APPEAL NO. 22-1440

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LONNIE BILLARD,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of North Carolina, Charlotte Division
Honorable Max O. Cogburn Jr.
Case No. 3:17-cv-00011-MOC-DCK

MOTION FOR LEAVE TO FILE BRIEF OF CARDINAL NEWMAN SOCIETY, ASSOCIATION OF CLASSICAL CHRISTIAN SCHOOLS, AND ASSOCIATION FOR BIBLICAL HIGHER EDUCATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, amici respectfully move this Court for leave to file the attached *amici curiae* brief in support of Defendant-Appellants and reversal of the district court's judgment. Counsel for amici contacted the parties' counsel before filing this motion, and both parties consented to the brief's filing.

IDENTITY AND INTEREST OF *AMICI*

The Cardinal Newman Society, the Association of Classical Christian Schools, and the Association for Biblical Higher Education, each seek to promote and support Christian schools to provide a rigorous education grounded in an authentic Christian worldview. The Cardinal Newman Society is an organization dedicated to promoting faithful Catholic education. It supports teachers and institutions around the country by promoting best practices and standards for Catholic teaching. The Association for Classical Christian Schools is an association of more than 400 classical Christian schools. It provides them with educational resources such as accreditation services and public advocacy. The Association for Biblical Higher Education is an association of more than 150 institutions of biblical higher education. It provides them educational opportunities through traditional residential, extension, and distance learning models.

These organizations have seen how increasing secularization of society and the Church threatens the very foundation of Christian education. All Christian schools seek to provide an education planted firmly in a Christian worldview. Yet Christian and other religious

schools are increasingly pressured to compromise on their religious tenets to accommodate the prevailing majoritarian norms of society.

Lawsuits like this one exemplify that threat. The Church teaches that God created human beings as male and female, that sexual relations of any kind are only appropriate within the confines of a biblical marriage, and that biblical marriage is the life-long union of one man and one woman. These religious beliefs have roots that stretch back millennia, and as they increasingly clash with cultural and societal trends, they also become an increasingly important aspect of how religious groups like the Catholic Church define themselves.

A growing number of individuals and groups don't just disagree with the Church's teachings in these areas; they actively seek to change them. Indeed, other religious schools have faced lawsuits just like this one. *E.g.*, *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931 (7th Cir. 2022). So have religious nonprofits. In Washington, for example, an individual applied to Seattle's Union Gospel Mission to "protest" the Mission's religious beliefs on marriage and sexuality. *Seattle's Union Gospel Mission v. Woods*, 142 S. Ct. 1094, 1095 (2022) (Alito, J., statement respecting the denial of certiorari). His application even "asked the Mission to 'change' its religious practices." *Id.* When the nonprofit hired someone else, the applicant sued, dragging the nonprofit through years of litigation.

As Justice Alito noted, "[i]f States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by those who disagree with their theological views most vigorously." *Id.* at 1096. Indeed, just the prospect of costly

litigation and "potential liability might affect the way an organization carrie[s] out … its religious mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

RELEVANCE AND DESIRABILITY OF BRIEF BY *AMICI CURIAE*

Courts are "usually delighted to hear additional judgments from able *amici* that will help the court toward right answers." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999) (emphasis added). This is particularly true when an amicus provides "information on matters of law about which there [is] doubt, especially in matters of public interest." *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991).

This amici brief can aid the Court in considering the statutory and constitutional issues in this case.

First, the amici brief explains why Title VII's plain text protects Charlotte Catholic's religiously motivated employment decisions, whether or not those decisions implicate protected characteristics like sex. The brief also explains that this accords with the religious exemption's purpose: protecting the autonomy of religious communities to define themselves and form communities committed to a shared mission.

Second, the amici brief explains how the First Amendment also protects Charlotte Catholic's religiously motivated employment decisions and compels a broad reading of Title VII's religious exemption. The brief does this by examining how historical instances of religious

persecution led to the church autonomy doctrine, which protects religious organizations' autonomy to decide questions of faith, doctrine, and internal governance. The brief then explains how this doctrine naturally encompasses the right of religious entities to employ only those who will follow their religious precepts and further their mission. Supreme Court precedent supports this understanding of the doctrine, and this compels a broad reading of the religious exemption to avoid infringing on First Amendment rights.

Last, the brief surveys other circuit courts which have applied the constitutional avoidance canon in exactly this way.

