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 the United States District Court for the Western District of North Carolina at Charlotte
Case No. 3:17-cv-00011 – Judge Max O. Cogburn, Jr.

BRIEF FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; THE LUTHERAN CHURCH–MISSOURI SYNOD; THE JEWISH COALITION FOR RELIGIOUS LIBERTY; AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE AS *AMICI CURIAE* SUPPORTING APPELLANTS AND REVERSAL

Alexander Dushku
R. Shawn Gunnarson
Jarom Harrison
Emily Haws Wright
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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: *Charlotte Catholic High School v. Billard*

Pursuant to FRAP 26.1 and Local Rule 26.1,

> The Church of Jesus Christ of Latter-day Saints; the Ethics & Religious Liberty Commission of the Southern Baptist Convention; the General Conference of Seventh-day Adventists; the Lutheran Church–Missouri Synod; the Jewish Coalition for Religious Liberty; and the Islam and Religious Freedom Action Team of the Religious Freedom Institute

who are amici, make the following disclosure:

1. Are any amici a publicly held corporation or other publicly held entity? **NO**

2. Do amici have any parent corporations? **NO**

3. Is 10% or more of the stock of any amici owned by a publicly held corporation or other publicly held entity? **NO**

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? **NO**

5. Are any amici a trade association? **N/A**

6. Does this case arise out of a bankruptcy proceeding? **NO**

7. Is this a criminal case in which there was an organizational victim? **NO**

/s/R. Shawn Gunnarson September 29, 2022

Counsel for *Amici*

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are religious organizations representing millions of Americans. We cherish different religious beliefs and hold nuanced views on the proper policy mix for ensuring freedom and equality for all Americans. But we are united in our commitment to defending the religious freedom of churches, religious schools, and other faith-based organizations. Religious freedom for all Americans will be dangerously curtailed unless this Court affirms the right of religious organizations to choose employees whose conduct and beliefs are in harmony with their religion.

SUMMARY OF ARGUMENT

Religious organizations exercise religion through their employees. Congress understood that when it included an exemption for religious employers in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Here, the district court misread that exemption and mistakenly denied its protection to a religious school.

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[1] Both parties have consented to the filing of this *amicus* brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

A fresh look at the statutory text shows where the district court went awry. Title VII exempts religious organizations when they set religious standards as a condition of employment. Reading the statutory exemption that way avoids serious constitutional questions that arise if Title VII abridged the freedom of religious institutions like Charlotte Catholic to hire and retain only employees who live by certain religious standards. The district court's legal errors call for reversal.

Title VII contains an express exemption authorizing religious organizations to choose employees who share their religious observances and practices, as well as their religious beliefs. Other circuits agree with this reading. They conclude, as we urge here, that Title VII exempts a religious employer when it discharges an employee for religious reasons. Since that is all Appellants did when removing Billard from the list of eligible substitute teachers, the statutory exemption applies.

Serious constitutional questions arise if the exemption is read otherwise. Holding Appellants liable for Billard's termination would abridge their constitutional rights by invading the religious autonomy secured by the First Amendment Religion Clauses and abridging their free exercise of religion. Given these constitutional doubts, the Court should interpret

the Title VII religious exemption as a broad protection for religious employers. Under that exemption, Appellants may dismiss a teacher who publicly advocates and privately engages in a form of marriage contrary to Catholic doctrine. By ruling otherwise, the district court clearly erred. This Court should reverse.

ARGUMENT

I. TITLE VII DOES NOT APPLY WHEN A RELIGIOUS EMPLOYER REMOVES AN EMPLOYEE FOR BREACHING RELIGIOUS STANDARDS.

A. Title VII Entitles Religious Organizations to Choose Employees Who Meet the Employer's Religious Standards.

1. The district court misread the Title VII religious exemption as a narrow license to hire and fire people of the same faith, so long as those decisions do not discriminate based on sex.

