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 Final Judgment of the
United States District Court for the Western District of North Carolina
Case No. 17-cv-0011, Hon. Max O. Cogburn Jr.

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, MUSLIM ADVOCATES, AND NATIONAL COUNCIL OF JEWISH WOMEN AS *AMICI CURIAE* SUPPORTING APPELLEE AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-1440 Caption: Billard v. Charlotte Catholic High School, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Americans United for Separation of Church and State
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Bradley Girard Date: 11/30/2022

Counsel for: Amicus Curiae

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 22-1440 Caption: Billard v. Charlotte Catholic High School, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Muslim Advocates
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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No. 22-1440 Caption: Billard v. Charlotte Catholic High School, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Council of Jewish Women
(name of party/amicus)

who is Amicus Curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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INTERESTS OF THE *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national, nonpartisan organization that for seventy-five years has brought together people of all faiths and the nonreligious who share the deep commitment to religious freedom as a shield to protect but never a sword to harm others. Americans United has expertise in this case because it frequently represents employees of religious institutions who have suffered discrimination. *See, e.g.*, *Gordon Coll. v. DeWeese-Boyd*, No. 21-145 (U.S. 2021); *Tucker v. Faith Bible Chapel Int'l*, No. 20-1230 (10th Cir. 2020); *Fitzgerald v. Roncalli High Sch.*, No. 19-cv-4291 (S.D. Ind. 2019). These cases often present questions of the scope of the church-autonomy doctrine and Religious Freedom Restoration Act. Americans United thus has an interest in ensuring applications of the church-autonomy doctrine and RFRA that serve—and do not distort—their important purposes.

Muslim Advocates, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake

[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

in this case relate directly to Muslim Advocates' work fighting religious discrimination against vulnerable communities.

National Council of Jewish Women is a grassroots organization of more than 200,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms.

INTRODUCTION AND SUMMARY OF ARGUMENT

A pluralistic democracy can survive only if every person has the right to engage in society fully and equally, regardless of what faith they follow or whether they follow any at all. To that end, religious exercise is protected from government intrusion while religious entities must abide by the same laws that govern us all.

But Defendants seek an exemption. Although this case is about a substitute teacher's right to work free from discrimination, the School's defenses would extend well beyond Title VII. Under Defendants' theory, religious institutions could avoid legal liability from any party—government or private—simply by presenting a religious motivation for the challenged action. This brief explains why two of Defendants' arguments—arising under the church-autonomy doctrine and the Religious Freedom Restoration Act—would wreak havoc on our legal system and civil society.

I. The First Amendment prohibits civil courts from answering religious questions. It does not prohibit courts from applying neutral principles of law just because one or both parties to a case happen to be religiously affiliated. Nor does it allow religious institutions to use faith as an excuse to circumvent their employees' basic legal protections.

Defendants ask this Court to ignore these fundamental precepts and read the Religion Clauses to mean that the law simply does not apply if you're a

religious institution. They insist that Billard—a lay substitute teacher who had no religious responsibilities and was fired for marrying his husband—must be denied relief because his firing was motivated by Defendants' religious beliefs. Under that theory, any time a religious institution offers a religious explanation for its unlawful actions, harmed individuals will be powerless to get relief. But "[i]n this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine" extends only to the point where the religious practice "does not infringe personal rights" guaranteed to all citizens. *Watson v. Jones*, 80 U.S. 679, 728 (1871). When a religious leader infringes on the "personal rights" of others, *id.*, "neither his robe nor his pulpit would be a defense," *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 109 (1952).

II. The Religious Freedom Restoration Act prohibits the government from substantially burdening religious exercise. But the government is not a party here. And RFRA is silent in suits between private parties—that should end the analysis.

Yet contrary to the Act's plain language, Defendants insist that RFRA gives them a pass to discriminate. There is, however, no reason for this Court to ignore straightforward statutory language in favor of Defendants'

linguistic backflips, especially because the majority of circuits that have considered the question have come to precisely the opposite conclusion.

The consequences of Defendants' legal arguments are clear: The civil-rights advancements of the last half century would be swept away for nearly one million workers employed by religious institutions, from nonprofit administrative assistants to school crossing guards to E.R. nurses. And religious institutions could opt out of any legal requirement any time they can serve up any religious explanation for their conduct. Defendants seek nothing less than a seismic shift in how religiously neutral laws are applied to religious entities and their lay employees. The Court should deny their invitation.

