Nos. 17-1618, 17-1623, 18-107

In The
Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,
v.
CLAYTON COUNTY, GEORGIA,
Respondent.

ALTITUDE EXPRESS, INC., and RAY MAYNARD,
Petitioners,
v.
MELISSA ZARDA and WILLIAM MOORE, JR.,
Co-Independent Executors of the Estate of Donald Zarda,
Respondents.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION and AIMEE STEPHENS,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eleventh, Second, And Sixth Circuits

BRIEF FOR FIRST LIBERTY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF EMPLOYERS

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INTEREST OF *AMICUS CURIAE*[1]

First Liberty Institute is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans. It provides *pro bono* legal representation to individuals and institutions of all faiths—Catholic, Islamic, Jewish, Native American, Protestant, the Falun Gong, and others.

As *amicus*, First Liberty Institute maintains an interest in preserving the freedom of all faith traditions to convey their religious missions. Several of the religious ministries that we represent hold sincere religious beliefs related to sexual orientation and gender identity. These ministries seek the freedom to operate in communities that share a common commitment to their religious beliefs and principles.

SUMMARY OF ARGUMENT

As the Court considers whether to judicially add new protected classes to those protected by Title VII of the Civil Rights Act of 1964, it is vitally important to ensure that federal employment discrimination law is not rewritten to hinder the religious freedom of churches,

[1] Attorneys from First Liberty Institute authored this brief as *amicus curiae*. No attorney for any party authored any part of this brief, and no one apart from *amicus curiae* made any financial contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

synagogues, mosques, religious schools, religious charities, and all other nonprofit religious ministries.

Religious ministries, including houses of worship, are not categorically excluded from the reach of Title VII. The First Amendment's ministerial exception protects their ability to choose their own ministers or spiritual leaders. However, religious ministries still could be held liable based on employment decisions related to non-ministerial positions.

People of faith often seek to operate in communities that share a common commitment to their religious tenets. Many religious denominations in America hold sincere religious beliefs about the nature of marriage, as well as the nature of male and female identities. If Title VII is interpreted to include sexual orientation and gender identity as protected classes, a question will arise as to whether these religious ministries may continue to hold internal faith-based standards related to sexual conduct and gender expression.

Fortunately, Title VII's statutory religious employer exemption provides an answer. Properly interpreted, the exemption allows religious ministries to maintain faith-based hiring standards (*i.e.*, to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts). Regardless of whether the Court adds additional protected classes, the Court should resolve the ambiguity in the lower courts and hold that the religious employer exemption

protects the freedom of religious ministries to maintain faith-based codes of employee conduct.

Interpreting the statutory religious employer exemption in this way would not only best align with the statutory text, but it would also prevent the government from encroaching on the internal affairs of religious ministries, limit the courts from unconstitutionally entangling themselves with religion, and safeguard First Amendment rights for all Americans.

ARGUMENT

I. Many Religious Denominations Hold Sincere Religious Beliefs About Marriage and Gender Identity.

Many religious denominations in America hold sincere religious beliefs about the nature of marriage, as well as the nature of male and female identities. The vast majority of Abrahamic religious denominations—Catholic, Evangelical, Jewish, Mormon, Muslim, Protestant—define marriage as the sacred union of a man and a woman. This includes, but is not limited to, the Roman Catholic Church, Eastern Orthodox Church, Presbyterian Church in America, Evangelical Presbyterian Church, Orthodox Presbyterian Church, Lutheran Church—Missouri Synod, Assemblies of God, Seventh-day Adventist Church, Church of God in Christ, American Baptist Churches USA, Church of Jesus Christ of Latter-day Saints, Rabbinical Council of America, and the Southern Baptist Convention.

Similarly, most Abrahamic denominations hold sincere religious beliefs about the nature of male and female identities and what it means to be created male or female. These denominations alone account for over 105 million Americans. *U.S. Religious Landscape Survey*, Pew Research Center (May 12, 2015).[2]

For millennia, Abrahamic traditions have held that men and women were created in the image of God and that all people should be treated with respect as image-bearers. As stated in Genesis 1:27, "So God created mankind in his own image, in the image of God he created them; male and female he created them." Under these traditions, male and female were created sexually different, but with equal personal dignity. Consequently, many religious denominations teach that the laity should affirm their biological sex and refrain from attempting to physically change, alter, or disagree with their predominant biological sex.

