Nos. 17-1618, 17-1623

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,

v.

CLAYTON COUNTY, GEORGIA, *Respondent.*

[Additional Case Caption Listed Inside Front Cover]

On Writs of Certiorari to the United States Court of Appeals for the Eleventh and Second Circuits

BRIEF *AMICI CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND OTHER RELIGIOUS ORGANIZATIONS IN SUPPORT OF EMPLOYERS

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v.

MELISSA ZARDA, AS EXECUTOR OF THE ESTATE OF DONALD ZARDA, et al., *Respondents*.

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INTEREST OF *AMICI*

The *amici* are national religious organizations that share the conviction that Title VII is not fairly read to address sexual orientation, and that such a reading would create serious burdens on religious liberty, speech, association, and other constitutional and statutory values.[1]

Individual statements of interest are set forth in Addendum A.

We submit this brief in support of Respondent Clayton County in No. 17-1618, and in support of Petitioners Altitude Express, *et al.*, in No. 17-1623. We urge this Court in both cases to hold that "sex" as used in Title VII does not include "sexual orientation."

SUMMARY OF ARGUMENT

The post-enactment history of Title VII shows that the people, through their elected representatives, have repeatedly and consistently rejected the very redefinition of Title VII proffered in these cases. It is not the proper role of courts to read into the law what advocates have recognized it does not cover and have tried and failed on so many occasions to enact.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief, in whole, and that no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief. The Clerk of this Court has noted on the docket the blanket consent of Petitioners Altitude Express, *et al.* Written consent from counsel for all other parties to the filing of this brief *amici curiae* has been filed with the Clerk.

By forbidding workplace discrimination based on sex, Congress intended to level the playing field between men and women. Differential treatment based on "sexual orientation," however, does not expose women to disadvantageous terms or conditions to which men are not exposed (or vice versa). Therefore, it is not sex discrimination.

Nor is "sexual orientation" a protected class under an "association" theory. Under that theory, it is a violation of Title VII's ban on race discrimination to subject an employee to adverse terms or conditions of employment for associating with or marrying someone of another race. That theory makes perfect sense in the race context because the employer's adverse treatment of the employee is rooted in the very evil that Title VII is intended to prevent: adverse work conditions that flow from racism. In the case of homosexual relationships, however, adverse workplace treatment is not grounded in sexism, and the evil that Congress intended to prevent (treating women less favorably than men or vice versa) is simply not implicated.

Construing the term "sex" to include "sexual orientation" will create conflicts with many religious believers and with their institutions. Such an interpretation will affect the ability of churches and faith-based schools and charities to hire and retain employees who, by word and conduct, accept or at least do not contradict the organization's religious message. It will also have an impact in the commercial workplace. Ordinary religious believers, whose views about marriage and human sexuality do not conform to those of the present culture, will be silenced or

punished for "unwelcome" speech on these subjects, which now will be regarded as a form of harassment.

Such a construction can be expected to easily migrate to areas of law beyond the workplace, creating innumerable conflicts with religious liberty. Interpreting "sex" to mean "sexual orientation" could affect the ability of faith-based homeless shelters, transitional homes, and schools to offer and to make appropriate placements with respect to housing. It could also affect the ability of faith-based and other health care providers to offer mental health services consistent with their professional judgment and religious and moral convictions.

A holding that "sex" means "sexual orientation" would entangle this Court and lower courts in a constitutional and statutory thicket for years to come. With neither legislative test nor history to guide them, courts will be forced on a case-by-case basis to determine the scope of such a holding in the face of competing constitutional and statutory values. The Judiciary will be called upon to decide when the bar on "sexual orientation" discrimination must yield to constitutional protections for religious liberty, speech, association, and the choice of a livelihood. Courts will also be forced to take up dormant questions regarding the meaning and scope of Title VII's existing religious exemptions. Given the absence of any affirmative expression of Congressional intent to forbid workplace discrimination based on sexual orientation, this Court should avoid reading into Title VII a term that raises such serious constitutional and statutory questions.

ARGUMENT

I. The Term "Sex" as Used in Title VII Does Not Mean "Sexual Orientation."

A. Title VII Says Nothing About Sexual Orientation.

For 45 years and on over 60 occasions, the people, through their elected representatives, have declined to make "sexual orientation" a protected class under Title VII.[2] Having failed to persuade their fellow citizens to enact a nationwide law making sexual orientation discrimination unlawful in the workplace, proponents of these measures have now turned to the courts, claiming that the original 1964 enactment already gives them what they have so long sought. It is not, however, the proper role of courts, through novel or creative interpretive leaps, to read into the law what advocates have recognized it does not cover and have tried and failed on so many occasions to enact.

Title VII is modest in scope. It protects only five classes of persons: those who have been treated differently in the workplace due to their race, color, religion, sex, or national origin. All but one of these classes (religion) is immutable.[3] All of them have been

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[2] Between 1974 and 2017, at least 62 bills were introduced in Congress to bar employment discrimination based on sexual orientation. Brief for the United States as *Amicus Curiae*, Att. A (listing the bills) (filed July 26, 2017), in *Zarda* v. *Altitude Express*, No. 15-3775 (2d Cir.). Similar proposals have been introduced in the present Congress. Equality Act, S.788 & H.R. 5, 116th Cong. (2019). None of these bills has been enacted.

