No. 22-1440

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

LONNIE BILLARD,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from a Judgment of the United States District Court
for the Western District of North Carolina (before the Hon. Max O. Cogburn Jr.)
Case No. 3:17-cv-0011

BRIEF FOR *AMICI CURIAE* MASSACHUSETTS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, AND WASHINGTON IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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INTERESTS OF AMICI

The *Amici* States—Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington[1]—share sovereign and compelling interests in protecting workers within our jurisdictions from discrimination in employment. States have long been at the forefront of fighting employment discrimination. "[B]y the time Congress passed Title VII to the Civil Rights Act of 1964, nearly two dozen states had already enacted laws mandating equal treatment in employment and engaged in nearly two decades' worth of enforcement efforts." David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 Stan. L. Rev. 1071, 1073 (2011). Today, nearly every State has some form of employment discrimination law in place.[2]

These efforts to level the playing field in the labor market have borne fruit. According to one researcher, "real wages among employed, black, male household

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[1] *Amici* States file as of right pursuant to Fed. R. App. P. 29(a)(2).

[2] *See* National Conference of State Legislatures, "State Employment-Related Discrimination Statutes" (July 2015), https://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf. All URLs cited in this brief were last visited on November 29, 2022.

heads aged 20 to 60 years old increased sharply during the 1960s across all ages and educational levels." Jenny Bourne, *"A Stone of Hope": The Civil Rights Act of 1964 and Its Impact on the Economic Status of Black Americans*, 74 La. L. Rev. 1195, 1195-96 (2014). Those gains have continued in more recent years among a wide variety of groups protected by employment discrimination laws. *See, e.g.*, EEOC, *American Experiences versus American Expectations* (2015) (collecting data from 1965 through 2015 showing that African Americans, Hispanics, Asian Americans, American Indians/Alaskan Natives, and women gained in most, but not all, of nine different job categories), https://www.eeoc.gov/special-report/american-experiences-versus-american-expectations.

We also share interests in upholding the rights protected by the First Amendment. We respect and do not seek to abridge the right to hold and express views regarding the nature of marriage, including views founded in religious faith. But the expansive theory of the First Amendment's right of expressive association that Defendants advance poses a unique threat to our ability to combat employment discrimination. We urge this Court to reject it.[3]

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[3] For the reasons stated in Billard's brief on appeal, we agree with the district court that Defendants are also not shielded from liability by Title VII's limited exemptions for religious organizations, by the doctrine of church autonomy, or by the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq*.

SUMMARY OF ARGUMENT

The First Amendment right of expressive association does not apply to the employer-employee relationship at issue in this case. That right is rooted in the First Amendment's freedom of speech and assembly clauses, and thus applies to all employers; it confers no special privileges on religious as opposed to secular entities. The First Amendment's religion clauses do confer upon religious employers a special exemption from employment discrimination laws for "ministerial" employees, but by stipulation that exemption is inapplicable here.

The drastic expansion of expressive associational rights that Defendants posit is unsupported by case law, which has generally concerned group membership rather than employment. Neither the Supreme Court nor this Court has recognized an expressive associational right for employers to engage in otherwise unlawful employment discrimination. And, under the Supreme Court's expressive association cases, courts should not blindly defer to an organization's assessment of whether having an employee on its payroll impairs its message.

Accepting Defendants' expansive theory of expressive association would badly undermine employment discrimination laws. If that theory is correct, there is nothing to stop a white supremacist employer from declaring an "expressive purpose" not to employ Black people, and thereby exempting himself from liability under Title VII.

Even if the right of expressive association applies here, it must yield to laws that satisfy strict scrutiny, and Title VII easily does so. The governmental interest in eradicating employment discrimination on the basis of sex is compelling and unrelated to the suppression of ideas, and Title VII and similar laws are narrowly tailored to advance that interest.

ARGUMENT

Defendants' claim that the First Amendment right of expressive association shields them from Title VII liability for terminating Billard should be rejected. There is no doubt that Defendants terminated Billard "because of … sex," an act of invidious discrimination that federal law expressly forbids. 42 U.S.C. § 2000e-2(a)(1); *see Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).[4] And, as the Supreme Court has repeatedly stated, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *see also, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (quoting *Norwood*).