ARGUMENT

I. The church-autonomy doctrine does not shield Defendants from Billard's Title VII claims.

The church-autonomy doctrine is long-established, and narrow. It shields religious institutions from civil-court intrusion into purely ecclesiastical matters. Defendants, however, ask this Court to ignore more than a century of Supreme Court precedent and apply the doctrine whenever a defendant can offer a religious motivation for violating a religiously neutral law. But the protection against having courts decide religious disputes over questions of religious doctrine does not shield religious institutions from having courts

apply secular laws to ordinary employment practices. To conclude otherwise would circumvent broad swaths of law and harm countless employees and institutions. The First Amendment neither demands nor permits that religious favoritism.

A. The church-autonomy doctrine prohibits courts from answering ecclesiastical questions, not from asking and answering legal ones.

The First Amendment protects religious institutions' freedom to make *religious* decisions: Neither courts nor political branches may decide "matters of church government" or "those of faith and doctrine." *Kedroff*, 344 U.S. at 116. Thus, "where resolution of the dispute cannot be made without extensive inquiry by civil courts into religious law and polity," *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976), such as whether conduct is "consistent with the governing law of the Church," courts must defer to the religious body's determination, *Burri Law PA v. Skurla*, 35 F.4th 1207, 1212 (9th Cir. 2022). Religious institutions must be free to decide for themselves who qualifies as a nun, *McCarthy v. Fuller*, 714 F.3d 971, 979 (7th Cir. 2013), "whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations," *Milivojevich*, 426 U.S. at 713, and whether a church board acted "in the best interests of the Church," *Nation Ford Baptist Church v. Davis*, 876 S.E.2d 742, 752 (N.C. 2022). Simply stated, civil courts may not "resolv[e] underlying controversies over

religious doctrine." *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969).

But "churches are not—and should not be—above the law." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). "[W]hen disputes arise which can be resolved solely through the application of 'neutral principles of law' that are equally applicable to non-religious institutions and organizations, a court's involvement in such a dispute does not 'jeopardize[] values protected by the First Amendment.'" *Davis*, 876 S.E.2d at 747 (quoting *Presbyterian*, 393 U.S. at 449); *see also Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 368 (1970) (per curium); *Bouldin v. Alexander*, 82 U.S. 131, 137 (1872); *Watson*, 80 U.S. at 731.

It follows that courts may, and routinely do, consider neutral questions, like whether a statute of limitations had passed, *Moon v. Moon*, 431 F.Supp.3d 394, 412 (S.D.N.Y. 2019), *aff'd by* 833 F.App'x 876 (2d Cir. 2020), whether a party violated copyright law, *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 99-100 (2d Cir. 2002), or whether a contract between a church and its employee established an at-will employment relationship, *Davis*, 876 S.E.2d at 752. Courts do not encroach on religious institutions' religious freedom when they rule on claims of libel, *Drevlow v. Lutheran Church, Mo. Synod*, 991 F.2d 468, 470-72 (8th Cir.

1993), negligence, *id.*, or defamation, *Paul v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 878 n.1 (9th Cir. 1987). And religious institutions, "[l]ike any other person or organization," may "be subject to Title VII scrutiny." *Rayburn*, 772 F.3d at 1171.

That the church-autonomy doctrine's prohibition is limited to ecclesiastical matters and does not extend to neutral questions of civil law is constitutionally mandated. The First Amendment requires religious neutrality—not favoritism. The government may not prefer "one religion over another, or . . . religion in general," *Flast v. Cohen*, 392 U.S. 83, 103 (1968); *accord, e.g.*, *McCreary Cnty. v. ACLU of Kentucky*, 545 U.S. 844, 875-76 (2005), nor may it "extend[] the benefit of a special franchise" to religious groups, *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994). *See also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion) ("[G]iving sectarian religious speech preferential [treatment] . . . would violate the Establishment Clause."); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 652-53 (1981).