CONCLUSION

For these reasons, the Cardinal Newman Society, the Association of Classical Christian Schools, and the Association for Biblical Higher Education respectfully request that the Court grant their unopposed motion for leave to file the attached *amici curiae* brief.

Respectfully submitted,

Dated: September 29, 2022

By: */s/ Johannes Widmalm-Delphonse*

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Johannes Widmalm-Delphonse
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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1 *amici curiae* The Cardinal Newman Society, the Association of Classical Christian Schools, and the Association for Biblical Higher Education make these disclosures:

1. Is party a publicly held corporation or other publicly held entity? No.

2. Does party have any parent corporations? No.

3. Is 10% or more of the stock of a party 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 (Local Rule 26.1(b))? No.

5. Is party a trade association? No.

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.

Dated: September 29, 2022

/s/ Johannes Widmalm-Delphonse
JOHANNES WIDMALM-DELPHONSE
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The Association of Classical Christian Schools represents more than 400 classical Christian schools. These schools practice classical education in a Christian context and from a Christian worldview. ACCS provides member schools educational resources that help them fulfill their mission to provide a Christian classical education, including accreditation services, public advocacy, and staffing support.

The Association for Biblical Higher Education is an association of more than 150 institutions of biblical higher education, which enroll more than 63,000 students. ABHE offers undergraduate and graduate educational opportunities through traditional residential, extension, and distance learning models. Its member schools have diverse histories and affiliations, but they are all centered on promoting a Christian education and a biblical worldview in their students.

The Cardinal Newman Society promotes faithful Catholic education. It supports schools at all levels, promotes best practices and standards for Catholic education, and recognizes exemplary teachers and institutions exemplifying faithful Catholic teaching that promotes the integral formation of their students.

These organizations and their members care deeply about preserving their religious autonomy. They advocate for the right of

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Fed. R. App. P. 29, and all parties consent to its filing.

religious educational institutions to select their own communities, free from government intrusion and consistent with First Amendment guarantees. These groups have seen how religious schools increasingly face challenges from those with contrary views on marriage, sexuality, and gender, endangering their religious mission. They desire to see strong protections for religious autonomy that safeguard religious schools' ability to draw their workforces from among those who will uphold their shared culture of faith and mission and cultivate a religious environment suitable for passing their faith to the next generation of Christian leaders. In this case, the organizations and their members support reversal of the district court to ensure that Charlotte Catholic High School can make religious decisions free from government punishment.

INTRODUCTION

Our nation has long protected the autonomy of religious groups to define and express themselves according to their religious beliefs. It's an independence born from experience. After King Henry VIII ascended the throne and made the English monarch the supreme head of the Church, the Crown exercised vast ecclesiastical powers. It appointed the Church's officials, prescribed which ministers could preach, and even dictated how congregations prayed. The Constitution's drafters, cognizant that these abuses had been repeated in the colonies, knew that letting secular authorities decide spiritual questions was a recipe for disaster. They drafted the First Amendment precisely to prohibit the government from exercising jurisdiction over matters of "theological controversy, church discipline, ecclesiastical government, or the

conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1872).

Congress drafted Title VII to respect this independence from secular control by granting faith-based organizations a broad religious exemption. As originally enacted, §702 stated that Title VII "shall not apply" to religious entities who wish to employ "individuals of a particular religion" to do the work of "carrying on [their] religious activities." Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified at 42 U.S.C. § 2000e-1 as amended). Recognizing that the First Amendment demanded far more, Congress expanded the exemption to include individuals hired to carry out *any* of the organizations' "activities"—religious or not. Pub. L. No. 92-261, § 3, 86 Stat. 103, 103–04 (codified at 42 U.S.C. § 2000e-1). And the statute defines "religion" broadly to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

This exemption was prescient. As government regulations have become more pervasive, "exerting a hydraulic insistence on conformity to majoritarian standards," Title VII's religious exemption has protected religious organizations' ability to continue living and teaching their faith. *Wisconsin v. Yoder*, 406 U.S. 205, 217 (1972). For decades, other Courts of Appeals have recognized this principle. A Jewish community center can ensure that its bookkeeper holds Jewish beliefs. A Catholic school can ensure that its teachers do not engage in public advocacy supporting abortion. And a Baptist college that believes marriage is the union between one man and one woman can employ only those who agree with—and abide by—their definition of marriage. This Court should similarly protect Charlotte Catholic High School's

religious autonomy to employ only those who abide by the Catholic Church's teachings on marriage and sexuality.