[4] Any argument that Billard could be terminated simply for having entered into a same-sex marriage cannot survive *Bostock*'s holding that Title VII prohibits an employer from "fir[ing] [a] person for traits or actions it would not have questioned in members of a different sex." 140 S. Ct. at 1737. Marrying a man is obviously such an "action." On appeal, Defendants have abandoned the argument that they did not terminate Billard "because of … sex." *See* Pl. Br. 10-13.

In this case, the district court correctly concluded that the right of expressive association does not apply to Defendants' action, and even if it does, the application of Title VII to Billard's termination readily survives strict scrutiny. Accordingly, *Amici* States urge this Court to affirm the district court's judgment.

I. The First Amendment Right of Expressive Association Does Not Apply to the Employer-Employee Relationship At Issue In This Case.

Defendants' theory of expressive association is astonishing in its breadth, and if accepted, would dramatically constrict the States' ability to enforce employment discrimination laws. Defendants, as religious organizations, are already exempt from employment discrimination laws in many cases due to the so-called "ministerial exception." That exception, rooted in the First Amendment's religion clauses, prohibits secular courts from involving themselves in "the selection and supervision of" employees whose "work lie[s] at the core of [religious organizations'] mission." *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

But Defendants, perhaps now regretting their litigation choice to forego reliance on the ministerial exception, JA0031, argue that they *also* have the unfettered right to discriminate against even employees like Billard who *do not* "serve[] as a messenger or teacher of [the] faith." *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 199 (2012) (Alito, J., concurring). In Defendants' view, if they determine that having such a non-

"ministerial" employee on their payroll would impair their expression, that is sufficient to invoke their First Amendment "freedom not to associate." Def. Br. 48-49.

This radical view of expressive associational rights finds no support in the case law of the Supreme Court or this Court. And it would wreak havoc on the States' ability to ensure that employment opportunities remain open to all. This Court should reject Defendants' effort to weaponize the First Amendment against fair employment practices designed to ensure the critical goal of equal employment opportunity.

A. Neither the Supreme Court nor this Court has ever upheld an expressive association claim in the context of employment.

Defendants' expressive association claim depends on their misapplication of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to the facts of this case. *See* Def. Br. 46. But *Dale* is about *group membership*, not *employment*, like every expressive association case preceding it—with one exception, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), in which the Court rejected out of hand an employer's expressive association claim. *See id.* at 78 (unanimously rejecting claim that holding law firm liable for sex discrimination in partnership admission "would infringe constitutional rights of expression or association"). Similarly, this Court, while recognizing that the ministerial exception "shelters certain employment decisions from the scrutiny of civil authorities," has explained that

"[w]here no spiritual function is involved, the First Amendment does not stay the application of a generally applicable law such as Title VII to the religious employer unless Congress so provides." *EEOC v. Roman Cath. Diocese of Raleigh,* 213 F.3d 795, 801 (4th Cir. 2000); *see also Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985) (noting that religious entities' "employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions"). This Court should decline Defendants' invitation to upset those well-reasoned decisions' careful balancing of "the most cherished principles of religious liberty" against "the profound state interest in 'assuring equal employment opportunities for all, regardless of race, sex, or national origin.'" *Roman Cath. Diocese*, 213 F.3d at 801 (quoting *Rayburn*, 772 F.2d at 1168).

The case that coined the phrase "freedom not to associate," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), concerned "members of a private organization," *id.* at 612, and asked whether a law "requiring the [organization] to admit women as full voting members" violated the First Amendment, *id*. The Court concluded that it did not, noting that the organization routinely engaged in "protected expression," but finding "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.* at

626-27. Three years later, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), again asked whether a state law could require the admission of women to membership in a private organization. The Court readily concluded that the law was consistent with the right of expressive association, holding that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." *Id.* at 548.

"Freedom not to associate" was again at issue in *New York State Club Association v. City of New York*, 487 U.S. 1 (1988) ("*NYSCA*"), in which private clubs challenged New York City's law requiring that membership in most private clubs be open to all. Like *Roberts* and *Rotary International*, *NYSCA* did not concern the employment context, and also like those cases, it rejected the First Amendment challenge. *Id.* at 11-14. In the course of doing so, the Court recognized that "[i]t may well be that a considerable amount of private or intimate association occurs" in clubs covered by the law, "but that fact alone does not afford the entity as a whole *any constitutional immunity* to practice discrimination *when the government has barred it from doing so*." *Id.* at 12 (emphasis added) (citing *Hishon*, 467 U.S. at 78). Similarly, the Court rejected the notion that "in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution."