But religious favoritism is what Defendants demand. They urge this Court to abstain from deciding the merits of Billard's claim even though it rests on entirely neutral questions: (1) whether Billard is a member of a protected class; (2) whether he performed his job as a lay substitute teacher satisfactorily; (3) whether an adverse employment action occurred;

(4) whether circumstances suggest an unlawfully discriminatory motive; and (5) whether the Defendants had a legitimate, nonpretextual, nondiscriminatory reason for terminating him. *See Spencer v. Va. State Univ.*, 919 F.3d 199, 207-08 (4th Cir. 2019). The district court did not need to, and did not, answer any ecclesiastical questions.

Defendants' cases are entirely consistent with the district court's analysis. *Garrick v. Moody Bible Institute*, for example, held that it would require "delv[ing] into" church disputes to rule in favor of an employee if the employee was terminated because of her advocacy against church teachings. 412 F.Supp.3d 859, 872 (N.D. Ill. 2019). Here, by contrast, Billard was terminated not for advocating against church teachings, but instead for his identity as a member of a protected class. Op. 14-15. In *NLRB v. Catholic Bishop of Chicago*, the Supreme Court explained that Congress could not have given the NLRB jurisdiction over religious schools without a clear expression of intent to do so. 440 U.S. 490, 507 (1979). That is because the invasive process of collective bargaining could touch on "nearly everything that goes on in the schools," *id.* at 503, which might give rise to "difficult and sensitive questions" of the government's entanglement with a religious institution, *id.* at 507. Importantly, *NLRB* did *not* hold that legal regulation of a religious institution's employment relationships would violate the First Amendment—it simply held that Congress would not have delegated that

regulatory authority to the NLRB implicitly. This case requires no such all-encompassing oversight of Defendants' relationships with its employees. It merely asks whether Defendants fired Billard for a discriminatory reason. And in *Bryce v. Episcopal Church*, unlike here, the plaintiffs did not challenge a wrongful termination but instead argued that a church's internal discussions of its own religious doctrine were unlawful. 289 F.3d 648, 651-53 (10th Cir. 2002). Thus, the court in *Bryce* could not rule on the plaintiffs' harassment claim without wading into internal debates over church doctrine and governance, specifically because those discussions were *themselves* the alleged harassment. *Id.* at 658.

Defendants ask this Court to do more than violate the long-settled prohibition against "categorically insulat[ing] religious relationships from judicial scrutiny," *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention*, 966 F.3d 346, 348 (5th Cir. 2020); they also ask it to categorically insulate religious employers' treatment of lay employees any time an employer offers up a religious motivation for its actions. That "'would impermissibly place a religious [institution] in a preferred position in our society,'" *id.* (quoting *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 335-36 (5th Cir. 1998)), allowing it to opt out of the laws necessary to maintain a just and fair civil society. And it would intrude on government's "obvious and legitimate interest in the peaceful resolution" of disputes, *Jones*

v. Wolf, 443 U.S. 595, 602 (1979), and "punish[ing] subversive action," *Kedroff*, 344 U.S. at 109. Applying the church-autonomy doctrine as Defendants suggest would grant exactly the religious favoritism that the Constitution prohibits. *See Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

B. Granting Defendants' request would circumvent broad swaths of First Amendment law.

In their effort to expand the church-autonomy doctrine, Defendants also ask this Court to circumvent broad swaths of First Amendment law—namely, *Employment Division v. Smith*, 494 U.S. 872 (1990), and the ministerial exception, *see Our Lady of Guadalupe v. Morrissey-Berru*, 140 S.Ct. 2049, 2060-61 (2020).

1. Under *Smith*, laws that are religiously neutral and generally applicable are valid and apply even when they might incidentally burden some exercise of religion. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A law is not neutral and generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interest in a similar way," operates "in a manner intolerant of religious beliefs," or "restricts practices because of their religious nature." *Fulton v. City of Phila.*, 141 S.Ct. 1868, 1877 (2021).

