No. 21-2524

# In the United States Court of Appeals for the Seventh Circuit

LYNN STARKEY,
*Plaintiff-Appellant*,
v.
ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC.,
and RONCALLI HIGH SCHOOL, INC.,
*Defendants-Appellees.*

On Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division
Case No. 1:19-cv-3153 – Judge Richard L. Young

**BRIEF FOR THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE NATIONAL ASSOCIATION OF EVANGELICALS; THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH–MISSOURI SYNOD; THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; THE CATHOLIC CONFERENCE OF ILLINOIS; THE INDIANA CATHOLIC CONFERENCE; THE WISCONSIN CATHOLIC CONFERENCE; THE JEWISH COALITION FOR RELIGIOUS LIBERTY; AND THE ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE AS *AMICI CURIAE* SUPPORTING DEFENDANTS-APPELLEES AND AFFIRMANCE**

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

*Counsel for Amici Curiae*

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

The Church of Jesus Christ of Latter-day Saints
The National Association of Evangelicals
The Ethics & Religious Liberty Commission
of the Southern Baptist Convention
The Lutheran Church – Missouri Synod
The General Conference of Seventh-day Adventists
The Catholic Conference of Illinois
The Indiana Catholic Conference
The Wisconsin Catholic Conference
The Jewish Coalition for Religious Liberty
The Islam and Religious Freedom Action Team of the
Religious Freedom Institute

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Kirton McConkie

(3) If the party or amicus is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's stock:

*Amici* have no parent corporations and issue no shares of stock.

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* include a diverse array of faith communities with members throughout the United States, including thousands of members in the Seventh Circuit.

**The Church of Jesus Christ of Latter-day Saints** is a Christian denomination with over 16 million members worldwide.

**The National Association of Evangelicals** is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical missions, social-service providers, colleges, and seminaries.

**The Ethics & Religious Liberty Commission of the Southern Baptist Convention** is an entity of the Southern Baptist Convention, an incorporated organization whose purpose is to facilitate the cooperative ministry of Baptists in the United States and its territories.

**The Lutheran Church – Missouri Synod** is an international Lutheran denomination with over 6,000 congregations and nearly 2 million baptized members throughout the United States.

**The General Conference of Seventh-day Adventists** is the worldwide administrative body for the Seventh-day Adventist Church, a Protestant Christian denomination with more than 23 million members. In the United States, the Church has more than 1.2 million members.

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

**The Catholic Conference of Illinois** serves as the public policy voice of the Illinois bishops and lay Catholics in Illinois' six Catholic dioceses. Within the Conference are approximately 949 parishes, 18 missions, 2,215 priests, 260 brothers, 2,480 sisters, 1,372 permanent deacons, 46 Catholic hospitals, 21 health care centers, 11 colleges and universities, 65 high schools, 359 elementary schools, and 527 Catholic cemeteries. It interacts with government officials at all levels to promote and defend the interests of the Catholic Church.

**The Indiana Catholic Conference** (ICC) is the public policy voice for the Catholic Church in the state of Indiana. Representing five dioceses, consisting of 372 parishes, the ICC focuses on shaping legislation, much of which intimately affects the daily lives of people in the state. ICC's involvement in the political arena comes from the belief that life is sacred and that all people have a responsibility to respect the dignity of life and to work for the common good of the entire human family.

**The Wisconsin Catholic Conference** is the public policy voice of Wisconsin's Roman Catholic bishops. It represents over 1.2 million Wisconsin Catholics, over 1,500 priests and deacons ministering in over 700 Wisconsin parishes; nearly 280 Catholic elementary and secondary schools serving over 50,000 students; and numerous Catholic pastoral, charitable, and educational ministries across Wisconsin.

**The Jewish Coalition for Religious Liberty** is a nondenominational organization of Jewish communal and lay leaders, seeking to protect the ability of all Americans to freely practice their faith.

**The Islam and Religious Freedom Action Team of the Religious Freedom Institute** amplifies Muslim voices on religious freedom, seeks a deeper understanding of the support for religious freedom inside the teachings of Islam, and protects the religious freedom and speech of Muslims.

Religious organizations representing millions of Americans thus appear on this brief. We may hold different religious beliefs and nuanced views on the proper policy mix for ensuring freedom and equality for all Americans. But we are united in our vigorous support for the religious liberty of churches, religious schools, and other faith-based organizations. Religious liberty for us—and for all Americans—will be dangerously curtailed unless this Court affirms the right of religious organizations to employ only men and women whose conduct and beliefs are in harmony with their employers' religion.