Appellants Charlotte Catholic High School, Mecklenburg Area Catholic Schools, and the Roman Catholic Diocese of Charlotte assert multiple statutory and constitutional defenses against Appellee Lonnie Billard's claim that discharging him violated Title VII of the Civil Rights Act of 1964. A settled rule of judicial procedure instructs courts to resolve statutory questions before constitutional ones. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Title VII's exemption for religious employers thus offers the narrowest ground

of relief for Appellants. If it applies, as we urge, the Court need not reach any other issue.

Appellants argue that part of Title VII itself, 42 U.S.C. § 2000e–1(a), authorizes them to dismiss Billard without violating Title VII.[2] This exemption, known as section 702(a) because of its place in the 1964 bill, offers a complete defense.

The district court concluded that section 702(a) does not apply on the ground that it operates only when a religious employer demonstrates that "(1) the purpose of the employment decision is religious discrimination, and (2) that sex is not a but-for cause in the decision." JA1392. The court conceived of the exemption as permitting the "hiring and firing [of] employees who have a role in promoting their religion's message." JA1387. But, in that court's view, that permission is strictly limited. "[R]eligious institutions may employ those with similar faiths, but they may not discriminate against other protected classes." JA1393. The court acknowledged that its interpretation reflected results-oriented concerns. Applying the exemption as written "would let religious employers

[2] A separate exemption, 42 U.S.C. § 2000e–2(e), also protects religious schools. Since it is rarely litigated, we discuss only § 2000e–1(a).

completely bypass Title VII liability, if they could prove their discrimination was related to a religious justification." JA1393. Doing that, the court said, "would erase protections against racial discrimination, sexism, gender discrimination, sexual orientation discrimination, and xenophobia by employers against hundreds of thousands of employees." JA1393. So the court ruled that section 702(a) is "narrowly drawn" and "do[es] not apply to shield [Appellants] from liability in this case." JA1393.

But the district court got section 702(a) completely wrong. It protects the freedom of a religious employer to choose employees who fit a particular religion, and that is all Appellants did here.

2. The plain text of Title VII entitles a religious organization to choose employees who meet its religious criteria.

Consider section 702(a) in full:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e–1(a).

Subchapter refers to Title VII and *shall* expresses a mandate, not a suggestion. Title VII cannot apply when the terms of section 702(a) are satisfied.

Only "a religious corporation, association, educational institution, or society" may assert the exemption. *Id.* Appellants qualify. Charlotte Catholic is an "educational institution," while the Diocese and Mecklenburg Catholic are "religious corporation[s]." *Id.*

Section 702(a) further says that it covers employees who "perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.* With these words, the exemption potentially applies to every employee of a qualified religious organization. Each will "perform work" that is at least "connected with the carrying on . . . of [the religious organization's] activities." *Id.* Whether an employee actually carries on religious work is irrelevant. *See Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335–36 (1987) (a 1972 congressional amendment removed the term *religious* from section 702(a)).

Having pared away other language, we come to the decisive phrase of section 702(a). It exempts a qualified religious organization from Title

VII "with respect to the employment of individuals of a particular religion." *Id.* Each substantive word of that phrase carries importance.

Employment denotes all activities comprising the employment relationship—not merely hiring and firing. *See Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 194 (4th Cir. 2011) (section 702(a) relieves "religious organizations from the entire 'subchapter' of Title VII with respect to the 'employment' of persons of a 'particular religion'").

Religion carries a special statutory definition. Under Title VII, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief … ." 42 U.S.C. § 2000e(j). Wherever *religion* appears in the statute, its meaning sweeps broadly—reaching "*all* aspects" of both "religious observance and practice." *Id.* (emphasis added). Religion, as Title VII defines it, includes what a person does, not merely what a person thinks or believes. Hence, "a particular religion" in section 702(a) means at least the "particular" religious observances, practices, and beliefs of the religious employer. *Id.*

Read together, these elements form a complete defense: Title VII does not apply whenever a religious organization takes an employment

action as to an employee because of a particular religious observance, practice, or belief. *See* 42 U.S.C. §§ 2000e-1(a), 2000e(j).