Building on this concept, Genesis 2:24 continues, "Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh." In the New Testament, Jesus reiterated this portion of Genesis in the Gospel of Mark, from which many Christians base their definition of marriage. Mark 10:6-8 ("But at the beginning of creation God 'made them male and female.' 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh.' So they are no

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[2] Available at https://www.pewforum.org/religious-landscape-study/.

longer two, but one flesh.”). Islam also harkens back to Adam and Eve, stating that mankind was created “from a single pair, male and female.” Qur’an 49:13. Consequently, ministers in many Abrahamic religions continue to preach their sincerely held religious view that marriage is the covenantal union of a man and a woman. Many in these traditions teach that the laity should refrain from sexual conduct outside the bond of marriage between one man and one woman.

The First Amendment protects sincerely held religious beliefs about marriage, and by extension, it must also protect sincerely held religious beliefs regarding issues of gender identity. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

II. Expanding Protected Classes in Title VII Will Hinder Religious Ministries’ Ability to Work Together in Communities that Share a Common Set of Religious Beliefs.

Nonprofit religious ministries, such as churches, synagogues, and religious schools, often seek to operate in communities that share a common set of religious beliefs. For instance, a common dedication to Catholicism is what makes a Catholic school Catholic.

In order to ensure that employees share a common set of beliefs, many religious ministries require all of their employees to abide by a statement of faith or a faith-based code of conduct. In this way, they ensure

that their employees are able to effectively work together to achieve a shared religious mission.

It is clear, as the Supreme Court unanimously held in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* in 2012, that both religion clauses of the First Amendment to the United States Constitution protect the right of religious organizations to choose their own ministers or spiritual leaders. 565 U.S. 171, 181 (2012). This necessarily means that religious ministries may hold at least their ministers to faith-based standards. However, it is less clear whether courts will permit religious organizations to implement faith-based standards of conduct for all other employees.

If Title VII is interpreted to include sexual orientation and gender identity as protected classes, a question will arise as to whether these religious ministries—including houses of worship—may continue to hold internal standards of conduct according to their religious beliefs on issues such as sexual conduct and gender expression.

III. Interpreting Title VII's Religious Employer Exemption to Protect Religious Ministries' Ability to Make Employment Decisions Based on Their Religious Precepts Is Correct and Necessary to Protect Religious Freedom.

The religious employer exemption of Title VII states that Title VII "shall not apply to an employer with respect to the employment of . . . a religious corporation,

association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a); *see also* 42 U.S.C. § 2000e-2(e)(2) (reiterating the exemption for religious schools). In other words, the exemption allows religious ministries to consider religion when making employment decisions in order to ensure that their employees are able to carry out the mission of the religious ministry. This statutory exemption applies not only to ministers, but to all employees of a religious ministry. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-36 (1987).

Because the religious employer exemption allows religious employers to consider religion, and Title VII defines "religion" broadly to include "all aspects of religious observance and practice, as well as belief," 42 U.S.C. § 2000e(j), therefore the exemption permits ministries "to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991); *see also Killinger v. Samford Univ.*, 113 F.3d 196, 198-200 (11th Cir. 1997). Thus, the plain meaning of the exemption permits religious employers to hold their employees to a code of conduct based on their religious tenets.

In a memorandum addressed to all executive departments and agencies, former Attorney General Jeffrey Sessions adopted this interpretation of the

statutory exemption. *Federal Law Protections for Religious Liberty*, Office of the Attorney General, 6, 11a-13a (Oct. 6, 2017).[3] This memorandum was issued in response to Executive Order 13798, *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21675 (May 4, 2017).