## SUMMARY OF ARGUMENT

Religious organizations exercise religion through their employees. Congress understood that reality when it included exemptions for religious employers in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq*. Although the district court properly dismissed plaintiff's claims under the ministerial exception, it misread Title VII's religious employer exemption as a limited privilege to employ coreligionists. Guided by that misreading, the court erred by ruling that the exemption does not apply here.

A fresh look at the statutory text shows that Title VII exempts Appellees Archdiocese of Indianapolis, Inc. and Roncalli High School when they set religious

standards as a condition of employment. Independent of the statute, Appellees also have the constitutional right to limit employment to those who uphold their religious standards. These statutory and constitutional rights offer alternative grounds to affirm. *See United States v. Terzakis*, 854 F.3d 951, 954 (7th Cir. 2017).

This dispute over whether a Catholic archdiocese and high school violated Title VII by removing Appellant Lynn Starkey for entering a same-sex marriage is not a typical civil rights suit. Religious employers like Appellees remove an employee who violates religious standards not out of spite or prejudice, but to preserve institutional and religious integrity. A religious organization that keeps an employee who violates its religious beliefs about personal morality undermines its ability to maintain those beliefs for other employees and to model and teach the faith credibly within the community of believers. That is why *discrimination* is a crude misnomer here.

Turning to the text of Title VII, it becomes evident that religious organizations like the Archdiocese and Roncalli High may choose employees who share their religious observances and practices, as well as their religious beliefs. Other circuits agree. They conclude, as we urge here, that Title VII exempts a religious employer whenever it discharges an employee for religious reasons. Since that is all Appellees did when removing Starkey, the statutory exemption applies.

Even if section 702(a) didn't exist, holding Appellees liable for Starkey's termination abridges their constitutional rights. The Free Exercise Clause entitles religious employers to dismiss an employee who violates religious standards. Strict scrutiny applies to plaintiff's employment discrimination claim because Title VII as

construed in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), is neither neutral toward religion nor generally applicable. And Starkey cannot convincingly show that the government's compelling interest in eradicating employment discrimination may accommodate secular interests but not religious exercise.

For any of these reasons, the Court should affirm.

## ARGUMENT

### I. *DISCRIMINATION* DOES NOT ACCURATELY DESCRIBE APPELLEES' REMOVAL OF STARKEY FOR ENTERING A SAME-SEX MARRIAGE.

Starkey's claims do not fit the standard narrative of civil rights suits. She entered a same-sex marriage knowing that it would breach her contractual duty to avoid "relationships that are contrary to a valid marriage as seen through eyes of the Catholic Church." *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, No. 1:19-cv-03153-RLY-TAB, 2021 WL 3669050, at *2 (S.D. Ind. Aug. 11, 2021) (*Starkey II*) (quotation omitted). Forcing Roncalli High to continue employing Starkey despite her breach would intolerably burden the Appellees' religious exercise "by putting [them] to the choice of curtailing [their] mission or approving relationships inconsistent with [their] beliefs." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

A dispute over religious employment differs from the standard civil rights narrative. Ordinarily, a claimant is harmed because of her membership in a protected class by an employer that intentionally discriminates. But *discrimination* is the wrong word here. Religious employers require employees to follow religious standards not out of prejudice or spite, but to preserve the integrity of their faith community. The freedom to hold employees to shared religious norms is often essential to the

process by which faith communities define themselves. Religious bodies are constituted not only by what they believe but also by who bears those beliefs and whether they actually live them. The narrative of faith develops and unfolds as the community discerns where to draw lines—what the demands of doctrine, faith, and godly love require, urge, permit, discourage, or forbid. This process of faith-community formation and preservation, akin in some ways to the formation of intimate family relationships, is extremely sensitive and exceptionally vulnerable in a secular world. The terms by which a faith community, including those it employs within a religious organization, gathers to advance the faith and carry out its religious works are no mere HR standards. At issue are not primarily secular terms of employment, but rather the very identity of a faith community and ultimately its members.

Consider the distinctive employment practices of The Church of Jesus Christ of Latter-day Saints. Professional qualifications make a candidate competitive, but only Church members in good standing are eligible for employment. Every employee must hold and be worthy of a temple recommend, a certification by a member's local Church leader affirming a person's obedience to Church teachings. *See Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 n.4 (1987). Many other faith communities would report similar restrictions on employment. Those restrictions make sense because a religious organization can pursue its religious mission and uphold its beliefs only through its employees.