The district court thought that granting Charlotte Catholic this autonomy was excessive. It agreed that § 702 protects a religious entity's right to make religiously motivated employment decisions, but not if that action violates an employment law. So the free exercise of religion depends on how plaintiffs frame their claims. Dismissing a teacher who enters a same-sex marriage is lawful if the plaintiff alleges *religious* discrimination but violates Title VII if the plaintiff alleges *sex* discrimination.

Yet the government "cannot foreclose the exercise of constitutional rights by mere labels," *NAACP v. Button*, 371 U.S. 415, 429 (1963), and the same is true of the rights secured by Title VII. Nothing in § 702 gives plaintiffs veto power over faith-based organizations' religious freedom. Section 702 says that Title VII—the whole thing—"shall not apply" to religiously motivated employment actions. And that autonomy does not depend on how plaintiffs couch their claims.

The district court's ruling sends an ominous message to religious institutions like Charlotte Catholic: abandon your religious beliefs and standards of conduct or face lawsuits, court battles, and pecuniary penalties. Some litigants, hungry to make a statement, are pursuing religious groups in an effort to change those groups' beliefs. *See Seattle's Union Gospel Mission* (*SUGM*) *v. Woods*, 142 S. Ct. 1094, 1095 (2022) (Alito, J., statement concurring in denial of cert.) (describing plaintiff submitting employment application to "protest" nonprofit's personnel policy).

The district court got it wrong. Title VII's plain text and purpose protect religious organizations like Charlotte Catholic by exempting them from Title VII's requirements. The Constitution does too, providing one more reason to read the religious exemption broadly. This Court should reverse the district court and affirm the right of religious groups to operate without fear of government punishment for operating consistent with their religious beliefs.

ARGUMENT

Title VII's plain text protects Charlotte Catholic's religiously motivated employment action. The Constitution does too, so the Court should read Title VII's religious exemption broadly to avoid infringing religious organizations' First Amendment rights.

I. Title VII's plain text protects all religiously motivated employment actions.

Title VII's religious exemption protects Charlotte Catholic's decision to fire the Plaintiff in this case. That's because § 702's plain text and purpose protects religiously motivated employment actions, whether or not the action discriminates based on sex.

A. The religious exemption's plain text and purpose protects religiously motivated employment actions.

"When interpreting a statute, we start with its text." *Harrell v. Freedom Mortg. Corp.*, 976 F.3d 434, 439 (4th Cir. 2020). "Statutes must 'be read as a whole,'" *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 135 (2007) (citation omitted), and courts have "no license to give statutory exemptions anything but a fair reading." *BP P.L.C. v. Mayor*

& City Council of Baltimore, 141 S. Ct. 1532, 1538 (2021) (citation and internal quotation marks omitted).

Section 702 of Title VII provides:

> This subchapter shall not apply 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.[2]

There's no doubt that a school like Charlotte Catholic is a religious "educational institution" under § 702. And the term "employment" "covers the breadth of the relationship between the employer and employee," including, but not limited to, "hiring and firing decisions." *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 193 (4th Cir. 2011). And teachers undeniably help carry out the school's activities. They play a "critical and unique role … in fulfilling the mission of a church-operated school." *NLRB. v. Cath. Bishop of Chicago*, 440 U.S. 490, 501 (1979).

This leaves the phrase "of a particular religion." If these words "were all we had to go on," the plaintiff in this case "might have a point." *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021).

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[2] Section 703(e)(1) provides a similar exception specifically for religious schools, protecting their ability "to hire and employ employees of a particular religion." 42 U.S.C. § 2000e-2(e). These exceptions overlap when the protected entity is a religious school, and courts analyze them the same way. *See Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991); *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997); *see also* JA1387 (explaining that the provisions "do the same thing" in this case). This brief focuses on § 702 but the analysis applies to both exceptions.

Standing alone, perhaps one could argue the exemption protects only a preference for employees of a *particular* religion or denomination, like Jewish and Muslim, or Catholic and Baptist. *See Little v. Wuerl*, 929 F.2d 944, 950 (3d Cir. 1991) (acknowledging and then rejecting this reading). But Title VII provides "an explicit definition" that courts "must follow." *Van Buren*, 141 S. Ct. at 1657 (citation omitted). Section 701 states that the "term 'religion' includes *all aspects of religious observance and practice*, as well as belief." 42 U.S.C. § 2000e(j) (emphasis added).