Defendants do not and cannot show that Title VII fails the requirements of neutrality and general applicability. For Title VII does not

unconstitutionally target religious exercise for unfavorable treatment but instead prohibits discrimination by religious and secular employers alike. If anything, it gives a religious *preference*, by carving out narrow religious exemptions (which do not apply here). *See, e.g.*, 42 U.S.C. § 2000e-1.[2]

Rather than attempt to show that they would win under *Smith*, Defendants propose a wild expansion of the church-autonomy doctrine that, if adopted, would abrogate *Smith*—something this Court cannot do. Religious entities would never need to show that a law isn't neutral or generally applicable, because they could effectively opt out of any law that they dislike by stating a religious objection to the law's requirements. The Supreme Court squarely rejected that approach. Writing for the Court, Justice Scalia explained that "[a]ny society adopting such a system would be courting anarchy. . . . The rule [Defendants] favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost

[2] If a law doesn't single out religion for unfavorable treatment, it receives rational-basis review and is presumptively valid. *Smith*, 494 U.S. at 887-88. If a law is not religiously neutral and generally applicable, it must satisfy strict scrutiny. *See Fulton*, 141 S.Ct. at 1879. Title VII passes strict scrutiny—though it doesn't need to. Its antidiscrimination purpose is "an interest of the highest order." *Rayburn*, 772 F.2d at 1169. And as with race discrimination, Title VII's prohibitions against sex discrimination "are precisely tailored to achieve [their] critical goal," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014).

every conceivable kind." *Smith*, 494 U.S. at 888-89. "The First Amendment's protection of religious liberty does not require this." *Id.*

2. What is more, Defendants' church-autonomy argument would make the ministerial exception a dead letter.

The First Amendment's Religion Clauses shield religious employers from liability for discrimination against ministerial employees—*i.e.*, those who play an important role in preaching or teaching the faith. *Morrissey-Berru*, 140 S.Ct. at 2060-61. That is because applying antidiscrimination laws to ministers—employees who are "essential to the performance" of religious functions, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring)—would encroach on a religious group's freedom to "shape its own faith and mission," *id.* at 188. But, of course, the ministerial exception does not apply here, because, as Defendants concede, Billard was not a minister. Op. 24.

Defendants would have this Court create a general and absolute defense to employment-discrimination claims brought by *any* employee—lay or ministerial—whenever the employer offers a religious explanation for its actions. *See* Br. 38-46. As the district court explained: "If the church autonomy doctrine were so expansive as to create in all religious employers a First Amendment right to engage in employment discrimination, then there

would be no need to have a ministerial exception because Title VII would not protect any employee of a religious organization." Op. 25.

Defendants argue that the district court "misunderstands the relationship between the ministerial exception and the broader church autonomy doctrine." Br. 45. In their view, the distinction is that the church-autonomy doctrine requires a religious explanation to justify discriminatory action whereas the ministerial exception does not. But that argument ignores a long line of ministerial-exception cases. In *Hosanna-Tabor*, for example, the defendant school alleged that it terminated a minister's contract not because of the minister's medical condition, but for "a religious reason." 565 U.S. at 180. Despite the defendant's stated religious motivation for terminating the teacher, the Supreme Court applied the ministerial exception, not the church-autonomy doctrine. The Court had the opportunity to adopt the reasoning of Defendants here but declined to do so.

To put a finer point on why Defendants' argument makes little sense, consider the practical reality that employers face when litigating the ministerial exception. The exception is a fact-intensive defense, often requiring discovery and dedicated briefing. And it is often raised even when the defendant employer has a religious explanation for its actions. *See Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 973 (7th Cir. 2021); *Penn v. N.Y. Methodist Hospital*, 884 F.3d 416, 421 (2d Cir. 2018); *Collette v.*

Archdiocese of Chi., 200 F.Supp.3d 730, 732 (N.D. Ill. 2016). If the church-autonomy doctrine acted as an absolute shield against employment-discrimination liability every time a religious employer listed a religious motivation for its actions, why would any employer go to the effort of arguing that the employee was a minister? Defendants do not and cannot answer that question.

C. Defendants' bid to expand the church-autonomy doctrine would harm countless employees and religious organizations.

Expanding the church-autonomy defense to shield religious employers from liability in so broad a range of employment disputes could rob nearly one million workers of any way to vindicate their fundamental rights. It would also harm religious employers who want to recruit a diverse workforce by deterring prospective employees from taking jobs where they know that, should the worst befall them at work, they would have no legal recourse.