Id. at 13 (citing *Hishon*, 467 U.S. at 78; *Norwood*, 413 U.S. at 470; and *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)). The citation to *Norwood* reaffirmed that case's declaration that "[i]nvidious private discrimination … has never been accorded affirmative constitutional protections." *Norwood*, 413 U.S. at 470.

Finally, *NYSCA* declared it "conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes, and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot *confine its membership* to those who share the same sex, for example, or the same religion." 487 U.S. at 13 (emphasis added). The Court's linkage of the relationship between an organization's expressive purposes with its ability to "confine its membership" emphasized once again that *NYSCA* (like *Roberts* and *Rotary International*) was about the relationship between members, not between employer and employee.

Several years later, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Court held that a state public accommodations law could not mandate a particular contingent's inclusion in a parade because the parade was "inherent[ly] expressive[]," *id.* at 568, as was the contingent seeking inclusion, *id.* at 570. Thus, requiring the contingent's inclusion "requir[ed] [the sponsors] to alter the expressive content of their parade." *Id.* at

572-73. *Hurley* contrasted the situation before it with *NYSCA*, explaining that there, even though the clubs might have been "engaged in expressive activity[,] compelled access … did not trespass on the organization's message itself," whereas "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81. Thus, *Hurley* allowed for the possibility that *membership* decisions could implicate expressive associational rights, but *Hurley* nowhere suggested that *employment* decisions could.

That brings us to *Boy Scouts of America v. Dale*—which, like *Roberts*, *Rotary International*, *NYSCA*, and *Hurley* before it, had nothing to do with employment, but rather concerned a private organization's membership and leadership decisions. In *Dale*, the Boy Scouts had "revoked" Dale's "adult membership" together with his "volunteer" position of "assistant scoutmaster," upon learning that he was "an avowed homosexual and gay rights activist." 530 U.S. at 644, 651; *see also id.* at 645 (noting that Dale had received a letter stating "that the Boy Scouts 'specifically forbid *membership* to homosexuals'" (quoting the record appendix) (emphasis added)). The question in the case was whether applying a state antidiscrimination law to the Boy Scouts' membership decision violated the Boy Scouts' "freedom not to associate"; the Court held that it did. *Id.* at 644. In support of its holding, the Court quoted *Roberts* for the proposition that

governmental enforcement of a "'regulation that forces the group to *accept members* it does not desire'" may unconstitutionally burden expressive associational rights. *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623) (emphasis added).

The record in *Dale* was especially clear that the issue was *membership* and *leadership* within the organization, as opposed to employment. For example, the Court looked to a "position statement" declaring that "'[t]he Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right.'" *Id.* at 651-52. A later "position statement" declared that the organization "'do[es] not allow for the registration of avowed homosexuals as *members* or as *leaders* of the BSA.'" *Id.* (emphasis added). And the record was similarly clear that the Boy Scouts regarded persons in the (volunteer) position of assistant scoutmaster as "leaders" responsible for transmitting the organization's "values." *See, e.g.*, *id.* at 649-50 ("During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values—both expressly and by example.").

In contrast, the Boy Scouts had acknowledged that "'it would be necessary for the Boy Scouts of America to obey'" any law that "'prohibits discrimination against individual's employment upon the basis of homosexuality.'" *Id.* at 672 (Stevens, J., dissenting) (quoting Boy Scouts' position statement in the record

appendix). Thus, while the Boy Scouts argued strenuously that the First Amendment guaranteed the organization the right to make any membership and leadership decisions it liked, the Boy Scouts also acknowledged that the organization could lawfully be subjected to state or federal employment discrimination laws—despite its stated view that "homosexual[s]" should be terminated from employment "in the absence of any law to the contrary." *Id.*