Standards like these ensure that a religious organization can shape its own identity. Personnel is policy, no less for churches than for government officials and

corporations. "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself." *Id.* at 342 (Brennan, J., concurring). This process of self-definition is "vital": a religious organization, when acting as employer, "should be able to require that only members of its community perform those activities." *Id.*

Starkey's complaint is unlike the run-of-the-mill employment discrimination claim. Her right to equal employment opportunity must be reconciled with the right of the Archdiocese of Indianapolis and Roncalli High School to carry out their religious missions. And to do that, a religious institution must be free to define itself by the conduct it rejects no less than by what it accepts.

## II. TITLE VII DOES NOT APPLY WHEN A RELIGIOUS EMPLOYER DISMISSES AN EMPLOYEE WHO BREACHES RELIGIOUS STANDARDS.

### A. Title VII Does Not Apply to a Religious Employer that Takes a Disputed Employment Action for Religious Reasons.

The Archdiocese and Roncalli High School argue that 42 U.S.C. § 2000e–1(a) permits them to dismiss Starkey without violating Title VII.[2] The district court disagreed. It ruled that the exemption, known as section 702(a),[3] "allows religious employers to favor coreligionists in employment decisions. It does not allow religious employers to do so in a way that also discriminates against another protected class." *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195,

[2] A separate exemption, 42 U.S.C. § 2000e–2(b)(2), also protects religious schools.

[3] Section 702(a) refers to the bill version of Title VII, while 42 U.S.C. § 2000e–1(a) is the same provision as codified.

1205 (S.D. Ind. 2020) (*Starkey I*). The court adjudged that result contrary to the legislative history of Title VII, during which "Congress specifically rejected proposals that would have given religious employers a complete exemption from regulation under the Act." *Id.* at 1202. So the district court held that section 702(a) "does not bar Plaintiff's claims for discrimination on the basis of sexual orientation, retaliation, or hostile work environment under Title VII." *Id.* at 1198.

The district court badly misread the exemption.

Correctly interpreting section 702(a) begins with its text. *See Bostock*, 140 S. Ct. at 1738; *United States v. Wright*, 48 F.3d 254, 255 (7th Cir. 1995). This Court has said that it "will not stray from the plain language in order to read limitations into the statute." *Wright*, 48 F.3d at 256. And the Supreme Court stressed the primacy of statutory text when construing Title VII as a ban on employment discrimination based on sexual orientation. "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment" because "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738.

Here is section 702(a), verbatim:

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

42 U.S.C. § 2000e–1(a).

Section 702(a) begins with the words, "This subchapter shall not apply." *Id.* *Subchapter* refers to Title VII and *shall* expresses a sweeping mandate. Title VII *cannot* apply in any respect when the terms of section 702(a) are satisfied.

Only "a religious corporation, association, educational institution, or society" may assert the exemption. *Id.* Appellees qualify. The Archdiocese is a "religious corporation" and Roncalli High is a Catholic "educational institution." *Id.*

Section 702(a) applies to employees who "perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id.* Hence, the exemption covers every employee of a qualified religious organization. Each will "perform work" that is at least "connected with the carrying on … of [the religious organization's] activities." 42 U.S.C. § 2000e–1(a). "Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'" *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991).

Having pared away other language, we come to the decisive phrase of section 702(a). It applies when a qualified religious employer takes a disputed action "with respect to the employment of individuals of a particular religion." *Id.* Each substantive word holds importance.

*Employment* denotes the entire range of activities comprising the employment relationship. "[I]f Congress had wished to limit the religious organization exemption to hiring and discharge decisions, it could clearly have done so. Instead, it painted

with a broader brush, exempting religious organizations from the entire 'subchapter' of Title VII with respect to the 'employment' of persons of a 'particular religion.'" *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 194 (4th Cir. 2011).