So § 702 doesn't confine religious groups to looking at mere religious or denominational labels but allows them to judge whether an employee lives their life "by word and deed … in accordance with the faith." *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S. Ct. 2040, 2066 (2020). For example, in *Kennedy* a Catholic facility fired a nursing assistant for wearing Church-of-the-Brethren attire that conflicted with the facility's religious principles. 657 F.3d at 190–91. The facility didn't let her go for attending the wrong church but because her beliefs and conduct about how to dress were "inconsistent with those of [her] employer." *Id.* at 192 (citation omitted). Section 702's "plain language" and "purpose" permitted this. *Id.* at 194, 196; *accord Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (same); *Little*, 929 F.2d at 951 (religious groups may "employ only persons whose beliefs and conduct are consistent with the employer's religious precepts").

This makes sense because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). So unless this Court is

going "to decide who is and who is not a good Catholic," the exemption protects all religiously motivated employment actions, regardless of the label plaintiffs give their claims. *Accord Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1500 (E.D. Wis. 1986) ("[T]he determination of who fits into that category is for religious authorities and not for the government to decide."), *aff'd in part and vacated in part*, 814 F.2d 1213 (7th Cir. 1987).[3] Even the district court agreed that "religious employers have strong legal protection for hiring and firing employees … if the employment decision is religiously motivated." JA1387.

Section 702's plain text protects Charlotte Catholic's decision to part ways with the teacher in this case. Lonnie Billard "decided to get married when same-sex marriage was legalized." JA1376. That's his choice. But "[i]t is 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." *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring). In fact, same-sex relationships are "forbidden by many religious faiths." *Id.* So a religious school like Charlotte Catholic is plainly "motivated by religion," JA1391, when it dismisses a teacher for entering into a marriage that its religious precepts forbid, and Title VII's plain text protects that decision.

[3] The Seventh Circuit affirmed the district court's judgment for the religious school because the plaintiff failed to make out a prima facie case of discrimination and did not reach the merits of the plaintiff's claims.

B. The exemption covers all religiously motivated employment actions, no matter if they also allegedly discriminate based on sex.

If § 702 protects religiously motivated employment actions like firing a teacher because of their religion—does it matter if the action also allegedly discriminates because of the teacher's sex? The only answer, based on a fair reading of the exemption, is "no."

Again, start with the text. Section 702 states that "this subchapter"—meaning Title VII—"shall not apply with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. § 2000e-2. The word "shall" is a "command." *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (citation omitted). It "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)." So when the exemption says that Title VII "shall not apply," there is no "implicit exception, for it is absolute." *Bozeman*, 533 U.S. at 153.

Moreover, § 702 "makes no distinction among different kinds of" decisions, *id.* at 154, regarding the "employment of individuals of a particular religion to perform work connected with the carrying on … of [a religious organization's] activities," 42 U.S.C. § 2000e-1. Accordingly, "we must assume that *every*" such religious employment action "triggers" the exemption. *Bozeman*, 533 U.S. at 154 (holding speedy trial statute made "no distinction among different kinds" of prisoner arrivals, so "*every* prisoner arrival … triggered" its provisions).

Plaintiffs can bring one discrimination claim or a dozen and label them however they like—the statute "does not contain any … language

… limiting" the exemption to "*solely*" claims of one type. *BP P.L.C.,* 141 S. Ct. at 1538. "Instead," the clause exempts religiously motivated actions from Title VII's reach "without any further qualification." *Id.*

In other words, the statute lays down a broad rule that religiously motivated employment actions are exempt from the Act. And "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020). There is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." *Id.*

So once a religious organization triggers the exemption, Title VII "shall not apply." 42 U.S.C. § 2000e-1(a). Section 702 "lays down a general rule placing *all*" of the enumerated conduct "outside the … Act's reach." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (provision stating that anti-trust statute "shall not apply" to foreign trade placed "*all*" such foreign trade "outside the Sherman Act's reach").

Everyday examples help prove the point. The Catholic Church makes employment decisions based on sex when it relies on the Bible's understanding that only men can enter the priesthood. An Orthodox synagogue does the same when it says that only men may serve as rabbis. So too an Islamic school that requires women to wear a hijab but not men. Everyone agrees these decisions are religiously motivated, and no one thinks they fall outside Title VII's religious exemption. *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring) ("§ 702(a) … permit[s] sex discrimination by religions that do not accept women as priests").