In short, *Dale*—like its predecessor cases about group membership—has little to say about the interplay between expressive associational rights and employment discrimination laws. At most, *Dale* stands for the proposition that *if* an employment position is *also* a "leadership" position within the organization—i.e., a position that involves "inculcat[ing]" the organization's "values," *Dale*, 530 U.S. at 649-50—then expressive associational rights could come into play. *See, e.g.*, *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003) (noting that "under any reading of *Dale*" the Boy Scouts' exclusion of "gay activists from leadership positions" would be "constitutionally protected"); *Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Hum. Relations*, 748 N.E.2d 759, 768-69 (Ill. App. 2001) (discussing "nonexpressive positions within [the Boy Scouts] where the presence of a homosexual would not 'derogate from [their] expressive message'") (quoting *Dale*, 530 U.S. at 661). And even in such a case (which neither the Supreme Court nor this Court has had occasion to

consider), the significant differences between employment and group membership would require careful examination in order to determine whether and how expressive associational rights applied.[5] Defendants' effort to extend the *Roberts-Dale* line of cases mechanically to all employees misreads those cases and should be rejected. *See, e.g.*, *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1209 (S.D. Ind. 2020) ("*Dale* did not arise from the employment context. The plaintiff sought membership in a private organization. The freedom of association cases relied upon in *Dale* reveal the doctrine's applicability to parade groups, political parties, and other non-employment contexts."), *app. dism'd*, No. 20-3265, 2021 WL 9181051 (7th Cir. Jul. 22, 2021).

[5] Commentators from across the ideological spectrum have recognized that employment differs meaningfully from group membership, and that principles applicable in one context do not necessarily carry over to the other. *See, e.g.*, Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225, 260-61 (2013) ("[A] commercial enterprise's hiring and retention of an employee—at least where the employee is not hired specifically to express a message—seems a far cry from an expressive association's decision to admit an individual to membership."); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 675-76, 693 (1996) (arguing that "where the alleged exclusion or discrimination in *membership* [on the basis of race, sex, or sexual orientation] is the consequence of a sincere religious belief, the exclusion must (outside of a commercial context) be permitted as part of the group's First Amendment free speech right of expressive disassociation," but also that "[f]ew these days would take seriously an *employer's* argument that racially discriminatory employment practices are protected as 'free speech'") (emphasis added).

B. Courts do not blindly defer to an organization's assessment of when its expressive associational rights are impaired.

Defendants misinterpret *Dale* in arguing that this Court cannot question their own view that employing Billard would impair their ability to express their opinions regarding homosexuality and same-sex marriage. Def. Br. 48. Even in the membership context, *Dale* itself squarely rejected the notion that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Dale*, 530 U.S. at 653. While *Dale* does indicate that courts "give deference to an association's view of what would impair its expression," *id.*, "deference does not imply … abdication," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Indeed, *Dale* accepted the Boy Scouts' view only after independently concluding that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message" that it did not wish to send. *Dale*, 530 U.S. at 653. And *Dale* did not address whether similar "deference" applies at all in the employment context.

The Court further clarified this point in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), in which a group of law schools claimed that a law requiring them to allow military recruiters on their campuses violated their expressive associational rights. The Court rejected the claim, emphasizing the "critical" distinction between *Dale* and situations not involving a

law that "force[s]" an organization "to *accept members* it does not desire." *Id.* at 69 (quoting *Dale*, 530 U.S. at 648) (emphasis added; internal quotation marks omitted). Under *Rumsfeld*, unless outsiders are "trying … to become *members* of the [organization]'s expressive association," *id.* at 69 (emphasis added), associational rights are not implicated—even if the association itself believes otherwise. Thus, the Court explained, "[t]he law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'" *Id.* (quoting *Dale*, 530 U.S. at 653) (emphasis in original; citation omitted). Similarly, here, the defendants *say* that employing Billard impairs their own expression, but under *Rumsfeld*, that is not sufficient where no law is forcing Defendants to accept Billard as a "member" or to place him in a leadership position with responsibility for inculcating organizational values.

In any event, Defendants have undermined any argument for deference by their own statements in this litigation. While they contend that having to "employ teachers who publicly contradicted the faith" would "'irreparably damage[]' [their] religious mission," Def. Br. 48-49, they admitted in discovery that they would not fire a heterosexual employee who made public statements in support of same-sex

marriage, JA0064. This concession lays bare that Defendants' decision to fire Billard hinged solely on his status as a man in a same-sex marriage, not on any advocacy he undertook in contravention of church teachings.