[3] 42 U.S.C. § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief," unless the

in Title VII since its enactment in 1964. In over 50 years, Congress has not added a protected class to Title VII and, apart from the clarifying definition of "religion," *see* note 3 *supra*, has only once clarified the meaning of such a class by specifying that "sex" includes "pregnancy, childbirth, and related medical conditions." 42 U.S.C. § 2000e(k). Thus, Congress has shown that it knows how to add to or clarify the meaning and reach of the protected classes under Title VII when it wants to.[4] Title VII is not a free-ranging fairness code by which Congress has delegated to other branches the authority to define what is fair. Instead, Title VII is a durable work of legislative craftsmanship that expresses, balances, and implements a certain number of distinct principles of fairness, including some of our nation's highest—not principles that repeatedly fail to garner legislative majorities. However unwise, unjust, or even (under state or local law) illegal it may be for employers to discriminate on the basis of other factors, such as marital status, family size, socio-economic status, political affiliation,

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employer can show an inability to reasonably accommodate the observance or practice without undue hardship).

[4] Likewise, Congress knows how to forbid discrimination based on sexual orientation when it wants to and, when it does, it lists *both* "sex" (or "gender") *and* "sexual orientation" as protected classes, which would be unnecessary if sex or gender already included sexual orientation. 34 U.S.C. § 12291(b)(13)(A) (forbidding discrimination "on the basis of … sex" or "sexual orientation" in certain federally funded programs and activities); 18 U.S.C. § 249(a)(2)(A) (imposing enhanced punishment for causing or attempting to cause bodily injury "because of actual or perceived … gender" or "sexual orientation").

or a hundred other reasons, Title VII simply does not address those categories.

B. "Sexual Orientation Discrimination" Is Not "Sex Discrimination."

Congress's purpose in enacting the sex discrimination provisions of Title VII was to level the playing field between men and women in the workplace. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not exposed*." *Oncale* v. *Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (emphasis added), quoting *Harris* v. *Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring); *see also Int'l Union* v. *Johnson Controls*, 499 U.S. 187 (1991) (employer policy that applies only to women violates Title VII). Differential treatment based on sexual orientation, by contrast, does not expose women to disadvantageous terms or conditions to which men are not exposed (or vice versa). Therefore, it is not sex discrimination.

Nor is "sexual orientation" a protected class under an "association" theory. Under this theory, an employer discriminates on the basis of race in violation of Title VII if it subjects an employee to adverse terms or conditions of employment for associating with or marrying someone of another race. *E.g.*, *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008); *Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986). The theory makes perfect sense in the race context because the employer's unfavorable treatment of the employee is rooted in the very evil that Title VII is intended to prevent: adverse work conditions that

flow from attitudes that are "racist, pure and simple." *Wittmer* v. *Phillips 66 Co.*, 915 F.3d 328, 340 (5th Cir. 2019) (Ho, J., concurring). In the case of homosexual relationships, however, adverse workplace treatment is not grounded in sexism. In such cases the evil that Congress intended to prevent when it forbade sex discrimination in the workplace—sexism, i.e., treating women less favorably than men (or vice versa)—is simply not implicated.

II. Construing Title VII's Ban on "Sex Discrimination" to Include "Sexual Orientation Discrimination" Will Create Conflicts with Many Religious Believers and with Their Institutions in the Workplace.

When Congress creates a new right, it can fashion a comprehensive code that anticipates problems, provides definitions, sets out important qualifications, articulates exceptions, and allows or requires accommodations for religious and other objectors. When, by contrast, courts announce a new or previously unrecognized right, it is always in the context of deciding a specific, concrete dispute and not through the sort of comprehensive treatment that is characteristic of a legislature.

Therein lies a danger. Were this Court to declare that federal law forbids sexual orientation discrimination in the workplace, it would open the floodgates to a host of problems, including for persons and institutions with religious and moral convictions about sexual conduct. Those problems can be addressed in plenary fashion by Congress; they cannot

be addressed by courts in anything but case-by-case fashion.

The problem is exacerbated by the failure to distinguish, or a tendency to conflate, two distinct concepts. In the view of many faith traditions and religious believers, there is a difference between an *inclination* toward homosexual conduct, which they do not regard as *per se* immoral, and homosexual *conduct*, which they do.[5] Though the distinction between inclination and conduct is also ubiquitous in our civil legal tradition,[6] this Court has hesitated to embrace it

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[5] The Catholic Church's teaching is illustrative:

> While the Church teaches that homosexual acts are immoral, she does distinguish between engaging in homosexual acts and having a homosexual inclination. While the former is always objectively sinful, the latter is not. To the extent that a homosexual tendency or inclination is not subject to one's free will, one is not morally culpable for that tendency. Although one would be morally culpable if one were voluntarily to entertain homosexual temptations or to choose to act on them, simply having the tendency is not a sin. Consequently, the Church does not teach that the experience of homosexual attraction is in itself sinful.

United States Conference of Catholic Bishops, *Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care*, at 5 (Nov. 14, 2006).

[6] It is axiomatic that the government is forbidden to punish a mere status, belief, or inclination. *See, e.g.*, *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-07 (2007) (noting that at common law, a mere attempt to commit an unlawful act was not a crime absent "some open deed"); *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining that "a law targeting religious beliefs as such is never permissible,"

in this context. *See Christian Legal Society* v. *Martinez*, 561 U.S. 661, 689 (2010), citing *Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003), and *id.* at 583 (O'Connor, J., concurring in the judgment).

In light of this hesitation, it seems likely that if this Court were to construe "sex" to include sexual *orientation*, it will then construe "orientation" to include *conduct*. That in turn will create innumerable conflicts for employers, especially religious employers that, as we describe in more detail below, wish to hire and retain employees who agree with and live out the religious commitments animating the employer's mission and work.