The same principle controls this case no matter whether firing someone for entering a same-sex relationship constitutes sex discrimination in the eyes of a secular court. "The Diocese is carrying out its theological views" and the fact "that its adherence to Roman Catholic doctrine [may] produce[]" what secular society considers "a form of sex discrimination does not make the action less religiously based." *Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring). The material point is that "when the decision is founded on religious beliefs, then all of Title VII drops out." *Id.* at 946.

The district court below thought that the religious "exemptions to Title VII do not authorize sex discrimination: they only allow religious discrimination" and no other kind. JA1391. The exemption for religious discrimination is "plain enough." *Starkey*, 41 F.4th 931, 946 (Easterbrook, J., concurring). "But where does the 'no other kind' limitation come from?" *Id.* Courts "cannot arbitrarily *constrict* [an exemption] by adding limitations found nowhere in its terms." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (citation omitted).

Sure, "Title VII does not confer upon religious organizations a license to make [employment] decisions on the basis of race, sex, or national origin." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985). But that doesn't limit the exemption for religious employment decisions. These "two propositions can be true at the same time." *United States v. Fall*, 955 F.3d 363, 373 (4th Cir. 2020). Religious colleges can be liable for sex discrimination against professors "[i]f religion played no role in the decision not to grant [them] tenure." *Ritter v. Mount St. Mary's Coll.*, 495 F. Supp. 724, 729 (D. Md. 1980).

And seminaries can be liable for sexual harassment against their novices if they "do not offer a religious justification for the harassment" but "condemn it as inconsistent with their values and beliefs." *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 947 (9th Cir. 1999).

Here, secular courts can't "distinguish religious discrimination from sex discrimination." *Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring). One is tied to the other. That still triggers the exemption, and Title VII does not apply.

Notice how courts have interpreted the same exemption language in other contexts. The first part of § 702 states that Title VII "shall not apply to an employer with respect to the employment of aliens outside any State." 42 U.S.C. § 2000e-1(a). "[N]o one disputes that the provision excludes coverage to aliens employed outside the states." *Boureslan v. Aramco, Arabian Am. Oil Co.*, 892 F.2d 1271, 1273 (5th Cir. 1990) (citation omitted), *aff'd sub nom. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 421 (D.C. Cir. 2005) (same). "What is true for the alien exemption must be true for the religious exemption as well." *Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring).

Because "the statute's language is plain," this Court's "inquiry should end." *Culbertson v. Berryhill*, 139 S. Ct. 517, 521 (2019). But it's worth noting that this reading reflects the religious exemptions' purpose too. "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." *Kennedy*, 657 F.3d at 194 (quoting *Little*, 929 F.2d at 951). In fact, employing "only those committed to that mission" is "a means by which

a religious community defines itself." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). Taking that away "would undermine not only the autonomy of many religious organizations but also their continued viability." *SUGM*, 142 S. Ct. at 1096 (Alito, J., concurring in the denial of certiorari). "If States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by those who disagree with their theological views most vigorously." *Id.*

The statute's text and purpose agree: § 702 protects religiously motivated employment actions, and once the exemption is triggered, Title VII no longer applies.

II. The constitutional avoidance canon compels a broad reading of the religious exemption to protect all religiously motivated employment actions.

In addition to Title VII's plain text and purpose, Charlotte Catholic's freedom to make religiously motivated employment decisions also comes from the Constitution. The First Amendment gives religious groups autonomy to decide questions of faith and internal governance, including the right to employ only those who will further their religious mission. This Court should read Title VII's exemption broadly to avoid trampling on First Amendment rights.

A. The United States has long protected religious organizations' autonomy to decide questions of faith, doctrine, and internal governance.

This country has long given religious groups an "independence from secular control or manipulation," and the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Though the First Amendment guarantees this autonomy, it predates the Constitution.

Many of the early American settlers fled Europe "to escape the bondage of laws which compelled them to support and attend government favored churches." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947). Others wanted the freedom "to elect their own ministers and establish their own modes of worship." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182 (2012). Even in the new world, the settlers saw "many of the old world practices and persecutions" become "so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence" and "indignation." *Everson*, 330 U.S. at 10–11.

These "feelings found expression in the First Amendment." *Id.* at 11. One of its "leading architects," James Madison, staunchly defended the rights of conscience from government meddling. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 141 (2011). He believed "that religion … and the manner of discharging it, can be directed only by reason and conviction, not by force or violence," making it "wholly exempt from [government's] cognizance." *Everson*, 330 U.S. at 64.