C. Defendants' theory of expressive association would badly undermine employment discrimination laws.

Amici States are deeply concerned that Defendants' theory of expressive association, if accepted, would harm their ability to ensure equal employment opportunity within their jurisdictions. "The right to freedom of association is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor*, 565 U.S. at 189. If *any* employer could invoke an "expressive purpose" not to employ certain types of people, and thereby claim exemption from employment discrimination laws under the "freedom not to associate," the results could be catastrophic and widespread.

This concern is not hypothetical. One federal court recently certified a nationwide class of ordinary businesses—"for-profit entities producing a secular product"—whose leaders do not wish to employ LGBTQ+ individuals, and has concluded that these businesses are "engaged in overt expression regarding [their] religious views of homosexuality and transgender behavior." *Bear Creek Bible Church v. E.E.O.C.*, 571 F. Supp. 3d 571, 600, 615 (N.D. Tex. 2021), *appeal pending*, No. 22-10145 (5th Cir.). Therefore, the court concluded, all such employers have the expressive associational right to discriminate against LGBTQ+

persons in employment notwithstanding Title VII. *Id.* at 616 (concluding that the government "do[es] not have a compelling interest in forcing Religious Business-Type Employers to hire and retain individuals that engage in conduct that is contrary to the employers' expressive interests").

It is difficult to overstate the threat that the expansive theory of expressive associational rights adopted in *Bear Creek* poses to the States' ability to enforce employment discrimination laws. Again, both religious and non-religious groups enjoy expressive associational rights. *See Hosanna-Tabor*, 565 U.S. at 189.[6] The reasoning in *Bear Creek* is therefore not limited to business owners who wish not to employ LGBTQ+ persons for religious reasons; *any* sincerely-held expressive purpose of not wishing to associate with LGBTQ+ people—or any other type of people—would seem to suffice. Under Defendants' theory of expressive

[6] Indeed, most expressive association cases have involved claims based not on religion, but rather on a claimed secular "expressive purpose" that requires excluding certain kinds of people from group membership. *See, e.g.*, *Dale*, 530 U.S. at 654 ("[T]he Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members…."); *Rotary Int'l*, 481 U.S. at 541 (noting that "the General Secretary of Rotary International[] testified that the exclusion of women results in an 'aspect of fellowship … that is enjoyed by the present male membership'"); *Roberts*, 468 U.S. at 628 (noting Jaycees' "contention that, by allowing women to vote, application of [state antidiscrimination law] will change the content or impact of the organization's speech"); *Hishon*, 467 U.S. at 78 (noting law firm's argument that requiring it not to discriminate on the basis of sex would interfere with lawyers' ability to "make a distinctive contribution to the ideas and beliefs of our society") (citation and internal quotation marks omitted).

association, then, there is nothing to stop a business owner who sincerely believes in white supremacy from invoking his "freedom not to associate" in refusing to hire Black employees, or a business owner who sincerely believes that Jews are responsible for the crucifixion of Jesus from refusing to hire them. Defendants' theory of expressive association thus threatens to make a mockery of employment discrimination laws by rendering those laws unenforceable in precisely the situations where they are most needed.

II. Employment Discrimination Laws Like Title VII Satisfy Any Level of Constitutional Scrutiny.

For the above reasons, the employment relationship at issue here does not implicate the right to expressive association—but even if it did, Title VII and similar laws forbidding employment discrimination on the basis of sex and other protected characteristics pass constitutional muster. Infringements upon the right to expressive association are justified where they "serve compelling state interests[] unrelated to the suppression of ideas" and where that interest cannot be vindicated "through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. That standard is easily met here.

A. The government has a compelling interest in eliminating sex discrimination in employment, and Title VII and similar statutes are narrowly tailored to that goal.