However, the federal appellate courts have split over the proper interpretation of the religious employer exemption. Some courts, such as the Court of Appeals for the Ninth Circuit, have interpreted the exemption narrowly, as a defense only against claims of religious discrimination. *See*, *e.g.*, *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276-77 (9th Cir. 1982). However, the statutory text of the exemption does not limit its availability to only when a plaintiff brings a claim of religious discrimination. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J.L. & RELIGION 368, 376 (2015) ("In particular, there is no limitation that turns on the mere chance that the employee-plaintiff complains of religious discrimination as opposed to claiming under some other protected class such as sex."); Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 307 (Spring 2016) ("The religious-employer exemption does not make any reference to the type of claim a plaintiff brings.").

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[3] Available at https://www.justice.gov/opa/press-release/file/1001891/download.

Other courts, such as the Court of Appeals for the Fifth Circuit, have expressly recognized that the exemption applies regardless of the protected class invoked by the plaintiff. *EEOC v. Mississippi College*, 626 F.2d 477, 485-86 (5th Cir. 1980). Still other circuit courts have affirmed that religious employers are permitted to maintain religious codes of conduct for their employees. *See*, *e.g.*, *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *Killinger*, 113 F.3d at 198-200; *Little*, 929 F.2d at 951. In short, the statutory religious employer exemption should be interpreted to allow religious ministries to make employment decisions based on adherence to faith-based codes of conduct.

If the Court expands the list of protected classes to include sexual orientation or gender identity, religious ministries across the country will wonder whether they may continue to hold faith-based codes of conduct. The Court should resolve the ambiguity in the lower courts by stating that the statutory religious employer exemption, or the Constitution itself, allows religious ministries to make employment decisions based on their religious precepts regarding matters of human sexuality and gender. This interpretation is not only compelled by the text of Title VII, but, as explained below, it is also required to avoid unconstitutionality.

IV. Clarifying that Religious Employers Remain Free to Operate in Communities of Faith Would Help Prevent a Flood of Constitutional Issues and Entanglements.

To protect the separation of church and state, the First Amendment guarantees autonomy to churches and other religious ministries. As unanimously affirmed in *Hosanna-Tabor*, both the Free Exercise Clause and the Establishment Clause protect the freedom of religious organizations to "decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 565 U.S. at 186 (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)). Freedom of religion depends upon protecting church autonomy from government intrusion.

If Title VII were interpreted to prohibit religious employers, especially houses of worship, from holding their employees to faith-based codes of conduct regarding matters of human sexuality or gender expression, it would violate the First Amendment's guarantee of religious autonomy.

Such an expansion would also substantially increase the risk of courts unconstitutionally entangling themselves with questions of religious validity, meaning, and importance. Because employment disputes often involve sensitive and fact-intensive inquiries, an expansion of Title VII would necessarily lead to more courts probing into thorny issues of religious doctrine. For example, in *Curay-Cramer v. Ursuline Academy*

of Wilmington, Delaware, Inc., 450 F.3d 130, 140 (3d Cir. 2006), a federal court was called upon to decide whether "being Jewish or opposing the war in Iraq is as serious a challenge to Church doctrine as is promoting a woman's right to abortion." Instead of weighing these religious issues, the court properly concluded that doing so would infringe upon the religious school's rights under First Amendment. According to the court, the "very process of inquiry" would impinge on rights guaranteed by the First Amendment. *Id.* at 138 (applying the Supreme Court's framework for avoiding unconstitutional entanglement as set forth in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)).

In order to prevent lower courts from unconstitutional entanglement with religion and to protect religious employers' First Amendment rights, this Court should explain that religious ministries remain free to abide by their own faith-based codes of conduct, whether through the statutory religious employer exemption to Title VII or through the First Amendment itself. This clarification becomes especially necessary if the Court expands the scope of Title VII, calling the fundamental right of religious autonomy into doubt.

"The Religion Clauses of the Constitution aim to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019). We call upon the Court to remember communities of faith from all

backgrounds, perspectives, and denominations in its resolution of this matter.

CONCLUSION

For these reasons, this Court should affirm the judgment of the Eleventh Circuit and reverse the judgments of the Second and Sixth Circuits.

Respectfully submitted,

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