Unlike courts, legislatures can anticipate at least some of these conflicts and enact exemptions to prevent or ameliorate them. Instructively, all 22 states that by statute ban sexual orientation discrimination in the private (i.e., non-governmental) workplace have a religious exemption of some type, and virtually all of these exemptions (19) are broadly crafted.[7] Likewise, many of the federal bills that would have outlawed employment discrimination

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but a law targeting religious practices may be justified upon the satisfaction of strict scrutiny); *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (holding that criminal punishment for "being" a drug addict, without the behavior of taking drugs, violates the Eighth Amendment).

[7] Our characterization of these exemptions as "broad" is purely descriptive, not an endorsement or judgment as to their adequacy. For a list of the 19 states, with citations to the relevant statutes, *see* Addendum B. For a list of the 3 states with less rigorous religious exemptions, with citations to the relevant statutes, *see* Addendum C.

based on sexual orientation have a religious exemption.[8] The danger of a judicial decision creating a ban on sexual orientation discrimination is that courts cannot, in systematic fashion, anticipate, prevent, or ameliorate the serious religious burdens that such a ban can be expected to create.

A. Churches

To exist and operate effectively, any organization, religious or secular, must be free to hire persons who agree and act in accordance with its mission. A group devoted to furthering civil liberties or environmental protection should not be forced to hire or retain someone who does not take these causes seriously or who, by word or conduct, actively undermines them.[9] Fittingly, this Court has held that the right of a group formed for expressive purposes includes the right to exclude those whose membership would undermine the group's message.[10]

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[8] All Employment Non-Discrimination Act bills introduced between 1994 and 2013 had a religious exemption. *See* note 2 *supra*.

[9] This even has some application in the commercial context. No one, for example, would expect a company to hire or retain an employee who, even on his or her own time (through a blog, for example), criticized the company's products or lauded those of a competitor.

[10] *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000) ("freedom of expressive association" prevents a state from enforcing its nondiscrimination law to require the Boy Scouts to accept a gay scoutmaster); *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995) (unanimously holding that organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was

Churches[11] have an even stronger right than secular groups to create expressive associations to advance their religious message: they enjoy the additional protection of the Religion Clauses.[12] In the 1950s, this Court concluded that even "[a]n interest as compelling as the avoidance of Communist infiltration [into the United States] at the height of the Cold War"[13] did not justify government interference with a church's right to govern itself and direct its mission,[14] and this right of self-governance has been reaffirmed by this Court time and again.[15]

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thought to communicate a message about homosexual conduct with which the organizers disagreed).

[11] In this brief, we use the term "church" to refer to a broad class of houses of worship and religious institutions of varied faiths and denominations.

[12] *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 189 (2012) (rejecting, as "untenable" and contrary to the text of the Religion Clauses, the claim that religious organizations enjoy only the right to expressive association shared by religious and secular organizations alike).

[13] Mark E. Chopko & Michael F. Moses, *Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEORGETOWN J. OF L. & PUB. POL'Y 387, 410 (Summer 2005) (describing *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952)).

[14] *Kedroff*, 344 U.S. at 107-08 ("[l]egislation that regulates church administration, the operation of the churches, [or] the appointment of clergy … prohibits the free exercise of religion").

[15] *See, e.g., Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171 (2012). *See also Lynch* v. *Donnelly*, 465 U.S. 668, 672 (1984) (the Religion Clauses were designed "to prevent, as far as possible, the intrusion of either [the church or the state]

Thus, churches, even more so than their secular counterparts, must have the ability to organize themselves with volunteers and employees who agree with, or at least do not oppose or contradict, the churches' religious beliefs, and to decide for themselves what form such agreement should take. "All who unite themselves to such a body do so with an implied consent to this government…." *Watson v. Jones*, 80 U.S., at 729. "But it would be a vain consent and would lead to the total subversion of such religious bodies," *id.*, if churches and other faith-based organizations were required to hire or retain workers who reject or refuse to practice the church's faith.[16]

A church, given its expressive mission, understandably and legitimately may wish to hire only those whose speech and conduct is consistent with that of the church. It would confuse and scandalize the faithful (and the public) if in contravention of its religious beliefs a church were, for example, forced to hire or retain an individual who publicly violates the church's teaching on a significant moral issue, including sexual ethics. This could include a cohabiting opposite-sex couple, or a person in a same-sex sexual relationship, who by their public example undermine the church's teaching on marriage and the immorality of sexual relations outside of marriage, understood as the union of one man and one woman. It would bring harm to a church and to the integrity of its mission and message were it forced to hire and

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into the precincts of the other").

[16] The ministerial exception does not prevent or resolve all such conflicts because it applies only to employees who satisfy relevant criteria. *Hosanna-Tabor*, 565 U.S. at 190-92.

retain employees who, by speech or conduct, do not espouse or have not integrated that mission and message into their own lives. It would also undercut the church's right to decide for itself what its mission and message are.

B. Religious Schools

What is true of churches is also true of religious schools. Faith-based schools are "an integral part of the religious mission" of many churches. *Lemon* v. *Kurtzman*, 403 U.S. 602, 616 (1971). Such schools are a "powerful vehicle" for transmitting the faith, and "involve substantial religious activity and purpose." *Id.*; *see also NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501 (1979) (noting the "critical and unique role of the teacher in fulfilling the mission of a church-operated school"). In recognition of this principle, this Court has, on more than one occasion, protected the freedom of religious institutions precisely to choose teachers at their religious schools. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. at 190-95; *NLRB* v. *Catholic Bishop*, 440 U.S. at 501-07.