From this plain-language perspective, the district court's missteps are evident. Nothing in Title VII hints that a religious organization is exempt only if its disputed employment action consists solely of "hiring and firing employees who have a role in promoting their religion's message" or that the exemption becomes ineffective when a disputed employment decision affects "other protected classes." JA1387, 1393. Nor does the statute lend support to the lower court's worry that applying section 702(a) as written "would let religious employers completely bypass Title VII liability, if they could prove their discrimination was related to a religious justification." JA1393.

True, section 702(a) does not confer total immunity from Title VII. *See Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985). A religious school cannot, for instance, impose harsher employment discipline on women than on men for violating a religious ban on extramarital sexual relations. *See Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 414 (6th Cir. 1996) (concluding that a religious school fired a teacher for violating a "code of conduct [that] applied

equally to both sexes"); *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring) ("[S]ex discrimination unrelated to religious doctrine falls outside the scope of § 702(a)."). But it is a mistake to say that section 702(a) operates only when an employer selects employees of the same denomination. Congress adopted language lifting the burdens of Title VII from a religious organization that selects (or removes) "an individual of a particular religion," with "religion" encompassing the full range of religious practices, observances, and beliefs. 42 U.S.C. § 2000e–1(a).[3] *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & REL. 368, 376 (2015) ("[T]here is no limitation that turns

[3] Consider the structure of section 702(a). Its opening clause declares, "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State … ." *Id.* The exemption covers all nondiscrimination claims by non-U.S. employees working overseas. It makes no difference whether a foreign employee alleges discrimination on another prohibited ground. By the same token, section 702(a) exempts a religious organization from Title VII whenever a religious organization takes a disputed action based on particular religious observances, practices, or beliefs—regardless of whether the plaintiff reframes a disputed employment action as sex discrimination. *See Bear Creek Bible Ch. v. EEOC*, 571 F. Supp. 3d 571, 591 (N.D. Tex. 2001); *see also Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring).

on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to claiming under some other protected class such as sex."). The district court erred by reading into section 702(e) limitations that the statutory text does not contain.

3. Bostock *affirms that Title VII's religious employer exemption protects religious freedom.*

Billard's claims rest on *Bostock*, which holds that Title VII's prohibition on employment discrimination because of *sex* implicitly prohibits employment discrimination based on *sexual orientation*, 140 S. Ct. at 1754. *See, e.g.*, JA1382. But *Bostock* does more than expand Title VII to prohibit employment discrimination based on sexual orientation and gender identity. It also reaffirms the Supreme Court's commitment to "preserving the promise of the free exercise of religion" as secured by statute—including Title VII's "express statutory exception for religious organizations." *See* 140 S. Ct. at 1754 (citing 42 U.S.C. § 2000e–1(a)). Under *Bostock*, a claim of sexual orientation discrimination remains fully subject to section 702(a).

II. MOST FEDERAL CIRCUITS AGREE THAT TITLE VII LETS RELIGIOUS EMPLOYERS CHOOSE EMPLOYEES FOR RELIGIOUS REASONS.

A. This and Other Circuits Hold that the Religious Employer Exemption of Title VII Permits Religious Employers to Choose Employees for Religious Reasons.

The leading decision in this circuit on section 702(a) is *Kennedy v. St. Joseph's Ministries*, 657 F.3d at 189. It dismissed a former nursing assistant's Title VII claims against a Catholic nursing facility. Her supervisor asked Kennedy, a member of the Church of the Brethren, to stop wearing long dresses and head coverings at work because it "made residents and their family members feel uncomfortable." *Id.* at 191. She refused and was discharged. *Id.* Kennedy sued the facility, alleging harassment, retaliatory discharge, and discriminatory discharge under Title VII. *Id.*

Kennedy holds that section 702(a) applies whenever a religious employer "deci[des] to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer." *Id.* at 192 (quoting *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000)). The exemption is not "limited to hiring and firing decisions." *Id.* at 193. Rather, section 702(a) "covers the breadth of the relationship between employer and employee." *Id.* Quoting the Third Circuit, *Kennedy*

explained that "Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'" *Id.* at 194 (quoting *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir.1991)).