It is beyond meaningful dispute that federal and state governments have a compelling interest in prohibiting discrimination in employment. This Court itself

has already recognized as much, holding in litigation over the Free Exercise Clause that "Title VII is an interest of the highest order," such that the statute is "properly applied to the secular employment decisions of a religious institution, such as those relating to a secular teacher in a church-approved school." *Rayburn*, 772 F.2d at 1169; *see also Roman Cath. Diocese*, 213 F.3d at 801 (noting "the profound state interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin") (citation and internal quotation marks omitted). So too have numerous other circuits. *See, e.g.*, *E.E.O.C. v. R.G. & G.R Harris Funeral Homes, Inc.* ("*Harris Funeral*"), 884 F.3d 560, 591 & n.12 (6th Cir. 2018) (noting the EEOC's "compelling interest in combating discrimination in the workforce" and citing other case law holding that "Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute"), *aff'd*, *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) ("Congress' purpose to end employment discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991); *E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms."). Indeed,

Defendants themselves admitted repeatedly in proceedings below that "the government certainly has a compelling interest in protecting employees from discrimination in general." Dkt. 63 (Defs.' Supplemental MSJ Mem.) at 19; *see also* Dkt. 30 (Defs.' MSJ Mem.) at 16 ("Certainly, the government has an interest in ending certain forms of discrimination prohibited by Title VII.").

This universally recognized governmental interest in combating employment discrimination is grounded in the significant harms such discrimination creates for both individual citizens and the marketplace at large. *See, e.g.*, *United States v. Burke*, 504 U.S. 229, 238 (1992) ("[D]iscrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is … an invidious practice that causes grave harm to its victims."). At the individual level, employment discrimination "depriv[es an affected employee or job applicant] of her livelihood and harm[s] her sense of self-worth." *Harris Funeral*, 884 F.3d at 592. Indeed, in amending Title VII with the Civil Rights Act of 1991, Congress noted that employment discrimination leads to "humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries." H. Rep. 102-40, 1991 U.S.C.C.A.N. 549, 603 (Apr. 24, 1991). But Title VII serves "societal as well as personal interests." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801

(1973). Left unchecked, racially discriminatory employment practices "foster[] racially stratified job environments to the disadvantage of minority citizens"; the same is of course true of sex discrimination. *Id.* at 800.

Unfortunately, in the States' experience, "workplace discrimination remains a pervasive problem."[7] Over 60% of American workers report that they have experienced or witnessed discrimination in the workplace based on race, age, gender, or LGBTQ+ status.[8] Research further indicates that Black workers consistently experience higher unemployment and underemployment rates than white workers across education levels, and "the fact that the country's most highly educated black workers are still less likely to be employed than their white counterparts, and when they are employed, are less likely to be employed in a job that is consistent with their level of education, strongly suggests that racial discrimination remains a major failure of an otherwise tight labor market."[9]

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[7] Desta Fekedulegn *et al.*, *Prevalence of workplace discrimination and mistreatment in a national sample of older U.S. workers: The REGARDS cohort study*, SSM – Population Health vol. 8 (2019), at 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6612926/pdf/main.pdf.

[8] Glassdoor, *Diversity and Inclusion Study 2019*, at 2, https://about-content.glassdoor.com//app/uploads/sites/2/2019/10/Glassdoor-Diversity-Survey-Supplement-1.pdf.

[9] Jhacova Williams and Valerie Wilson, *Black workers endure persistent racial disparities in employment outcomes*, Economic Policy Institute Report (Aug. 27, 2019), at 4, https://www.epi.org/publication/labor-day-2019-racial-disparities-in-employment.

Similarly, studies consistently report the existence of a substantial wage gap between men and women.[10] The gap is even wider for some women of color.[11] Thus, women from different backgrounds experience different wage gaps—some far worse, likely reflecting, at least in part, pervasive race discrimination as well as gender discrimination. While the overall gender pay gap does in part reflect differences between the male and female workforces, including differences in education levels, occupations, and labor-market experience, as much as 38% of the wage gap remains even after controlling for these factors.[12] And discrimination against LGBTQ+ workers is pervasive and persistent as well. Nearly half of LGBTQ+ workers in a recent survey reported having suffered adverse treatment at

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[10] U.S. Bureau of Labor Statistics, *Highlights of Women's Earnings in 2018*, at 1 (Nov. 2019) ("BLS Report"), https://www.bls.gov/opub/reports/womens-earnings/2018/pdf/home.pdf (noting that women working full-time earn only 81% of what men earn, and noting lack of change since 2004).