To carry out their religious mission, faith-based schools must be able to hire and retain employees who agree with, and abide by the tenets of, the faith that it is the school's purpose to impart. Few things undermine a faith-based school's religious message as much as speech or conduct on the part of school administrators and teachers that contradict, reject, or distort that message.[17] Children and young adults will

[17] The necessity of good conduct, and not mere words, in sharing the Gospel is well attested in both Scripture and the preaching of

hardly find religious faith attractive or persuasive—quite the opposite—when those in positions of authority contradict the faith by word or example. If this Court were to decide that Title VII forbids sexual orientation discrimination in the workplace, it could require that religious schools hire and retain employees who, by their speech and conduct, violate the religious teaching, including teaching on sexual ethics, that is a constitutive part of the school's professed faith. And that in turn will imperil the ability of the school to effectively teach its faith.

Government action that infringes the *school's* right to convey its religious message would also infringe upon the rights of *parents* who want their children to be reared in that faith tradition.[18] Parents naturally expect that the faith-based school will be led by administrators, and their children will be taught by faculty, who agree with and model that tradition for their children.

By way of analogy, no company would be expected to hire or retain an employee who disliked the company's products and touted those of a competitor. Nor should a religious school be forced to hire or retain those who by word or conduct reject the school's

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the Church Fathers. *E.g.*, James 2:17 ("faith of itself, if it does not have works, is dead"); St. John Chrysostom, *In Epistolam I ad Timotheum homiliae* 10, 3 (PG 62, 551) ("Christ has appointed us … to be seed and to yield fruit. There would be no need of speaking if our lives shone in this way. Words would be superfluous if we had deeds to show for them.").

[18] *See Troxel* v. *Granville*, 530 U.S. 57 (2000) (reaffirming the constitutional right of parents to direct the upbringing of their children).

religious tradition. To hold otherwise would be a serious misreading of what Title VII says and would distort what Congress intended originally and has repeatedly maintained.

C. Religious Charities

Like religious schools, faith-based charities need the freedom to employ workers who believe in, and carry out, the charity's mission.

In many cases, faith-based charities provide services and activities that are inextricably connected with their religious and moral views about marriage and human sexuality. Many religious nonprofits, for example, provide services related to the good of marriage and the family in the form of pre-marital, marital, and family counseling and related services. Deciding what that counseling should consist of is a fundamentally moral and religious process. Faith-based charities also work to join young children separated from their biological parents with loving caregivers and prospective adoptive and foster parents.[19] To perform this work in a manner consistent with their mission, faith-based charities must be able to hire and retain employees who agree

[19] Concern about the ability of faith-based agencies, in the face of similar nondiscrimination requirements, to continue to provide adoption and foster care services consistent with their religious convictions is neither hypothetical nor remote in time. *E.g.*, *Fulton* v. *City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (refusing to enjoin City of Philadelphia from ending its contract with Catholic Charities because the agency declined for reasons of conscience to place foster children in homes headed by same-sex or cohabiting couples).

with and live out the religious tradition that animates these efforts.

D. Individual Religious Believers

A holding that Title VII bans sexual orientation discrimination can be expected to have adverse consequences for ordinary religious believers in the broader commercial workplace. This is especially so for those whose beliefs about marriage and human sexuality do not conform to those of the present culture. Rules currently applicable to sexual harassment[20] will likely be applied to "unwelcome" speech relating to "sexual orientation," construed broadly to include even the most temperate moral disagreement about sexual conduct. Wanting to avoid, and to retain the affirmative defenses to, such claims, employers will take prophylactic measures to deter speech on these subjects. The workplace policies and training that employers implement will almost certainly convey the message that expressions of religious and moral views critical of homosexual conduct will result in workplace discipline, while the opposite viewpoint will most likely be freely allowed.[21]

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[20] *See Burlington Indus.* v. *Ellerth*, 524 U.S. 742 (1998); *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998).

[21] To be sure, religious believers are protected under Title VII's ban on religious discrimination, but that ban requires only a reasonable accommodation, and then only if it does not create an undue hardship for the employer, 42 U.S.C. § 2000e(j), a standard that, as construed by this Court, gives only anemic protection to employees. *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977) (concluding that Title VII's prohibition on religious discrimination does not require an employer to make any accommodation that imposes more than a *de minimis* burden). Thus, in any contest with persons claiming sexual orientation

Employees would face this risk whether their views were expressed on the job or off.[22]

In this way, construing Title VII to forbid discrimination based on sexual orientation would move the law in the direction of a viewpoint-based speech code. Employees who question the prevalent cultural view on the moral status of homosexual acts will be placed on par with those who espouse racial and sexual bigotry.[23] This, we submit, is nowhere near what Congress intended when it enacted the sex discrimination provisions of Title VII.

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discrimination, religious believers will likely come out on the losing side.

[22] Employees already are being fired or pressured to resign after making *off-the-job* comments opposing homosexual conduct or supporting traditional marriage. *See*, *e.g.*, *Cochran* v. *City of Atlanta*, No. 1:15-CV-0477-LMM (N.D. Ga. Dec. 20, 2017) (fire chief forced to resign based on views he expressed outside the job on marriage and sexual ethics); Allistair Barr, *Mozilla CEO Brendan Eich Steps Down*, WALL STREET J. (Apr. 3, 2014) (CEO resigned after it became widely known that he had supported a California ballot referendum that defined marriage as the union of one man and one woman). A law forbidding unwelcome speech relating to sexual orientation would add to this environment and further chill (and punish) speech.