Kennedy added that section 702(a) "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin." *Id.* at 192. That principle, first enunciated by this court in *Rayburn*, 772 F.2d 1164, is easily misunderstood. *Rayburn* held that section 702(a) "applies to one particular reason for employment decision—that based upon religious preference." *Id.* at 1166. But *Rayburn* nowhere suggests that a religious employer may make employment decisions based on religion only when those decisions have no effect on the members of a protected class. When a religious employer makes an employment decision for religious reasons, section 702(a) applies—even when that decision incidentally affects members of a different protected class.

Kennedy's reliance on *Little* matters because it is the leading decision interpreting section 702(a) as written. There, an employee sued a parochial school for declining to renew her contract because she remarried without pursuing the "proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage." *Little*, 929 F.2d at 946. The sponsoring parish invoked section 702(a).

The Third Circuit held that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Id.* at 951. That reading flows naturally from the statutory text and legislative history and accords with "sensitivity to the constitutional concerns that would be raised by a contrary interpretation." *Id. Little* correctly understood that "Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices … ." *Id.* Section 702(a) allows "for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious

principles." *Id.* So section 702(a) "cover[s] the Parish's decision not to re-hire Little because of her remarriage." *Id.*

Other circuits have been no less insistent that section 702(a) confers a generous protection for religious employers. Earlier this year, the Seventh Circuit held that the ministerial exception protected a Catholic school from Title VII claims when it did not renew a counselor's contract after she entered a same-sex union. *See Starkey*, 41 F.4th at 942. Writing separately, Judge Easterbrook wrote an especially thoughtful concurrence explaining how to apply section 702(a) properly.

He points out that the statutory phrase "particular religion" must be read in light of Title VII's broad definition of "religion," which includes "*all* aspects of religious *observance and practice*, as well as belief." *Id.* at 946 (quoting 42 U.S.C. § 2000e(j)) (emphasis added). Easterbrook adds that courts cannot ignore the full breadth of that definition when interpreting section 702(a). "Any temptation to limit [Section 702(a)] to authorizing the employment of co-religionists, and not any other form of religious selectivity, is squelched by the definitional clause in § 2000e(j)." *Id.* Under the exemption, in short, "[a] religious school is entitled to limit

its staff to people who will be role models by living the life prescribed by the faith, which is part of 'religion' as § 2000e(j) defines that word." *Id.*

Easterbrook then applied this understanding of section 702(a) to the Title VII claims brought by a former employee against the Catholic high school. He acknowledged as "undisputed" that "the Roman Catholic Church deems same-sex marriages improper on doctrinal grounds and that avoiding such marriages is a kind of religious observance." *Id.* Removing an employee who enters such a marriage is, for a Catholic institution, necessary to select only employees who are "living the life prescribed by the faith." *Id.*

It makes no difference, Easterbrook wrote, that "§ 702(a) does not exempt all employment decisions by religious organizations." *Id.* A disputed employment decision "must itself be religious," but he could not "imagine any plausible reading" of Title VII "that boils down to 'churches can discriminate against persons of other faiths but cannot discriminate on account of sex.'" *Id.* Firing an employee for entering a same-sex union can be both religious discrimination *and*—according to *Bostock*—sex discrimination. "The Diocese is carrying out its theological views; that its

adherence to Roman Catholic doctrine produces a form of sex discrimination does not make the action less religiously based." *Id.* at 947.

Other circuits have adopted the same interpretation of section 702(a) as a broad protection for religious employers to choose employees who satisfy religious criteria. *See, e.g.*, *Hall*, 215 F.3d at 627 (holding that section 702(a) allows a religious employer to dismiss an employee who became a lay minister for a gay-affirming church); *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (holding that a Baptist university may terminate a professor in the divinity school); *EEOC v. Miss. Coll.*, 626 F.2d 477, 487 (5th Cir. 1980) (interpreting section 702(a) to cover a Baptist college's "employment practices by which it seeks to ensure that its faculty members are suitable examples of the Christian ideal advocated by the Southern Baptist faith").