Nearly 100 years later, before the First Amendment was even applied to the states, the Supreme Court recognized that "civil courts exercise no jurisdiction" over matters involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson*, 80 U.S. at 733. Indeed, civil authorities are "incompetent judges of matters of faith, discipline, and doctrine," and any courts "so unwise as to attempt" it, "would do anything but improve either religion or good morals." *Id.* at 732 (citing *German Reformed Church v. Seibert*, 3 Pa. 282, 282 (1846)).

This religious autonomy doctrine prevents the government from deciding "what does or does not have religious meaning," *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977), interpreting "church doctrines and the importance of those doctrines to the religion," *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969), or regulating "church administration, the operation of the churches, [or] the appointment of clergy." *Kedroff*, 344 U.S. at 107–08. It also gives religious groups independence to choose who carries out their missions. After all, any other rule would allow courts to weigh in and second-guess a religious group's beliefs and operations.

B. Religious organizations have an absolute right to employ only those who follow their religious precepts and further their religious mission.

"[T]he Religion Clauses foreclose certain employment discrimination claims," that intrude on an organization's "independence in matters of faith and doctrine and in closely linked matters of internal

government." *Our Lady of Guadalupe*, 140 S. Ct. at 2061. They protect "the freedom of religious groups to select their own" representatives, *Hosanna-Tabor*, 565 U.S. at 184, and reject those who go against tenets of the faith.

"[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of … educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (cleaned up). Forcing a "group to accept members it does not desire," burdens that right by intruding on the organization's "internal structure or affairs," impairing its ability to express certain views "and only those views," and "significantly burden[ing] the organization's right to oppose or disfavor [certain] conduct." *Id.* at 648, 659.

Though the "freedom of association is a right enjoyed by religious and secular groups alike," the First Amendment "gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 565 U.S. at 189. After all, their "very existence … is dedicated to the collective expression and propagation of shared religious ideals." *Id.* at 200 (Alito, J., concurring); *see also Amos*, 483 U.S. at 337 ("to advance religion … is their very purpose"). And "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine … is unquestioned." *Watson*, 80 U.S. at 728–29.

One aspect of this independence is the right to decide that only those who share the group's beliefs—or are at least committed to their religious practices—should help to "define and carry out their religious missions." *Amos*, 483 U.S. at 335. This is sometimes known as the "co-religionist exemption," but like § 702, the right isn't limited to hiring

someone of a *particular* religion or denomination. It gives religious groups the autonomy "to shape [their] own faith and mission through [their] appointments," so religious organizations can ensure that *all* personnel will contribute, rather than detract from, the group's shared ideals. *Hosanna-Tabor*, 565 U.S. at 188.

The district court below thought mistakenly that the church autonomy doctrine was "limited only to employees who perform spiritual functions that qualify for the ministerial exception." JA1396. But the Supreme Court's "precedents suggest that the guarantee of church autonomy is not so narrowly confined." *SUGM*, 142 S. Ct. at 1096.

Amos, for example, considered whether § 702 allowed a Mormon organization "to discriminate on religious grounds in hiring for nonreligious jobs" consistent with the Establishment Clause. 483 U.S. at 331. The Court said yes because the "government may (and sometimes must) accommodate religious practices" to allow them "to define and carry out their religious missions." *Id.* at 334–35. And "intrusive" inquiries into whether a job was sufficiently religious, *id.* at 339, could create a "significant burden" by requiring a religious group "to predict which of its activities a secular court will consider religious," and pressuring it to alter "the way it carried out … its religious mission," to avoid "potential liability." *Id.* at 336.

As Justice Brennan explained in his concurrence, religion *is* what a religious organization *does*. When it comes to non-profits dedicated to service, "the activities themselves are infused with a religious purpose." *Id.* at 344 (Brennan, J., concurring). So the First Amendment protects these organizations' right to decide for themselves "that certain

activities are in furtherance of [their] religious mission, and that only those committed to that mission should conduct them." *Id.* at 342.

Recently, the Supreme Court affirmed related principles in *Our Lady of Guadalupe*, in which it held that the ministerial exception protected the actions of two Catholic schools who fired two religion teachers. 140 S. Ct. at 2066. The Court emphasized that "titles" were unimportant; rather, "[w]hat matters … is what an employee does," *id.* at 2064, and a religion teacher's job was "loaded with religious significance," *id.* at 2067. The two dissenting justices disagreed on this last point, but even they agreed that religiously motivated actions are different. *Id.* at 2072, 2078–79, 2081 (Sotomayor, J., dissenting) (stressing that the schools did not provide a "religious reason" for their actions). They also connected the dots to religious exemptions like § 702, which already "protect a religious entity's ability to make employment decisions … *for religious reasons*." *Id.* at 2072 (emphasis added).