[23] *See Masterpiece Cakeshop* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

III. The Creation of a Workplace Ban on "Sexual Orientation Discrimination" by a Judicial Reinterpretation of the Meaning of "Sex Discrimination" Will Have a Ripple Effect in the Law, Creating Burdens on Religious Liberty Even Outside the Employment Context.

Federal courts often rely on precedent construing and applying Title VII's ban on sex discrimination to interpret other federal statutes that bar sex discrimination.[24] If, therefore, this Court were to interpret "sex" in Title VII to include "sexual orientation," that interpretation would likely "migrate" to other parts of the U.S. Code. Thus, other federal statutes that bar sex discrimination would—on the basis of this Court's holding in the Title VII context, but similarly without basis in legislative text or history—be construed by lower courts (and perhaps ultimately by this Court) to forbid sexual orientation discrimination.

This in turn will create innumerable conflicts with religious liberty even beyond those we have already described. Two examples illustrate the problem.

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[24] *See, e.g.*, *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) ("This Court has … looked to its Title VII interpretations of discrimination in illuminating Title IX") (collecting cases); *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (applying Title VII principles in a Title IX case); *Texas Dep't of Housing & Cmty. Affairs* v. *Inclusive Communities Project*, 135 S. Ct. 2507, 2519 (2015) (citing the Court's Title VII precedent in interpreting analogous provisions of the Fair Housing Act).

A. Housing

The Fair Housing Act ("FHA") proscribes sex discrimination in the sale or rental of housing. 42 U.S.C. § 3604. If "sex" under the FHA is read to include "sexual orientation," it could affect the ability of faith-based homeless shelters, transitional homes, and other faith-based housing projects to make appropriate placements.

A faith-based housing provider, for example, may choose to offer single-room housing to single persons and/or couples who, in the eyes of the church, are married. This would mean excluding cohabiting unmarried persons of the opposite sex, and same-sex couples who have entered into what the law regards as a marriage but the church does not. Thus, the same-sex couple that has obtained a marriage license could sue for sexual orientation discrimination, arguing that they are treated less advantageously than a similarly-situated opposite-sex married couple, and a court might regard the same-sex couple as similarly situated even though the church does not.

A problem like the one just described may also occur with respect to married *student* housing offered by religiously-affiliated colleges and universities.[25] A

[25] The Department of Housing and Urban Development maintains that the FHA applies to student housing. *United States* v. *Millikin Univ*., FHEO No. 05-06-0829-8 (Sept. 18, 2009) (charging university with violation of the FHA when it evicted a student from a student dormitory). Some courts have so held. *United States* v. *Univ. of Nebraska*, No. 4:11-CV-3209 (D. Neb. Apr. 19, 2013); *Franchi* v. *New Hampton Sch.*, 656 F. Supp. 2d 252, 260 (D. N.H. 2009), and cases cited therein.

college student who has obtained a marriage license naming a same-sex partner as spouse may insist upon the couple's admission to married (rather than single) student housing despite the fact that the faith-based college or university, in light of its religious beliefs about marriage, does not regard him or her as married and opposes extramarital sexual conduct.[26]

B. Mental Health Services

Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, forbids sex discrimination in health programs and activities that receive federal financial assistance. If sex under section 1557 includes sexual orientation, then this provision could be read to condition the availability of federal funding for mental health services on the provision of counseling that may conflict with the treating psychologist's or psychiatrist's own professional judgment and religious and moral beliefs. A therapist, for example, may believe that a patient's self-reported problems are caused by, or associated with, a sexual relationship that the therapist believes is immoral and therefore harmful to the patient and others. The patient, on the other hand, may be looking for affirmation of that relationship. In such circumstances, where the moral presuppositions of the therapist and patient are so fundamentally at odds, it is not clear what legitimate interest the government could assert in forcing the

[26] Even if the FHA were *not* applicable to student housing, the same student could, if this Court were to find that "sex" includes "sexual orientation," sue under the sex discrimination provisions of Title IX of the Education Amendments of 1972.

psychologist to accept or continue to treat the patient.[27]

To require that a therapist set aside his or her professional judgment, and religious and moral convictions, as a condition of providing therapy would obviously imperil his or her livelihood and raise serious questions with respect to rights of free exercise, association, and speech. Yet, as long as sex is construed to include sexual orientation and orientation is construed to include conduct, the patient could assert sex discrimination if a reason for declining or ceasing treatment is related to his or her sexual conduct.[28]

Of course, many counseling services expressly hold themselves out as providing counseling from the viewpoint of a specific faith tradition. Many prospective and actual patients find this option attractive and beneficial; indeed, a patient may insist upon a therapist who shares his or her religious values so that psychological, developmental, and behavioral

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[27] Naturally there may be *many* reasons why a mental health therapist might legitimately decline to offer his or her services to a particular client. One reason may be that the therapist has no experience addressing the sort of problem that the patient exhibits. Given the high degree of specialization in health care, health professionals as a rule do not personally treat every presenting problem. A reason for declining to accept someone as a patient is no less legitimate or worthy of protection because it is faith-based.