Incidentally, we are pleased to answer the district court's request for "a case that allows employers to discriminate based on sex when the sex discrimination is motivated by religion." JA1391. The case is *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130 (3d Cir. 2006). There, the Third Circuit held that section 702(a) exempted a private Catholic school from a sex discrimination claim by a former teacher who challenged her

removal for signing a pro-choice newspaper advertisement. *Id.* at 141. *Curay-Cramer* squarely holds that section 702(a) applies "where a religious institution's ability to 'create and maintain communities composed solely of individuals faithful to their doctrinal practices' will be jeopardized by a plaintiff's claim of gender discrimination." *Id.* at 141 (quoting *Little*, 929 F.2d at 951).

B. The Ninth Circuit's Reading of Title VII Is Unpersuasive.

Opposing this solid phalanx of precedent—including this Court's decision in *Kennedy*—are decisions by the Ninth Circuit. Its position is exemplified by *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (discussed in the district court opinion at JA1391–92). There, a female employee sued an evangelical school for sex discrimination because its benefits policies favored married men. *Id.* at 1364. The school asserted a defense under section 702(a). *Id.* Legislative history figured prominently in the decision. The court of appeals described how Congress rejected complete immunity for religious employers when adopting Title VII and again during debate on the 1972 amendments. *See id.* at 1365–66. Reading section 702(a) to "exempt[] religious institutions only to a narrow extent," the court concluded that "religious institutions may base

relevant hiring decisions upon religious preferences" but they are not immune from liability for discrimination based on some other prohibited ground, such as sex. *Id.* at 1366. Given its view that section 702(a) does not offer religious employers "a complete exemption from regulation," the court ruled that the school lacked protection from sex discrimination claims. *Id.*

But the Ninth Circuit's interpretation of section 702(a) is mistaken. Treating the exemption as a narrow coreligionist privilege, as *Fremont* does, *see id.*, wars against the statutory text and against the weight of circuit court precedent in decisions like *Little*.

First, the text of 702(a) says nothing about a coreligionist preference. It applies "with respect to the employment of individuals of a particular *religion*"—a word broadly defined to include religious observances, practices, and beliefs—not religious affiliation, about which the statute says nothing. 42 U.S.C. § 2000e–1(a) (emphasis added). The breadth of that definition correspondingly expands the scope of section 702(a). Courts have ruled that "it is inconceivable that [section 702(a)] would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination

that all nominal members [of the denomination] are equally suited to the task." *Larsen v. Kirkham*, 499 F. Supp. 960, 966 (D. Utah 1980), *aff'd without op.*, No. 80-2152, 1982 WL 20024 (10th Cir. Dec. 20, 1982).

Second, legislative history as recounted by the Ninth Circuit, is a red herring. No one disputes that Congress rejected amendments that would have given religious organizations complete immunity from Title VII. *See Fremont*, 781 F.2d at 1365–66. But Congress was not limited to the all-or-nothing options of exempting religious organizations from Title VII altogether or subjecting them to the statute except where they prefer employees nominally affiliated with their denomination. Section 702(a) charts a middle course. Religious employers are exempt from Title VII when a disputed employment action turns on a religious observance, practice, or belief. *See* 42 U.S.C. §§ 2000e–1(a), 2000(j).

Third, section 702(a) applies to religious standards of conduct—not merely expressions of religious belief. *Religion* in Title VII means "religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). *Observance* and *practice* denote religiously motivated conduct. A Jewish employer can decline to hire a man who refuses to observe the Sabbath as surely as for expressing beliefs contrary to the Torah. By the same

principle, a Catholic employer can fire a man for entering a same-sex marriage no less than for disbelieving the Trinity.

Fourth, nothing in section 702(a) suggests that the exemption becomes ineffective whenever a religious organization's employment action, founded on religion, happens to affect a protected class. *See Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring). To the contrary, the exemption is mandatory (Title VII "shall not apply"), and neither section 702(a) nor the definition of religion cuts off the exemption when a religious decision results in some form of incidental impact on a protected class. An alternative reading of section 702(a) leads to absurd and obviously unconstitutional results. If the district court is correct that "religious exemptions do not let religious organizations facially discriminate based on sex," then section 702(a) does not protect the ability of Catholic institutions to reserve religiously sensitive employment positions for priests (or for Orthodox Jewish institutions to reserve certain positions for rabbis) because only men can be ordained to the priesthood. JA1392.