*Religion* carries a special meaning. Under Title VII's definition, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief … ." 42 U.S.C. § 2000e(j). Wherever *religion* appears in Title VII, its meaning sweeps broadly—reaching "*all* aspects" of both "religious observance and practice." *Id.* (emphasis added). It is religious belief, not religious conduct, that appears almost as an after-thought. *Id.* And *includes* expands the definition beyond these enumerated elements. *See Hammer v. U.S. Dep't of Health and Human Servs.*, 905 F.3d 517, 527 (7th Cir. 2018). With this definition in hand, it becomes evident that "a particular religion" in section 702(a) means at least "particular" religious observances, practices, and beliefs. 42 U.S.C. § 2000e–1(a).[4]

[4] Congress broke no new ground by defining religion to mean much more than mere affiliation. A dictionary entry from the era when the Civil Rights Act was adopted explains that religion encompasses "commitment or devotion to religious faith or observance" and "a personal set or institutionalized system of religious attitudes, beliefs, and practices." *Religion*, Webster's Seventh New Collegiate Dictionary (1965). Understanding religion in terms of practices as well as beliefs persists today. *See also* Stanford Encyclopedia of Philosophy, *Philosophy of Religion* (last updated Jan. 8, 2019), https://plato.stanford.edu/entries/philosophy-religion/ ("A religion involves a communal, transmittable body of teachings and prescribed practices about an ultimate, sacred reality or state of being that calls for reverence or awe, a body which guides its practitioners into what it describes as a saving, illuminating or emancipatory relationship to this reality through a personally transformative life of prayer, ritualized meditation, and/or moral practices like repentance and personal regeneration."). A religious organization's religious employment standards fall well within the ordinary definition of "religion" and "religious practice."

The elements of section 702(a) thus form a straightforward rule: Title VII does not apply whenever a religious organization takes a disputed employment action because of a particular religious observance, practice, or belief. To be sure, religious organizations do not possess complete immunity from Title VII. *See Curay-Cramer v. Ursuline Acad.*, 450 F.3d 130, 141 (3d Cir. 2006). A church could not, for instance, subject women to harsher employment discipline than men for violating a religious prohibition on extramarital sexual relations. *See Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 414 (6th Cir. 1996) (concluding that a religious school fired a teacher for violating a "code of conduct [that] applied equally to both sexes"). But Title VII does not apply to a religious organization when a disputed employment action comes down to the choice of "an individual of a particular religion," with "religion" encompassing far more than bare religious affiliation. 42 U.S.C. § 2000e–1(a).

The district court rejected this plain-text interpretation. The court acknowledged that section 702(a) entitles defendants "to terminate an employee whose conduct or religious beliefs are inconsistent with those of [her] employer" but denied that the exemption applies "when the religious reason *also* implicates another protected class." *Starkey I*, 496 F. Supp.3d at 1202–03 (quotation omitted and punctuation altered). Nothing in section 702(a) supports that cramped interpretation, and it flies in the face of both Title VII's definition of *religion* and the statute. To reduce the meaning of *religion* to the superficial question of whether an employee is nominally affiliated with the employer's religion—not even allowing for consideration

of whether the employee is a member in good standing—finds no support in logic or law. It ignores what religion is.

So far, this Court has not addressed whether Title VII's religious employer exemption applies "only to claims of *religious* discrimination or … more broadly to other employment-discrimination claims." *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1087 (7th Cir. 2014) (dismissed on other grounds) (punctuation altered). Other circuits addressing that question have concluded, persuasively, that section 702(a) erects a broad shield for religious employers to select employees whose conduct and beliefs are consistent with the employer's faith.

### B. Several Circuits Read Section 702(a) As a Guarantee for Religious Employers to Build and Maintain a Faithful Workforce.

*Little v. Wuerl*, 979 F.2d at 944, is the leading decision under section 702(a). There, an employee sued a Catholic school for declining to renew her contract because she remarried without pursuing the "proper canonical process available from the Roman Catholic Church to obtain validation of her second marriage." *Id.* at 946.[5] The parish operating the school invoked section 702(a) in defense.

The Third Circuit held that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Id.* at 951. That reading flowed from statutory text and legislative history, as well as "sensitivity to the constitutional

[5] It made no difference that the employee was Protestant since Catholic canon law allows non-Catholics to get an annulment. *Little*, 979 F.2d at 946.

concerns that would be raised by a contrary interpretation." *Id.* *Little* saw that "Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices … ." *Id.* Section 702(a) allows "for a parochial school to discharge a Catholic or non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles." *Id.* Section 702(a) thus "cover[s] the Parish's decision not to rehire Little because of her remarriage." *Id.*