[28] Even today, students who decline to affirm same-sex relationships are being drummed out of counseling-degree programs. *See*, *e.g.*, *Ward* v. *Polite*, 667 F.3d 727 (6th Cir. 2012) (describing one such case and the constitutional issues it raises).

problems can be discussed and hopefully resolved in light of them. When the treating therapist and patient share a similar religious and moral outlook, their work together may be more fruitful and helpful to the patient. Exposing faith-based counseling services to claims of sexual orientation discrimination, on the other hand, could cause such faith-based counselors to close their doors, to the detriment of those seeking and otherwise benefiting from their services.

IV. If This Court Rules That "Sex Discrimination" Includes "Sexual Orientation Discrimination," Courts Will Be Forced to Decide, Without Legislative Text or History to Guide Them, the Scope of That Ruling in Relation to Existing Constitutional and Statutory Rights.

Interpreting Title VII's ban on sex discrimination to reach sexual orientation would entangle the Judiciary in a constitutional and statutory thicket. Federal courts (and ultimately this Court) will be called upon to decide, potentially in case after case and with no legislative text or history to guide them, how this newly-declared right should be applied and enforced in the face of competing constitutional and statutory values.

A. Constitutional Protections for Religious Liberty, Speech, Association, and Choice of a Livelihood

"When a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which

the question may be avoided." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018) (internal quotation marks omitted). Construing Title VII not to embrace sexual orientation discrimination is not only "fairly possible" but, given the text of the statute and Congress's repeated refusal to adopt any such view, compelling, and a contrary holding would open a Pandora's box of constitutional problems. Indeed, when presented with a far more plausible construction of another federal employment statute, which would have generated far fewer potential religious freedom issues than the construction here, this Court followed the principle of constitutional avoidance. *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (rejecting an interpretation of the National Labor Relations Act that would have raised a serious constitutional question by requiring church-operated schools to collectively bargain with their faculty).

We have already noted some of the anticipated constitutional issues above. Given the increasingly common construction of "sexual orientation" to include sexual conduct, churches and faith-based schools and charities would be impeded or even outright barred from hiring and retaining a workforce that agrees with them on questions of faith and morals that are integral to their message and mission. This raises very difficult constitutional questions as to rights of church governance, free exercise, association, and speech. A ruling that sexual orientation is a protected class under Title VII would tee up those questions in scores of cases with varying fact patterns.

Insofar as individual religious believers are kept or forced out of professions and occupations under color

of law because of their expressed views on homosexual conduct and marriage, rights of free exercise and speech, and perhaps even the liberty to pursue a livelihood,[29] are also implicated.

B. Statutory Protections for Religious Organizations

Two existing exemptions in Title VII apply to religious organizations.[30] Though they have been provided for by statute for some time, there is an as-

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[29] *Conn* v. *Gabbert*, 526 U.S. 286, 291-92 (1999) (describing, but reaching no conclusion as to the continued viability of, an earlier line of Supreme Court cases that found a "due process right to choose one's field of private employment"); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (constitutionally protected liberty includes "the right of the individual … to engage in any of the common occupations of life"). *See* David E. Bernstein, *The Due Process Right to Pursue an Occupation: A Brighter Future Ahead?*, 126 YALE L.J. FORUM 287 (Dec. 2016).

[30] 42 U.S.C. § 2000e-1 ("This subchapter shall not apply to an employer with respect … 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-2(e) ("Notwithstanding any other provision of this subchapter, … it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.").

yet-unresolved division among courts—sometimes among judges on the same circuit court—as to the appropriate criteria for determining which organizations are eligible for them.[31] There is also disagreement among scholars as to whether the exemptions are a defense to religious discrimination claims alone or have wider application.[32] Congress has not resolved these questions, and in recent years the questions have remained dormant. But a ruling by this Court that Title VII bars sexual orientation discrimination would force lower courts, not Congress, to answer them.

There is a related problem. If we suppose—contrary to statutory text, contemporaneous legislative history, and the subsequent and consistent

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[31] *Compare LeBoon* v. *Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (setting out nine criteria that various circuit courts have considered in deciding whether the exemption set out in 42 U.S.C. § 2000e-1 is applicable), *with Spencer* v. *World Vision*, 633 F.3d 723 (9th Cir. 2011) (reflecting a three-way split among three circuit judges regarding the appropriate criteria for determining whether an organization is eligible for the religious exemption set out in 42 U.S.C. § 2000e-1).

[32] *Compare* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J. OF L. & RELIGION 368 (Sept. 2015) (arguing that Title VII's religious exemptions are a shield against not only religious discrimination claims but other Title VII claims that implicate the faith-based employer's religious convictions), *with* Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees*, RELIGIOUS FREEDOM INSTITUTE (June 30, 2016) (arguing that the exemptions protect employers only from religious discrimination claims).

refusal of Congress to enact a ban on sexual orientation discrimination—that Congress *implicitly* put such a ban in place when it forbade sex discrimination in 1964, then the religious exemptions that Congress *expressly* enacted as part of Title VII would yield anomalous, even absurd, results. For example, religious employers, under the existing religious exemptions and without running afoul of Title VII, may decline to hire or retain those who are not *members* of their church. But if construed as proposed in this case, that same statute would compel those same employers to hire and retain those who, by their speech or conduct, contradict the church's own deeply-held religious *convictions*.[33] The only way to avoid these interpretive dilemmas is to hold that Title VII simply means what it says, so that "sex" is a protected class under the statute and "sexual orientation" is not.