These analytical errors explain why the district court's reliance on Ninth Circuit case law led it astray. What matters under section 702(a) is whether the religious employer takes the disputed employment action

for religious reasons—not whether counsel for the employee can reframe that religious decision as sex discrimination. The district court's concern that applying the exemption as written would "erase protections" for employees within protected classes is a false premise. JA1393. Section 702(a) assuredly does not pose a dangerous departure from Title VII's general guarantee of workplace equality. Any apparent tension between section 702(a) and the rest of Title VII comes from misconceiving nondiscrimination as an absolute that governs every employment context. Exempting a religious organization from Title VII when it makes employment decisions for religious reasons is precisely what the statute directs courts to do. *See Little*, 929 F.2d at 951.

III. APPLYING SECTION 702(a) AS WRITTEN AVOIDS SERIOUS CONSTITUTIONAL QUESTIONS.

Any lingering doubt about how to interpret and apply section 702(a) should be resolved by the familiar rule of constitutional avoidance. It "militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–48 (2012). Serious constitutional questions arise from the district court's reading of

section 702(a) as a "narrow" provision allowing "religious institutions [to] employ those with similar faiths" but not to "discriminate against other protected classes." JA1393.

Congress deliberately adopted exemptions to lift Title VII from religious employers in the view that "the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention." *Little*, 929 F.2d at 951. Denying that exemption to these Appellants—a Catholic high school, diocese, and religious affiliate—forces an issue that Congress's handiwork deliberately avoided. Can federal law constitutionally prevent religious employers from using religious criteria to employ those best suited to carry out their religious missions? The simple answer is no. Interpreting section 702(a) as we propose would avoid serious objections under the First Amendment that could otherwise preclude Billard's claims.

A. Billard's Employment Discrimination Claim Raises Questions Under the Religious Autonomy Doctrine.

Employment disputes have generated important protections for religious freedom. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 399–400 (1963); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713–

14 (1983); *Hosanna-Tabor Evangelical Lutheran Ch. and Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012). One of those protections is the principle of religious autonomy. Under that principle, the First Amendment Religion Clauses protect the "autonomy" of religious institutions "with respect to internal management decisions that are essential to the institution's central mission." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

In determining whether an employment dispute is controlled by the religious autonomy doctrine, what matters is identifying the dispute as essentially *religious*, which depends on the character of the employer and the nature of the dispute. Religious organizations are fully protected in their constitutional rights as to religiously based employment relationships. *See Hosanna-Tabor*, 565 U.S. at 196; *Our Lady of Guadalupe*, 140 S. Ct. at 2069. Of course, religious employers are not exempt from all legal requirements in the workplace. They are governed by wage-and-hour requirements, just as any other employer. *See Tony and Susan Alamo Found. v. Sec'y of Lab.*, 471 U.S. 290, 306 (1985). And under Title VII, they may not indulge in unlawful discrimination unrelated to religious belief and practice. *See Rayburn*, 772 F.2d at 1166–67.

But the First Amendment does bar courts from second-guessing how a church or other religious organization implements religious employment standards. Formulating and implementing such standards is an internal religious matter. Requiring employees to hold certain religious beliefs and to live by them involves all the matters long-held to be within the principle of religious autonomy—"theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714 (1976). Adjudicating a dispute over a religious employer's implementation of a religious employment standard transgresses both Religion Clauses. "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion." *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

Some might argue that a religious organization cannot require more than nominal religious affiliation. But church membership is commonly more demanding than merely declaring an affiliation; it typically entails "a profession of its faith and a submission to its government." *Den*

v. Bolton, 12 N.J.L. 206, 246–47 (1831) (Ewing, C.J.). For such religious communities, their spiritual interests are served only by men and women who share a genuine devotion to its mission and the way of life it prescribes. The First Amendment safeguards their freedom to set demanding standards in the interest of ensuring that their employees pursue the prescribed religious mission. Adjudicating a Title VII claim challenging the implementation of such standards essentially would be "an invasion of the province of a religion to decide whom it will regard as its members, or who will best propagate its doctrine. That is an internal matter exempt from sovereign interference." *Larsen*, 499 F. Supp. at 966.

