability to create and maintain communities of the faithful" and "we do not hold that a plaintiff seeking to establish pretext by a religious employer need establish that the comparators engaged in precisely the same conduct as that said to support the adverse employment action against the plaintiff. Whether the proffered comparable conduct is sufficiently similar to avoid raising substantial constitutional questions must be judged on a case-by-case basis." *Id.* at 141–42.

1178–79 (N.D. Ind. 2014); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 223–24 (E.D.N.Y. 2006) ("[W]hile a religious school employer may validly seek to impose moral doctrine upon its teaching staff, punishment singularly directed at the Hester Prynnes, without regard to the Arthur Dimmesdales, is not permissible."), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); *Vigars v. Valley Christian Ctr. of Dublin*, 805 F. Supp. 802, 810 (N.D. Cal. 1992); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 271 (N.D. Iowa 1980). Defendants' overly expansive theory of Title VII's religious exceptions would abrogate all of these cases, because a pregnant employee could be viewed as "advocating" against religious views on in vitro fertilization or premarital sex merely by showing up to work. Such a policy would be untenable because it would apply only to pregnant employees and therefore discriminate based on sex. *See Cline*, 206 F.3d at 658. Defendants' suggested rule, which would apply only to LGBTQ employees, likewise discriminates based on sex. *See Bostock*, 140 S. Ct. at 1744.

This case concerns the fundamental right to marry, one of many "personal choices central to individual dignity and autonomy." *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015). Notably, some religious doctrines not only oppose same-sex marriage, but interracial marriage as well. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting a trial judge's religious justification for enforcing a ban on

interracial marriages). If an employee were to announce an intention to marry a person of a different race, Defendants' position here would render that deeply intimate decision beyond Title VII's protection if an employer held an equally sincere religious objection to it.

Indeed, if Defendants' arguments were accepted, they could hardly be limited to the particular religious beliefs Defendants hold. Communication about myriad aspects of an individual's daily life could be characterized as "advocacy" against or otherwise contrary to a religious entity's views. A female employee who signs a form using her surname instead of her husband's could be fired because she was "advocating" against religious views that wives should submit to their husbands. *Contra Allen*, 553 F.2d at 524–25. A woman who continues to work after marriage or while raising children could be fired for talking about her family while at work because this "advocates" against religious views that men are the head of the household and women should raise children. *Contra Fremont Christian Sch.*, 781 F.2d at 1364–65; *Sprogis*, 444 F.2d at 1197. A woman with pre-school-age children could be denied a job because the mere fact that she applied constitutes "advocacy" for prioritizing a woman's professional responsibilities over familial obligations. *Contra Phillips*, 400 U.S. at 544. Or a female employee requesting equal pay with a male coworker could be fired for "advocating" against religious views about the roles and financial obligations of men and women.

Contra Pac. Press Publ'g Ass'n, 676 F.2d at 1274–76. Religious employers could claim that any of these actions fall within Title VII's religious exceptions, even those that are properly understood as textbook illegal sex discrimination.

Allowing religious employers to discriminate by recharacterizing any aspect of an employee's life as "advocacy" against or otherwise contrary to the employer's religious beliefs would upend decades of caselaw. There is a rich variety of religious beliefs in the United States. Some religions and religious sects have rules or requirements relating to proper clothing, the freedom to drive, or where someone can go and with whom they may have contact when menstruating. To be sure, Defendants' reading of section 702 cannot be confined to Defendants' particular religious beliefs, and courts cannot pick and choose which beliefs are "honorable." Some religions promote the view that women's workplace roles should be limited to avoid being alone with men who are not their husbands. Some people continue to hold religious objections to interracial dating or to racial equality. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 n.5 (1968) (per curiam) (addressing a faith-based opposition to racial integration). In fact, any aspect of an employee's life could be reinterpreted as "advocacy" against or otherwise contrary to an employer's religious views, which would eviscerate Title VII's protections for individuals who work for religious employers.

Ultimately, the expansive religious exemption to Title VII that Defendants seek would contravene Congress's intent in enacting Title VII, as expressed by its text, and would upend decades of caselaw prohibiting religious employers from workplace discrimination based on race, color, sex, or national origin. Broadening Title VII's limited exception would also harm the million or more workers who need our nation's civil rights protections the most, including women, LGBTQ people, people of color, and those at the intersections of these and other identities.

CONCLUSION

For the foregoing reasons, *amici* respectfully support Plaintiff-Appellee's request that the Court affirm the district court's order and rule in favor of Mr. Billard.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Courtney M. Dankworth, hereby certify that this brief contains 6,499 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6), prepared using MS Word, Times New Roman, 14 pt., and the brief complies with the word limits of Fed. R. App. P. 29(a)(5).

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