[11] Institute for Women's Policy Research, *The Gender Wage Gap: 2018, Earnings Differences by Gender, Race, and Ethnicity*, at 2 (Sept. 2019), https://iwpr.org/wp-content/uploads/2020/08/C484.pdf ("Hispanic women earned just 54.5 percent (up from 53.2 in 2017) and Black women earned just 61.8 percent (up from 61.3 percent in 2017) of White men's median annual earnings in 2018.").

[12] Francine D. Blau & Lawrence M. Khan, *The Gender Wage Gap: Extent, Trends & Explanations*, Nat'l Bureau of Econ. Res., at 8 (Jan. 2016), http://www.nber.org/papers/w21913.

work because of their sexual orientation or gender identity, and nearly a third reported such treatment within the last five years.[13]

Furthermore, enforcement activities by federal and state agencies charged with protecting equal opportunity in employment continue to result in many millions of dollars in recoveries to victims, reflecting significant ongoing workplace discrimination[14]—including millions of dollars for LGBTQ+ victims.[15] And yet, these recoveries no doubt represent only a fraction of all workplace discrimination, much of which goes unredressed. The essential work of eradicating discrimination in employment is thus far from complete, and the States continue to have a critical interest in fighting this problem.

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[13] Brad Sears *et al.*, *LGBT People's Experiences of Workplace Discrimination and Harassment*, Williams Institute, at 1 (Sept. 2021), https://www.sjsu.edu/ccll/docs/Workplace-Discrimination-Sep-2021.pdf.

[14] *See, e.g.*, EEOC, *Title VII of the Civil Rights Act of 1964 Charges* (2021), https://www.eeoc.gov/statistics/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges (administrative resolutions); EEOC, *EEOC Litigation Statistics, FY 1997 through FY 2021* (2021), https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2019 (federal court actions); Mass. Comm'n Against Discrimination, *Annual Report FY 2022*, at 15-22, https://www.mass.gov/doc/mcad-fy22-annual-report/download.

[15] The EEOC reports over $44 million in benefits for LGBTQ+ victims since it began tracking such charges in 2013. *See* EEOC, *LGBTQ+-Based Sex Discrimination Charges*, https://www.eeoc.gov/data/lgbtq-based-sex-discrimination-charges.

Defendants do not meaningfully address either of the other two elements of the strict scrutiny test articulated in *Roberts*. They do not contend that Title VII or other statutes barring employment discrimination are animated by a government interest in the "suppression of ideas"—nor could they. As with the public accommodations law at issue in *Roberts*, employment discrimination statutes reflect a "strong historical commitment to eliminating discrimination," which is a "goal … unrelated to the suppression of expression." 468 U.S. at 624; *see also, e.g.*, *N.Y. State Club Ass'n, Inc. v. City of New York*, 505 N.E.2d 915, 921 (N.Y. 1987) (noting that "the City's strong public policy to eliminate discrimination against women and minorities" is a "compelling governmental interest[] unrelated to the suppression of ideas"), *aff'd*, 487 U.S. 1 (1988).

As for the question of tailoring, the Supreme Court has observed that prohibitions on "discrimination in hiring" are "precisely tailored to achieve" the government's interest in "providing an equal opportunity to participate in the workforce." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014); *see also Roberts*, 468 U.S. at 628-29 (holding that statute forbidding discrimination in public accommodations infringes on protected speech in a manner "no greater than is necessary to accomplish the State's legitimate purposes" and that prohibitions on discrimination "respond[] precisely to the substantive problem" that animates them). So too here.

B. Defendants' arguments that strict scrutiny is not satisfied fail.

Contrary to Defendants' argument, *Bostock* and *Obergefell* do not undermine Title VII's continued application to religious employers, outside the bounds of the religion clauses' ministerial exception. Nor does Title VII's exception for small businesses undermine the government's compelling interest here.