That the religious autonomy doctrine denies legal relief to certain aggrieved employees is immaterial. (That would also be true of employees affected by other statutory exceptions, such as those working for employers with fewer than 15 employees.) The Supreme Court has rejected the notion that religious autonomy becomes ineffective when a religious decision has legal consequences. *Kedroff* recognized that deferring to a church's internal decision-making procedures would allow a Moscow-controlled leader of the Russian Orthodox Church to control real property in New York City. *See Kedroff v. St. Nicholas Cathedral of Russian*

Orthodox Ch., 344 U.S. 94, 115 (1952). Similarly, *Milivojevich* acknowledged that deferring to the Serbian Orthodox Church's internal leadership struggle would determine who controlled church properties in this country. *See* 426 U.S. at 709. Yet the Court did not pause: "[e]ven in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls." *Kedroff,* 344 U.S. at 120–21.

Applying the religious autonomy doctrine to dismiss claims challenging a religious organization's implementation of its religious employment standards leads to common-sense results, as a few hypotheticals illustrate. (1) An Orthodox Jewish organization dismisses an employee for failing to observe the Sabbath. (2) A Quaker organization dismisses an employee for publishing a blog post supporting war. (3) The Church of Jesus Christ of Latter-day Saints dismisses an employee for drinking alcohol off-the-job. *See, e.g.*, *Amos*, 483 U.S. at 330 n.4 (and accompanying text). Each involves the implementation of religious employment standards. Each involves employee conduct that's perfectly legal—even constitutionally protected against government interference.

Yet no one would question the employer's right to fire an employee as unsuitable for *that* religious community.

The reasons to safeguard the autonomy of religious organizations are compelling. Trying to adjudicate religious matters risks "inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern." *Presbyterian Ch. in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Ch.*, 393 U.S. 440, 449 (1969). Or, as *Kedroff* discerned, religious organizations must be free to resolve their own religious matters in their own way "that there may be free exercise of religion." *Kedroff*, 344 U.S. at 121.

So long as an employment dispute involves a religious matter, the same principle of religious autonomy applies. It is true that Title VII is in full force when a religious employer indulges in discrimination without a religious justification, as when a religious school with no corresponding religious belief or practice fires an employee for his sexual orientation. But the implementation of a religious employment standard is not invidious discrimination. *Discrimination* is the wrong word to describe what happens when a religious organization excludes from employment a person who does not share the employer's religion. Where a religious

standard reflects sincere religious beliefs and practices, as here, no court can adjudicate a legal challenge to an employment decision founded on that standard.

By ruling that "[i]n the context of employment, the church autonomy doctrine is limited only to employees who perform spiritual functions that qualify for the ministerial exception," JA1396, the decision below defies a line of precedent stretching back 150 years to *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). Ever since, it has been understood that the religious autonomy doctrine encompasses more than the ministerial exception—even in the area of employment. Unless section 702(a) protects Appellants' freedom to select employees for religious reasons, the decision below will raise difficult questions about whether Title VII as applied here unconstitutionally deprives them of religious autonomy.

B. Holding Appellants Liable for Dismissing Billard Would Violate Their Right to the Free Exercise of Religion.

Additional questions arise under the Free Exercise Clause. *Employment Division v. Smith*, 494 U.S. 872 (1990), holds that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or

proscribes)." *Id.* at 879 (quotation omitted). But "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (citation omitted). In *Fulton*, a city contract allowing exceptions to a nondiscrimination requirement triggered strict scrutiny when the city refused to accommodate Catholic Social Services. *Id.* at 1881. That no exception had been given to others made no difference. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given . . . ." *Id.* at 1879.