*Curay-Cramer*, 450 F.3d at 130, followed *Little*. There, a Catholic school discharged a teacher for signing a newspaper advertisement advocating the right to abortion. *Id.* at 132. She alleged sex discrimination under Title VII. *Id.* at 133. The Third Circuit disagreed. Relying on *Little*, the court held that "a religious institution's ability to 'create and maintain communities composed solely of individuals faithful to their doctrinal practices' will be jeopardized by a plaintiff's claim of gender discrimination." *Id.* at 141 (quoting *Little*, 929 F.2d at 951). So the Title VII claims were dismissed. *Id.*

Other circuits have arrived at the same text-based reading of section 702(a). *See Kennedy*, 657 F.3d at 194–95 (4th Cir.) (following *Little*'s reading of section 702(a)); *EEOC v. Miss. College*, 626 F.2d 477, 487 (5th Cir. 1980) (interpreting section 702(a) "broadly" to cover a Baptist college's "employment practices by which it seeks to ensure that its faculty members are suitable examples of the Christian ideal advocated by the Southern Baptist faith"); *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (exempting a Baptist employer from Title VII for firing

an employee who became a lay minister for a gay-affirming church); *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (section 702(a) "allows religious institutions to employ only persons whose beliefs are consistent with the employer's").

### C. Reading Section 702(a) As a Coreligionist Privilege Is Flawed.

Swimming against this tide, the district court insisted that section 702(a) confers only a privilege "to favor coreligionists in employment decisions" and that Title VII generally prohibits any employment action that "also discriminates against another protected class." *Starkey I*, 496 F.Supp.3d at 1205. Precedent supporting this reading is thin, as evinced by the district court's reliance on decades-old decisions that the Fourth and Fifth Circuits have since distanced themselves from.[6] *See id.*at 1202. Only the Ninth Circuit currently maintains this straitjacketed reading of section 702(a)—and its reasoning is deeply flawed.

The Ninth Circuit position is exemplified by *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986). There, a female employee sued an evangelical school for sex discrimination because its religiously based benefits policies favored married men, and the school asserted a defense under section 702(a). *Id.* at 1364. Legislative history figured prominently. The court of appeals described how Congress rejected

[6] *Compare Kennedy*, 657 F.3d at 194–95 *and Miss. College*, 626 F.2d at 487 (adopting a broad reading of section 702(a)) *with Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) *and McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972) (construing section 702(a) as a narrow coreligionist privilege). The district court also cited *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). *Starkey I*, 496 F.Supp.3d at 1202. But the reference is inexplicable. *Cline* stands for the contrary reading—that when a challenged employment policy "emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discriminated [ ] in violation of Title VII." 206 F.3d at 658 (citations omitted).

complete immunity for religious employers when it enacted the Civil Rights Act in 1964 and again during debate on the 1972 amendments to Title VII. *See id.* at 1365–66. Reading section 702(a) to "exempt[] religious institutions only to a narrow extent," the court concluded that "religious institutions may base relevant hiring decisions upon religious preferences" but they are not otherwise immune from liability for discrimination based on some other prohibited ground, such as sex. *Id.* at 1366. Given its view that section 702(a) does not offer religious employers "a complete exemption from regulation," *id.*, the court ruled that the school had no protection from sex discrimination claims.

But the Ninth Circuit's interpretation of section 702(a) is wrong. Treating the exemption as a narrow coreligionist privilege, as the district court did, *see Starkey I*, 496 F.Supp.3d at 1205, wars against the statutory text and the overwhelming weight of circuit precedent.

*First*, section 702(a) is mandatory. Its opening words—"This subchapter shall not apply"—mean that when a religious employer satisfies the terms of the exemption, Title VII *cannot* apply. 42 U.S.C. § 2000e–1(a). The district court's worry that "[t]he exemption under Section 702 should not be read to swallow Title VII's rules" invites a court to withhold the exemption whenever a religious standard disparately affects the member of a protected class. *Starkey I*, 496 F.Supp.3d at 1203. But the statute's mandate leaves no such leeway.

*Second*, section 702(a) says nothing about a coreligionist preference. The exemption applies "with respect to the employment of individuals of a particular

*religion*"—a word broadly defined to include religious observances, practices, and beliefs—not religious affiliation, about which the statute says nothing. 42 U.S.C. § 2000e–1(a) (emphasis added). Courts have recognized that "it is inconceivable that [section 702(a)] would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task." *Larsen v. Kirkham*, 499 F.Supp. 960, 966 (D. Utah 1980), *aff'd without op.*, No. 80-2152, 1982 WL 20024 (10th Cir. Dec. 20, 1982).