These concerns are not hypothetical. In 2015, a religious school sought to avoid liability in a sexual-harassment suit by arguing that "Catholic principles influenced its actions and that any review by a court . . . would entail a review of the reasonableness of Catholic principles that were followed in response to Plaintiff's complaint." *Bohnert v. Roman Cath. Archbishop of S.F.*, 136 F.Supp.3d 1094, 1116 (N.D. Cal. 2015) (internal quotation marks omitted). The court rejected the defendant's argument, observing that "this

reasoning would immunize [the defendant] from judicial review of almost any cause of action. This is clearly not the law." *Id.* Similar arguments have been asserted to defend sexual abuse by clergy, *Doe v. Roman Cath. Bishop of Springfield*, 190 N.E.3d 1035, 1043-44 (Sup. Jud. Ct. Mass. 2022), race discrimination, *McCallum v. Billy Graham Evangelistic Ass'n*, 824 F.Supp.2d 644 (W.D.N.C 2011); *Edley-Worford v. Va. Conf. of United Methodist Church*, 430 F.Supp.3d 132 (E.D. Va. 2019), breaches of contract, *Galetti v. Reeve*, 331 P.3d 997 (N.M. Ct. App. 2014), and pregnancy discrimination, *Kelley v. Decatur Baptist Church*, No. 17-cv-1239, 2018 WL 2130433 (N.D. Ala. May 9, 2018).

Allowing religious employers to use religious excuses to opt out of employment law wholesale would open a huge swath of American workers to workplace discrimination, harassment, and other forms of gross maltreatment. In Defendants' view, a religious hospital could pay men twice what it pays women for the same job on the theory that women should not work outside the home. *Cf. Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303-06 (1985) (rejecting argument that Fair Labor Standards Act violated religious group's free exercise of religion). And it would strip workers of far more than their equal-employment protections: The Fair Labor Standards Act, wage-and-hour laws, and the Occupational Safety and Health Act, to name a few, would all be threatened. *See, e.g.*, *id.* That would leave

every teacher, nurse, janitor, administrative assistant, and IT specialist at every religious institution vulnerable to discrimination and maltreatment if their employers frame the harm as tied to some religious belief. In total, more than 1.7 million people are employed by religious institutions in this country.[3] And 51% of those employees work in lay positions.[4] That means that nearly one million lay workers could be stripped of their civil rights and other workplace protections under Defendants' theory.

These harms would, moreover, extend not just to the employees at the full panoply of religiously affiliated entities, including the hundreds of thousands of schools, nonprofits, and hospitals nationwide, but to the institutions themselves. *Amici* know from experience that most religious employers—like most employers generally—wish to base their hiring decisions on merit, not on discriminatory factors like race, sex, or disability. Many religious organizations specifically affirm and welcome staff of all sexual orientations.[5] These institutions would likely see fewer qualified applicants, because workers "might think twice about providing their services if there were no

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[3] Data USA, *Religious Organizations*, https://perma.cc/J4FV-UNWJ.

[4] *Id.*

[5] *See, e.g.*, Augsburg University, *Reconciling in Christ Statement* (2009), https://perma.cc/PM8W-XRGS; Guilford College, *Queer and Trans Guide*, https://perma.cc/9HLR-9RF3; Q Christian Fellowship, *About Us*, https://perma.cc/5LW4-RWXE; Sidwell Friends, *Non-Discrimination*, https://perma.cc/CGT9-QEKV.

neutral forum for resolving the kinds of disputes that inevitably arise in the course of everyday business." *Davis*, 876 S.E.2d at 750. After all, workers and applicants know that even the broadest nondiscrimination policy means little without the ability to enforce it.

Amici do not mean to suggest that the risks of discrimination are unique to religious workplaces. Many nonreligious employers discriminate; and many religious employers do not. But by the time a claim is raised, much less when litigation commences, the parties already likely disagree about the merits of the claim. That's what litigation is meant to solve. And even where a religious institution—as an institution—actively advocates for an inclusive workplace, individual supervisors or employees may violate those teachings and mistreat other workers. When that occurs, responsible organizational heads have an institutional duty, and their attorneys have an ethical obligation, to raise the best defenses available. A church-autonomy doctrine with the breadth that Defendants request would ensure that many meritorious claims against religious employers fail. Knowing that employers can easily avoid all possibility of liability, applicants would view skeptically assurances made by hiring managers. That, in turn, would leave religious institutions less able to promise job security and would harm the many, many religious organizations that seek to hire talented employees and have no wish to discriminate.