When a law falls short of *Smith*'s neutral-and-generally-applicable standard, government must show that the law advances a compelling interest through the least restrictive means. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.* at 1881. The test is concrete and highly focused. "The question, then, is not whether [government] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [the religious objector]." *Id.* In *Fulton*, a unanimous Court concluded that

Philadelphia's goal of eliminating LGBT discrimination in city services did not by itself satisfy strict scrutiny. "The City offers no compelling reason why it has a particular interest in denying an exemption to [Catholic Social Services] while making them available to others." *Id.* at 1882.

Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam), describes a parallel framework for resolving free exercise claims. There, claimants challenged a state executive order restricting the number of people from different households that could gather for in-home religious worship. The Court reiterated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Id.* at 1296. In the free exercise context, "narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest … ." *Id.* at 1296–97.

Denying Appellants protection under section 702(a) would raise serious questions under *Fulton* and *Tandon* regarding the application of Title VII to Appellants.

Title VII is not generally applicable. Employers with fewer than 15 employees can discriminate with impunity. *See* 42 U.S.C. § 2000e(b). Businesses are free to terminate employees for communist affiliation. *See id.* § 2000e–2(f). And businesses can assert a bona fide occupational qualification (BFOQ) that effectively permits them to discriminate on the basis of a protected class trait. *See id.* § 2000e–2(e). That carve-out alone renders Title VII less than generally applicable since BFOQs effectively create a mechanism for individualized exemptions—and that mechanism triggers strict scrutiny. *See Fulton*, 141 S. Ct. at 1868.

Title VII, as construed in *Bostock*, is not neutral toward religion either. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. A rule punishing religious employers for long-standing religious practices upholding traditional beliefs concerning marriage effectively makes "prohibiting the exercise of religion" the statute's necessary "object." *Smith*, 494 U.S. at 878. Major Abrahamic religions commonly teach the biblical principle that marriage consists in the union of a man and a woman—not the union of two men or two women. Requiring one's employees to hew to that principle reflects

the exercise of religion. But what traditional religions teach as moral truth, Title VII now generally requires employers to disregard. Unless 702(a) applies as we have explained, this creates a direct conflict between federal law and widespread religious beliefs. That conflict renders the nondiscrimination rule of Title VII less than neutral toward religion.

Under *Fulton*, strict scrutiny applies. Billard must show that denying Appellants an accommodation serves a compelling government interest through the least restrictive means. This he cannot do. "The creation of a system of exceptions" like the granting of BFOQs "undermines [Billard's] contention that [Title VII's] non-discrimination policies can brook no departures." *See Fulton*, 141 S. Ct. at 1882. The Supreme Court has never held that applying nondiscrimination rules to churches or religious schools without exception serves a compelling interest.

Nor can Billard satisfy the least restrictive means prong of strict scrutiny. Under that prong, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.* at 1881. Since Title VII excuses small businesses and BFOQs, it must also relieve religious organizations like Appellants when the duty to avoid employment discrimination clashes with sincere religious beliefs.

Similar questions arise under *Tandon*. Title VII treats comparable secular activities "more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. Small businesses and businesses operating under a BFOQ inflict the same harms by discriminating against LGBT employees as any other category of employers, yet Title VII exempts them. *See* 42 U.S.C. §§ 2000e(b); 2000e–2(e). Strict scrutiny again applies. Billard cannot satisfy that demanding test because the government lacks a compelling interest in requiring Charlotte Catholic to employ a man in a same-sex marriage (or compensate him for the loss of employment) when Title VII admits exemptions for comparable secular interests.

* * * *

Rather than tackling these difficult constitutional questions, it would be better to confirm what *Kennedy* already holds—that Title VII's religious exemption entitles Appellants to discharge Billard for religious reasons, as the plain terms of section 702(a) direct.

CONCLUSION

This Court should reverse the district court's judgment.

Respectfully submitted,

September 29, 2022

/s/R. Shawn Gunnarson

R. Shawn Gunnarson

Alexander Dushku
R. Shawn Gunnarson
Jarom Harrison
Emily Haws Wright
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 22-1440

Caption: *Charlotte Catholic High School v. Billard*

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/s/R. Shawn Gunnarson
Counsel for *Amici*
September 29, 2022

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/s/R. Shawn Gunnarson
R. Shawn Gunnarson