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*., may likewise serve as a defense in some cases, but as this Court is well aware from nearly a decade of litigation on the federal contraceptive mandate, circuit courts are not uniform in their interpretation of RFRA. Furthermore, RFRA requires the use of a balancing test, which further increases the likelihood that different courts will come

[33] Such a reading would seem to disfavor religious organizations that are ecumenical in their hiring practices and create a legal incentive for them to reject job applicants of other faiths. Alternatively, it would seem to create a government incentive for churches to excommunicate dissenting members. Obviously, the government has no constitutionally legitimate interest in either of these outcomes.

to different conclusions when presented with similar facts.

In sum, there is already uncertainty regarding the scope of application of the existing Title VII religious exemptions and RFRA. These vexing questions will be multiplied and amplified—and ultimately land on this Court's doorstep—if it decides that sexual orientation is a protected class under Title VII.

CONCLUSION

For all these reasons, we urge this Court to affirm the judgment of the Court of Appeals in No. 17-1618, reverse the judgment of the Court of Appeals in No. 17-1623, and to hold in both cases that "sex" as used in Title VII does not include "sexual orientation."

Respectfully submitted,

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August 23, 2019

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Addendum A

Individual statements of interest

The Anglican Church in North America ("ACNA") unites some 100,000 Anglicans in more than 1,000 congregations across the United States and Canada into a single Church. The ACNA is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference ("GAFCon") and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

The Association of Christian Schools International ("ACSI") is a nonprofit association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 2,700 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world. ACSI accredits Protestant pre-K-through-grade-12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. ACSI's calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in

ensuring expansive religious liberty with strong protection from government attempts to restrict it.

The Cardinal Newman Society ("The Society") is a nonprofit organization established in 1993 for religious and educational purposes to promote and defend faithful Catholic education. The Society fulfills its mission in numerous ways, including supporting education that is faithful to the teaching and tradition of the Catholic Church; producing and disseminating research and publications on developments and best practices in Catholic education; and keeping Catholic leaders and families informed. The Society serves many Catholic schools and colleges and their employees by helping them consistently teach and witness to the Catholic faith. The Society requires a commitment by its own employees to ensure fidelity to the Magisterium of the Catholic Church in all Society-related activities and commitments and to ensure that employees' public statements and actions, whether as part of their official duties or not, are consistent with the Society's dedication to Catholic values and the promotion of strong Catholic identity.

The Catholic Bar Association ("CBA") is a community of legal professionals that educates, organizes, and inspires its members to faithfully uphold and bear witness to the Catholic faith in the study and practice of law. The CBA's mission and purpose include upholding the principles of the Catholic faith in the practice of law, and assisting the Church in the work of communicating Catholic legal principles to the legal profession and society at large. This includes the principles of religious liberty and

rights of conscience with respect to religious beliefs as reflected in this nation's founding documents.

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

International Church of the Foursquare Gospel ("The Foursquare Church") seeks to declare the unchanging ministry of Jesus Christ worldwide. To that end, The Foursquare Church has congregations in nearly 150 countries, totaling approximately nine million global members. The Foursquare Church believes that all human beings are created in the image of God, and therefore should be treated with love and grace. The religious freedom of The Foursquare Church and its members, and the ability to carry out its mission, will be profoundly threatened if the Court construes "sex" in Title VII to encompass sexual orientation.

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the active Catholic Bishops

of the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference, and implicated in these cases, include the protection of the religious freedom and other rights of faith-based organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

Addendum B

Nineteen states with broad religious exemptions from statutory bans on sexual orientation discrimination in the workplace

California. Cal. Gov't Code §§ 12940(a) (barring sexual orientation discrimination in employment) & 12926(d) (exempting "a religious association or corporation not organized for private profit").

Colorado. Colo. Rev. Stat. Ann. §§ 24-34-402(1)(a) (barring sexual orientation discrimination in employment) & 24-34-402(7) (exempting religious organizations and associations not supported, in whole or in part, by money raised by taxation or public borrowing).

Connecticut. Conn. Gen. Stat. Ann. §§ 46a-81c (barring sexual orientation discrimination in employment) & 46a-81p (exempting religious corporations, entities, associations, and educational institutions or societies "with respect to the employment of individuals to perform work connected with the carrying on" of the organization's activities, or "with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law").

Delaware. Del. Code Ann. tit. 19, §§ 711(a) (barring sexual orientation discrimination in employment) & 710(7) (exempting religious corporations, associations, or societies except where the duties of employment pertain solely to activities that generate unrelated business taxable income).

Hawaii. Haw. Rev. Stat. Ann. §§ 378-2(a)(1) (barring sexual orientation discrimination in employment) & 378-3(5) (stating that nothing in this part shall be deemed to prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised, or controlled by or in connection with a religious organization, from "giving preference to individuals of the same religion or denomination" or from "making a selection calculated to promote the religious principles for which the organization is established or maintained").

Iowa. Iowa Code Ann. §§ 216.6(1) (barring sexual orientation discrimination in employment) & 216.6(6)(d) (exempting religious institutions and their educational facilities, associations, corporations and societies with respect to qualifications based on sexual orientation when such qualifications are "related to a bona fide religious purpose").

Maine. Me. Rev. Stat. tit. 5, §§ 4572 (barring sexual orientation discrimination in employment) & 4573-A(2) (stating that a religious corporation, association, educational institution or society may give preference in employment to individuals of its same religion, and that religious organizations "may require that all applicants and employees conform to the religious tenets of that organization").