* * *

The church-autonomy doctrine is meant to protect religious institutions' ability to make ecclesiastical determinations about church governance. It is not a free pass for anything that can be tangentially tied to religious beliefs. It is not an end-run around long-standing First Amendment doctrine. And it is not a vehicle to rob employees of legal protections or deter qualified applicants from working at religious organizations.

II. The Religious Freedom Restoration Act does not shield Defendants from liability.

A. RFRA does not apply to suits between private parties.

The plain text of RFRA—consistent with the Act's history and objectives—makes clear that it applies only when the government is a party to the litigation. Because the government is not a party to this lawsuit, Defendants cannot use RFRA as a defense.

It is a "cardinal canon" of statutory construction "that courts must presume that a legislature says in a statute what it means." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: The 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

"[T]he text of RFRA is plain." *Rweyemamu v. Cote*, 520 F.3d 198, 203 n.2 (2d Cir. 2008). "*Government* shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in" the Act itself. 42 U.S.C. § 2000bb-1(a) (emphasis added). Because RFRA has no bearing on—and nothing to say about—disputes between private parties, it can serve as a legal defense or as a basis for a claim only when the government is a party to the suit.

That plain-language construction is underscored by the fact that RFRA puts the onus on the government to "meet[] the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). "Government may substantially burden a person's exercise of religion only if it demonstrates the application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The government cannot meet the burdens of production and persuasion if it is not even a party to the litigation. And "[a] private party cannot step into the shoes of the 'government' and demonstrate a compelling governmental interest and that it is the least restrictive means of furthering that compelling governmental interest because the statute explicitly says that the 'government' must make this showing." *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015).

Finally, the relief that RFRA provides "is clearly and unequivocally limited to that from the 'government.'" *Id.* at 737. RFRA allows that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). RFRA defines "government" as "a branch, department, agency, instrumentality, [or] official (or other person acting under color of law) of the United States . . . ." 42 U.S.C. § 2000bb-2(1). Private parties are notably absent from that list.

If that weren't clear enough, compare the federal RFRA with similar state laws. The New Mexico Supreme Court, for example, relied on federal case law to hold that its own state RFRA—which mirrors the federal Act—does not apply to cases between private parties. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013). Following that decision, Arkansas and Indiana legislators proposed state RFRAs with language distinct from that of the federal RFRA, precisely so that the laws *would* apply to private parties. The Arkansas bill stated that parties could raise the Act "[r]egardless of whether the state or one of its political subdivisions is a party to the proceeding." H.B. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015). The proposed Indiana bill would similarly have guaranteed that "[i]f the relevant governmental entity is not a party to the proceeding, the governmental entity has an

unconditional right to intervene in order to respond to the person's invocation of this chapter." S. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015). Both bills, which ultimately failed to pass, highlight the limited scope of the federal RFRA and the sort of language that would make a RFRA applicable to suits between private parties—language that Congress chose not to use originally and chose not to enact by statutory amendment.

Because the meaning of RFRA is plain, the Court can stop its analysis here. *See Germain*, 503 U.S. at 253-54. But as explained below, limiting RFRA's application to cases in which the government is a party is also consistent with the Act's history and goals.

RFRA was enacted in response to the Supreme Court's holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), that religiously neutral, generally applicable laws are presumptively valid. Unhappy with the Court's ruling, Congress passed RFRA to "restore the compelling interest test set forth in" *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963)—the cases that had previously defined free-exercise jurisprudence. S. Rep. No. 103-111, at 3 (1993); *see* 42 U.S.C. § 2000bb-1(b). In doing so, Congress sought to fulfill the Framers' promise of a nation where citizens could practice their religion "free from Government interference" and "Government actions singling out religious activities for special burdens." S. Rep. No. 103-111, at 4. Unsurprisingly, therefore, "[a]ll of the examples cited

in the Senate and House Reports on RFRA involve actual or hypothetical lawsuits in which the government is a party." *Hankins v. Lyght*, 441 F.3d 96, 115 n.9 (2d Cir. 2006) (Sotomayor, J., dissenting). "The lack of even a single example of a RFRA claim or defense in a suit between private parties in these Reports tends to confirm what is evident from the plain language of the statute: It was not intended to apply to suits between private parties." *Id.* RFRA was passed to shield individuals from "government actions," and "only government actions." S. Rep. No. 103-111, at 8-9.