First, while Defendants fault the district court for "ignoring" exhortations in *Bostock* and *Obergefell* to protect religious freedom in the context of same-sex marriage, those very cases point to the flaw at the core of their theory. Religious groups do receive special protection under our Constitution—under the Free Exercise and Establishment Clauses. *See Bostock*, 140 S. Ct. at 1754 (expressing "deep[] concern[] with preserving the promise of *the free exercise of religion* enshrined in our Constitution") (emphasis added); *Obergefell v. Hodges*, 576 U.S. 644, 679-80 (2015); *Hosanna-Tabor*, 565 U.S. at 189. Thus, where the First Amendment protects religious groups from having to "employ teachers who reject their message," Def. Br. 50, it does so through the religion clauses' ministerial exception—which Defendants have stipulated does not apply to Billard. *See supra* at 5. Instead, Defendants here attempt to conjure a constitutional defense to Title VII liability grounded in the First Amendment's protections for freedom of

association that would extend to *all* employers, not just religious employers.[16] *See supra* Part I-C.

Defendants' discussion of *Bostock* and *Obergefell* also paint a misleading picture of the interest Title VII must serve to survive strict scrutiny. They claim that the government does not have "a compelling interest in forcing [religious] groups to employ teachers who reject their message," Def. Br. 50, but this flips the compelling interest test on its head. The question is not whether the government has "an interest in disturbing a company's workplace policies" or "in requiring … organizations to act in a way that conflicted with their religious practice," *Harris Funeral*, 884 F.3d at 591, but whether the government has a compelling interest that *justifies* a regulation affecting such policies and practices. *See, e.g.*, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (rejecting argument that "take[s] the *effect* of the statute and posit[s] that effect as the State's interest" (emphasis in original)). By conflating the effects of a statute with the interest giving rise to the statute in the first place, Defendants attempt to transform the compelling interest test into a tautology that can never be satisfied. The ample case law (described *supra* at 18-21) recognizing and defining

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[16] For the same reason, Defendants' repeated attempts in their discussion of Title VII's scope to contrast "secular, for-profit businesses" with their own religious status, Def. Br. 51, are irrelevant. Defendants are no more protected by the right of expressive association than are secular entities that satisfy the constitutional test for whether an association is expressive.

the compelling interest served by Title VII and its ilk—namely, in fighting employment discrimination—refutes this sleight of hand.

Second, Defendants misconstrue both law and history in suggesting that Title VII's exemption of small employers renders the law so underinclusive that the interest it protects cannot be compelling. Def. Br. 50-51. On the law, Defendants again ignore the many cases (including from this Court) finding that Title VII *does* serve a compelling interest, even though the small-employer limitation has been part of the statute since its inception. *See supra* at 18-21. And the history of Title VII underscores Congress's view that fighting employment discrimination is a compelling interest. The fifteen-employee threshold—set in the statute's original 1964 version at twenty-five employees, *see* Pub. L. 88-352, § 701(b), 78 Stat. 253—was intended to ensure that covered employers fell within Congress's authority to regulate interstate commerce. H. Rep. 88-914, 1964 U.S.C.C.A.N. 2391, 2475 (Nov. 20, 1963) (statement of Reps. Poff and Cramer); *see also, e.g.*, Burke Marshall Personal Papers, *Civil Rights Act of 1964: Legislative history and scope of H.R. 7152: Title VII*, at 28 ("It is hard to imagine many businesses employing 25 or more persons which cannot plausibly be said to affect commerce within the meaning of Title VII.").[17] So, unlike *Church of the*

[17] Available at https://www.jfklibrary.org/asset-viewer/archives/BMPP/029/BMPP-029-010.

Lukumi Babalu Aye, Inc. v. City of Hialeah, where the limitations of the statute in question were "designed to persecute or oppress a religion or its practices," 508 U.S. 520, 547 (1993), Title VII's employer-size requirements represent Congress's effort to ensure that the statute was constitutionally sound. Congress's cognizance of and respect for its own constitutional constraints—and its efforts to ensure that a historic effort to combat widespread discrimination would not be struck down—cannot undermine the compelling interests animating Title VII.[18]

CONCLUSION

The judgment below should be affirmed.

[18] Defendants are also wrong to compare the fifteen-employee requirement to the regulations at issue in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Unlike the *Fulton* regulations, which allowed government officials to exempt entities at their "sole discretion," *id.* at 1879, Title VII's size limitation confers no such discretion. In any event, the exemptions at issue in *Fulton* bore on the question whether the regulation was generally applicable for purposes of a free exercise claim—not, as Defendants would have it, on whether the statute "'protect[s] an interest of the highest order,'" Def. Br. 50.

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