These decisions show that the ministerial and co-religionist exceptions are different means to the same end. Remember that "the general principle of church autonomy" is tied to religious entities' "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe*, 140 S. Ct. at 2061. The ministerial exception recognizes that deciding "whose voice speaks for the church is *per se* a religious matter," and courts have no say when it comes to "how and by whom churches spread their message." *EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795, 804–05 (4th Cir. 2000) (cleaned up).

The co-religionist exemption recognizes that religiously motivated employment actions are "*per se* religious" too. *Id.* at 805. In fact, hiring or firing an employee for openly contradicting an organization's religious tenets—even if that employee is not a spiritual leader—*directly* affects the group's religious expression. If a religious organization "possess[es] a religious reason" for firing someone, practically everyone agrees that decision should be protected. *Our Lady of Guadalupe*, 140 S. Ct. at 2072 (Sotomayor, J., dissenting).

This is not a "general immunity from secular laws." *Id.* at 2060; *contra* JA1396 (claiming Appellants' position would render ministerial exception superfluous "because Title VII would not protect any employee of a religious organization"). In one sense, the co-religionist exemption is narrower than the ministerial exception because it applies *only* to religiously motivated actions. *See supra* § I.B (providing examples in which religious groups could be held liable for secular employment actions). In another sense, the co-religionist exemption is broader than the ministerial exception, because it protects the organization's religiously motivated employment actions regarding *all* employees. These protections are like circles on a Venn diagram: sometimes they overlap sometimes they don't. But they both "demarcate[] a sphere of deference with respect to those activities most likely to be religious … in which discrimination is most likely to reflect a religious community's self-definition." *Amos*, 483 U.S. at 345 (Brennan, J., concurring). And that self-definition, as James Madison wrote, is wholly outside the government's cognizance.

True, religious employment decisions "may at times result from preferences wholly impermissible in the secular sphere." *Rayburn*, 772

F.2d at 1171–72. A secular employer, for example, could never designate a job category that could be held only by men. But "[w]here the values of state and church clash" over "decision[s] of a theological nature, the church is entitled to pursue its own path without concession to the views of" the government. *Id.* at 1171. And when a religious practice or "belief implicates a difficult and important question of religion and moral philosophy," it is even more important for civil authorities not to dictate that certain "beliefs are flawed." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014). Indeed, the view that marriage is "by its nature" the "union of man and woman … long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015). "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Id.* at 679–80.

These religious liberty concerns are at their apex when selecting teachers at religious schools. "The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission." *Our Lady of Guadalupe,* 140 S. Ct. at 2055. A "wayward" teacher who "contradict[s] the church's tenets," will undermine its teachings and could lead students "away from the faith." *Id.* at 2060 (discussing significance of selecting ministers who preach, teach, or provide counseling).

That's still the case when a teacher teaches "secular subjects." *Id.* at 2059. "[A] textbook's content is ascertainable, but a teacher's handling of a subject is not," so the "potential for involving some aspect of faith or morals *in secular subjects*" is unavoidable. *Cath. Bishop*, 440 U.S. at 501 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), *abrogation on other grounds recognized by Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022)).

Besides, *all* teachers are supposed to "model and promote" the religion's "faith and morals." *Our Lady of Guadalupe,* 140 S. Ct. at 2056 (quoting teacher's employment agreement); App.'s Opening Br. 9, ECF No. 24. (same). The Catholic Church says so in its canon law, which requires that "teachers are to be outstanding in correct doctrine and integrity of life." App.'s Opening Br. 9 (citing 1983 Code c.803, § 2). That's why Charlotte Catholic required all teachers "regardless of their membership in the Catholic Church" to "not publicly engage in conduct opposed to the fundamental moral tenets of the Roman Catholic faith, including those concerning marriage." *Id.*

The church autonomy doctrine gives schools like Charlotte Catholic independence to decide questions of faith, doctrine, and governance, including who is religiously qualified to fulfill its mission. The "courtroom is not the place to review a church's determination of 'God's appointed.'" *Rayburn*, 772 F.2d at 1170. And this constitutional guaranty requires the courts to read Title VII's religious exemption broadly.

C. Because religiously motivated employment decisions are protected by the First Amendment, the constitutional avoidance canon compels a broad reading of Title VII's religious exemption.