Consistent with that history and the plain meaning of the text, the Sixth, Seventh, and Ninth Circuits have held that RFRA applies only when the government is a party to the lawsuit. *See Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010); *Listecki*, 780 F.3d at 736; *Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 835-36 (9th Cir. 1999). This Court should do likewise.

Only the Second Circuit has diverged from RFRA's plain meaning and history to apply it in a dispute between private parties—over the strong dissent of then-Judge Sotomayor. *See Hankins*, 441 F.3d 96. And the *Hankins* decision has been roundly criticized, including by a later Second Circuit panel, which, per Judge Walker, was forthright in declaring that it "d[id] not understand" how RFRA's language could possibly be read to apply to suits between private parties. *Rweyemamu*, 520 F.3d at 203 & n.2. And writing for

the Seventh Circuit, Judge Posner described the reasoning of *Hankins* as "unsound." *Tomic v. Cath. Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

As for the other two cases that Defendants cite, the government was a party in both. *See EEOC v. Cath. Univ.*, 83 F.3d 455 (D.C. Cir. 1996) (the EEOC); *In re Young*, 82 F.3d 1407, 1412-13 (8th Cir. 1996) (U.S. Bankruptcy Trustee, the United States as intervenor), *vacated*, 521 U.S. 1114 (1997), *reinstated*, 141 F.3d 854 (8th Cir. 1998). And neither decision addressed whether RFRA applies between private parties.

Undeterred, Defendants try mightily to introduce confusion where none exists.

First of all, quoting *Hankins*, they read the statute selectively, arguing that because it "applies to all Federal law" and can be raised as a "defense in a judicial proceeding," any litigant may rely on RFRA in any federal case. Br. 54. But that ignores the statute's repeated use of the term "government." To elide that plain language, Defendants argue that any private litigant bringing a Title VII lawsuit is acting "under color of law" merely because the EEOC issued a right-to-sue letter—that is, the government chose *not* to bring

an enforcement action. Br. 56-57. Defendants cite no authority and offer no justification for this extraordinary proposition. Nor can we think of any.[6]

Then, when Defendants finally "[t]urn[] to RFRA's text" and the evidentiary burdens that Section 2000bb-1(b) places on the government, they insist that private parties are forced to defend the constitutionality of statutes all the time. Br. 56. But that is a red herring: The Constitution says nothing about who must satisfy the evidentiary burden when the constitutionality of a law is challenged. RFRA, on the other hand, states explicitly that the government always carries the burden in a RFRA suit—which means that the government must always be a party.

Defendants' *amici* amplify the confusion. They argue that "[w]hen a court applies a federal law in a way that burdens religion, it is the government that is burdening religion." Br. Christian Legal Soc'y & Crista Ministries as Amici Curiae in Support of Defendants-Appellants 8. But it is an "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning." *Nat'l Credit Union Admin. v.*

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[6] Defendants also fail to explain the muddle that would be made of state-actor analysis in other contexts if the EEOC's mere refusal to bring a Title VII claim meant that a litigant was acting under "color of law." Because "Congress intended for RFRA 'color of law' analysis to overlap with Section 1983 analysis," *Listecki*, 780 F.3d at 738, Defendants' theory would drastically remake the stringent test imposed on the under-color-of-law classification, *see Polk Cnty. v. Dodson*, 454 U.S. 312, 318-21 (1981), potentially requiring sweeping rewriting of Section 1983 jurisprudence.

First Nat'l Bank & Trust Co., 522 U.S. 479, 501 (1998). So if "government" includes "court" in one part of RFRA, then the same must be true elsewhere in this short statute. But then, when Section 2000bb-1(b) imposes the "government's" burden of persuasion, that would require the *court* to present evidence—which simply can't be. And under *amici's* interpretation, Section 2000bb-1(c) would likewise make little sense, because a party cannot "obtain appropriate relief against a [court]" hearing the party's case.