Maryland. Md. Code Ann., State Gov't §§ 20-606 (barring sexual orientation discrimination in employment) & 20-604 (stating that this subtitle does not apply to religious corporations, associations,

educational institutions, or societies, with respect to the employment of persons of a particular religion or sexual orientation to perform work connected with the activities of the religious entity).

Massachusetts. Mass. Gen. Laws Ann. ch. 151B, §§ 4(1) (barring sexual orientation discrimination in employment), 4(18) (stating that the law shall not be construed to prevent religious or denominational institutions or organizations, or organizations operated for charitable or educational purposes which are operated, supervised or controlled by or in connection with a religious organization, from "giving preference to persons of the same religion or denomination" or from "taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained"), and 1(5) (same).

Minnesota. Minn. Stat. Ann. §§ 363A.08 (barring sexual orientation discrimination in employment), 363A.26 (stating that nothing in this chapter prohibits any nonprofit religious association, corporation, or society, or any educational institution operated, supervised, or controlled by such an association, corporation, or society, from, "in matters relating to sexual orientation, taking any action with respect to … employment").

Nevada. Nev. Rev. Stat. Ann. §§ 613.330(1) (barring sexual orientation discrimination in employment) & 613.320 (exempting religious corporations, associations, and societies with respect to the

employment of persons of a particular religion to perform work connected with the carrying on of its religious activities, and exempting nonprofit employers from any provisions concerning unlawful employment practices related to sexual orientation).

New Hampshire. N.H. Rev. Stat. Ann. §§ 354-A:7 (barring sexual orientation discrimination in employment) & 354-A:18 (stating that nothing in this chapter shall be construed to bar religious or denominational institutions or organizations, or organizations operated for charitable or educational purposes, which are operated, supervised, or controlled by or in connection with a religious organization, from "giving preference to persons of the same religion" or from "making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained").

New Jersey. N.J. Stat. Ann. § 10:5-12 (barring sexual orientation discrimination in employment, but stating that it shall not be an unlawful employment practice for a religious association or organization to use religious affiliation as a uniform qualification in the employment of persons engaged in the association's or organization's religious activities, or to follow "the tenets of its religion in establishing and utilizing criteria for employment of an employee").

New Mexico. N.M. Stat. Ann. §§ 28-1-7 (barring sexual orientation discrimination in employment) & 28-1-9 (providing that nothing in the Human Rights Act shall bar any religious or denominational institution or organization that is operated,

supervised, or controlled by, or that is operated in connection with, a religious or denominational organization from giving preferences to persons of the same religion or "imposing discriminatory employment … practices that are based upon sexual orientation," provided that the provisions of the Act relating to sexual orientation shall apply to any other for-profit or nonprofit activities of a religious or denominational institution or organization).

New York. N.Y. Exec. Law §§ 296(1)(a) (barring sexual orientation discrimination in employment) & 296(11) (providing that nothing in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or giving preference to persons of the same religion or denomination or "from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained").

Oregon. Or. Rev. Stat. Ann. §§ 659A.030(1) (barring sexual orientation discrimination in employment), 659A.006(5) (providing that it is not an unlawful employment practice for a bona fide church or other religious institution "to take any employment action based on a bona fide religious belief about sexual orientation," in employment positions directly related to the operation of a church or other place of worship, in nonprofit religious schools, camps, day care centers, thrift stores, bookstores, radio stations, or shelters; or in other employment positions that

involve religious activities so long as not connected with a commercial or business activity), & 659A.006(4) (providing that it is not an unlawful employment practice for a bona fide church or other religious institution to prefer a co-religionist for employment if, in the institution's opinion, the preference will best serve its purposes, and the employment is closely connected with or related to the primary purposes of the church or institution and is not connected with commercial activities that have no necessary relationship to the church or institution).

Utah. Utah Code Ann. §§ 34A-5-106 (barring sexual orientation discrimination by employers) & 34A-5-102(1)(i)(ii) (stating that "employer" does not include religious organizations, religious corporations sole, religious associations, religious societies, religious educational institutions, or religious leaders acting in that capacity, or any corporation or association constituting an affiliate, wholly-owned subsidiary, or agency of any religious organization, religious corporation sole, religious association, or religious society).

Vermont. Vt. Stat. Ann. tit. 21, §§ 495(a) (barring sexual orientation discrimination in employment) & 495(e) (stating that the prohibition of sexual orientation discrimination shall not be construed to prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preferences to persons of the same religion or

denomination, or "from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained").

Washington. Wash. Rev. Code §§ 49.60.180 (barring sexual orientation discrimination by employers) & 49.60.040(11) (stating that the term "employer" does not include "any religious or sectarian organization not organized for private profit").

Addendum C

Three states with statutory bans on sexual orientation discrimination in the workplace that have less rigorous religious exemptions

Illinois. 775 Ill. Comp. Stat. Ann. §§ 5/2-102 & 5/1-103(Q) (barring sexual orientation discrimination in employment) & 5/2-101(B)(2) (providing that employer does not include any religious corporation, association, educational institution, society or nonprofit nursing institutions 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, society, or nonprofit nursing institution of its activities).

Rhode Island. R.I. Gen. Laws Ann. §§ 28-5-7(1) (barring sexual orientation discrimination in employment) & 28-5-6(8) (providing that nothing in this subdivision shall be construed to apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities).

Wisconsin. Wis. Stat. Ann. §§ 111.36(1)(d)(1) (barring sexual orientation discrimination in employment) & 111.337(2) (providing an exemption for certain religious organizations from the prohibition on employment discrimination based on creed).