This Court need not reach, much less resolve, the First Amendment issues in this case. The constitutional avoidance canon compels this Court to read Title VII's religious exemption broadly to avoid infringing on First Amendment rights.

If "the validity of an act of the Congress is drawn in question," or "a serious doubt of constitutionality is raised, it is a cardinal principle" to first give the statute a fair reading that avoids the constitutional issues. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) (citation omitted). "Such a construction is especially appropriate when a broader reading of the statute implicates the religion clauses of the First Amendment." *Rayburn*, 772 F.2d at 1166. And at this stage, the Court need only ask whether the statute's application "presents a significant *risk* that the First Amendment will be infringed." *Cath. Bishop*, 440 U.S. at 502 (emphasis added).

In *Catholic Bishop*, the Supreme Court applied this canon to a similar case in determining how a labor law applied to religious schools. 440 U.S. at 501. There, the Court barred the National Labor Relations Board from exercising jurisdiction over religious schools because overseeing labor disputes—even if they only involved lay faculty—would require the Board to judge the sincerity of the schools' religious beliefs when the "challenged actions were mandated by their religious creeds." *Id.* at 502. Just "the very process of inquiry" could burden the schools' religious rights, *id.* at 502, and without "a clear expression of

Congress' intent," the Court read the law narrowly to sidestep constitutional concerns, *id.* at 507.

This Court applied the avoidance canon in *Kennedy*, 657 F.3d at 195; *see supra* § I.A (describing this case). Though § 702's "plain language" and "purpose" already protected the facility's actions, this Court applied "the doctrine of *constitutional* avoidance … to avoid reaching [the facility's] First Amendment argument." *Kennedy*, 657 at 194–96. It should do the same here. Firing a teacher for religious reasons is "*per se* religious." *Roman Cath. Diocese of Raleigh*, 213 F.3d at 805. So, to avoid "difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses," the Court should read § 702 to protect religiously motivated employment actions. *Cath. Bishop*, 440 U.S. at 507.

Other circuit courts have done exactly that. *Contra* JA1391. Take *Little*, in which the Third Circuit upheld a Catholic school's right not to renew a teacher's contract after she divorced and then remarried without seeking an annulment. 929 F.2d at 946. Applying Title VII would "arguably violate both the free exercise clause and the establishment clause," *id.* at 947, so the court read § 702 "broadly" to permit religious groups "to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts," *id.* at 951. This allowed the school to dismiss a "teacher who … publicly engaged in conduct" that was "inconsistent with its religious principles." *Id.*; *accord Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 138–41 (3d Cir. 2006) (holding § 702 protected Catholic school's decision to fire a teacher for pro-abortion advocacy because applying Title VII to school's actions raised "serious constitutional questions").

The Fifth Circuit also read § 702 "broadly to [protect] any employment decision made … on the basis of religious discrimination." *EEOC v. Mississippi Coll.*, 626 F.2d 477, 487 (5th Cir. 1980). To avoid "conflicts [with] the religion clauses," it ruled that if a school showed it fired a professor "on the basis of religion," the EEOC can't investigate "whether the religious discrimination was a pretext." *Id.* at 485; *accord Curay-Cramer*, 450 F.3d at 141 (courts should not inquire "into a religious employers' religious mission or the plausibility of its religious justification for an employment decision").

The Sixth Circuit ruled similarly that a religious college could fire a student-services specialist after she disclosed that she was a lesbian ordained in an LGBT-friendly church. *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 622–23 (6th Cir. 2000). It recognized that religious groups have a "constitutionally-protected interest … in making religiously-motivated employment decisions," *id.* at 623, and that courts cannot "dictate to religious institutions how to carry out their religious missions or how to enforce their religious practices," *id.* at 626.

When a Baptist university demoted a professor because of theological differences, the Eleventh Circuit read § 702 "to avoid the First Amendment concerns." *Killinger*, 113 F.3d at 201. The court held that the "exemption allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities." *Id.* at 200.

In short, appellate courts across the country have given Title VII's religious exemption a broad reading to avoid encroaching on

foundational First Amendment rights. This Court should too and avoid a circuit split that would likely trigger Supreme Court review.

CONCLUSION

Title VII's plain text protects Charlotte Catholic's religiously motivated employment decisions, including its decision to part ways with the teacher in this case. The First Amendment does too, which requires reading § 702 broadly to avoid constitutional issues. This Court should reverse the district court's judgment and remand for it to enter summary judgment in Charlotte Catholic's favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because this brief contains 6,418 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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