In sum, Defendants and their *amici* contend that the government is the "government"; the court is the "government"—when it is adjudicating and applying the laws; and private parties are "government"—when they assert legal claims. All therefore bear the government's burden of production and persuasion, no matter how incoherent that may be. No logic or precedent supports anyone and everyone being the "government" under RFRA.

Finally, Defendants contend that it would be nonsensical for Congress to constrain the government but not private citizens, Br. 58, never mind that it is exactly what Congress does all the time—and what the Constitution itself does. Because the government uniquely has the legal authority to enact laws and enforce them, RFRA, like the First Amendment, is concerned with limiting how the government—not one's next-door neighbor—burdens a person's religion. And contrary to what Defendants argue, the Supreme Court's language in *Bostock v. Clayton County* suggesting that RFRA "might

supersede Title VII's commands in appropriate cases," 140 S.Ct. 1731, 1754 (2020), supports Congress's line drawing here. RFRA certainly might supersede Title VII in "appropriate cases," when the *government* sues to enforce Title VII. And that is precisely how the Sixth Circuit analyzed the arguments in its decision affirmed in *Bostock*. *See EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 584 (6th Cir. 2018), *aff'd sub nom*. *Bostock*, 140 S.Ct. 1731.

The bottom line is this: Defendants and their *amici* don't like the policy decisions that Congress made and the statute that it wrote. But amending the plain language of RFRA is a job for Congress, not the courts.

B. RFRA would not shield Defendants from Billard's claim.

Even if Defendants could raise RFRA as a legal defense in this suit between two private parties, it would not shield them from liability. Instead, RFRA serves as a defense only when an enforcement action would "substantially burden" a religious exercise and is not the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). *Amici* agree with Billard that if RFRA did apply, his claims would survive strict scrutiny. And though the parties assume for this argument that Defendants showed a substantial burden, that is not so.

Satisfying RFRA's substantial-burden requirement means showing a nexus between a religious exercise and the asserted burden imposed. The

burden must be significant: It must "truly pressure[] the adherent to significantly modify his religious behavior and *significantly violate* his religious beliefs," *United States v. Sterling*, 75 M.J. 407, 417 n.5 (C.A.A.F. 2016) (quoting *Sossamon v. Lone Star State*, 560 F.3d 316, 332 (5th Cir. 2009)); *see also Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981); *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 350 (5th. Cir. 2022); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).

And the nexus between that burden and the affected religious exercise must be specific: Simply "having restraints placed on behavior that is religiously motivated does not necessarily equate to either a pressure to violate one's religious beliefs or a substantial burden on one's exercise of religion." *Sterling*, 75 M.J. at 417; *see also Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001); *Marianist Province of United States v. City of Kirkwood*, 944 F.3d 996, 1000 (8th Cir. 2019). The burdened party must instead "indicate how complying with the [governmental action] pressured her to either change or abandon her beliefs or forced her to act contrary to her religious beliefs." *Sterling*, 75 M.J. at 418.

Applying Title VII does not impose a substantial burden on Defendants' religious exercise. And indeed, Defendants do not argue that the specific conduct 'burdened' by Title VII—discrimination against employees based on their membership in a protected class—is any part of their religious exercise.

Instead, they insisted in the district court that employing Billard—"someone who publicly opposes core tenets of Catholic teaching," Mot. for Summ. J. 20—would impose a substantial burden on their "religious preference . . . which recognizes marriage only between one man and one woman," *id.* at 2. But as the district court found, Defendants did *not* terminate Billard because he was someone who publicly opposes core tenets of Catholic teaching. Op. 14. They admitted to firing him "because he is a man who intended to, and did, marry another man.'" Op. 14. That is textbook status-based discrimination, not theological debate.

So while Billard's personal actions may be inconsistent with Defendants' religious preference regarding marriage, nothing about this lawsuit, the district court's decision, or Title VII's mandate puts significant pressure on Defendants to violate their religious exercise. Title VII merely prohibits discrimination based on sex; it does not force Defendants to marry same-sex partners, officiate at weddings of same-sex couples, or sanctify and celebrate those couples' marriages. The nexus between Title VII's prohibition against discrimination and Defendants' religious belief that marriages should be between a man and a woman is too attenuated.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Rule 29(a)(5) because it contains 6,457 words including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Word 365, set in Century Schoolbook font in a size measuring 14 points or larger.

/s/ *Bradley Girard*