*Third*, section 702(a) applies to religious standards of conduct. *Religion* in Title VII means "religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). *Observance* and *practice* denote religiously motivated conduct. A Jewish employer can decline to hire a man who refuses to keep kosher as surely as for expressing beliefs contrary to the Torah. By the same principle, a Catholic employer can fire a woman for entering same-sex marriage no less than for disbelieving the Trinity. That section 702(a) covers religious conduct should be unsurprising since "[f]ree-exercise problems usually arise when a law, regulation, or some action of a public official interferes with a religiously motivated practice, forbearance, or other conduct." *Korte v. Sebelius*, 735 F.3d 654, 676 (7th Cir. 2013).

*Fourth*, the Ninth Circuit's recounting of legislative history, reiterated by the district court here, is a red herring. *See Starkey I*, 496 F.Supp.3d at 1202–03. No one disputes that Congress rejected amendments that would have conferred complete immunity from Title VII for religious organizations. But Congress was not limited to

the all-or-nothing alternatives of exempting religious organizations entirely or subjecting them to Title VII except where they prefer employees nominally affiliated with their religion. The actual language of section 702(a), read in conjunction with the definition of *religion* in 2000e(j), shows that Congress made a third choice. Religious employers are exempt from Title VII when a disputed employment action turns on a religious observance, practice, or belief.

These errors help explain why the district court's reliance on Ninth Circuit case law led it astray. Section 702(a) nowhere suggests that it can be disregarded if "a religious reason for an employment decision … *also* implicates another protected class[.]" *Starkey I*, 496 F.Supp.3d at 1203. What matters under section 702(a) is whether the religious employer takes the disputed employment action for religious reasons—not whether the employee can reframe that action as discriminatory. Behind the district court's concern with allowing the exemption to "swallow" Title VII's ban on employment discrimination is the false premise that section 702(a) is a dangerous departure from the statute. *Id.* Any tension between the prohibition on employment discrimination and section 702(a) results from a misreading of the latter. Exempting a religious organization from Title VII when it relies on religious reasons to make a disputed employment action is precisely what Congress directed courts to do. *See Little*, 929 F.2d at 951.

### *D. Bostock* Confirms that Title VII Entitles Religious Employers to Make Adverse Employment Decisions for Sincere Religious Reasons.

Starkey's claims rest on *Bostock*, which holds that Title VII's ban on employment discrimination based on sex implicitly prohibits discrimination based on sexual

orientation. 140 S. Ct. at 1754. But *Bostock* does not cut back on section 702(a). It reaffirms the Supreme Court's commitment to "preserving the promise of the free exercise of religion enshrined in our Constitution." *Id.* Among the federal laws that safeguard that promise is section 702(a)—Title VII's "express statutory exception for religious organizations." *Id.* (citing 42 U.S.C. § 2000e–1(a)).[7] *Bostock* thus acknowledges that section 702(a) may apply when an employee brings a claim of sexual orientation discrimination against a religious organization.

Appellees' commitment to traditional marriage deserves judicial respect, not suspicion. Even while announcing the right to same-sex marriage, the Supreme Court underscored that support for traditional marriage rests on beliefs that are not invidious. "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). Appellees' belief in the divinity of marriage between a man and a woman and their rejection of same-sex marriage rests on religious beliefs, practices, and observances with millennia of history. As *Obergefell* stressed, those beliefs are neither subversive nor invidious.

[7] *Bostock* also mentions the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, as "a kind of super statute, displacing the normal operation of other federal laws" and suggests that "it might supersede Title VII's commands in appropriate cases." 140 S. Ct. at 1754. Appellees correctly point out that *Bostock* undermines *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015), where a panel of this Court concluded that RFRA applies only when the government is a party. *See* Appellees' Response Br. at 38–39. RFRA therefore presents an additional basis for relief.

Having said that, the content of Appellee's religious beliefs is not subject to judicial approval. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). Appellees' belief that entering a same-sex marriage is a serious religious offense merits respect, even if it prompts judicial concern. *See Hall*, 215 F.3d at 626; *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It 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.").

## III. APPELLEES HAVE A CONSTITUTIONAL RIGHT TO DISMISS AN EMPLOYEE WHOSE BELIEFS OR ACTIONS CLASH WITH THE EMPLOYER'S RELIGION.

The district court's errant reading of section 702(a) raises difficult constitutional questions. Congress deliberately adopted exemptions to lift Title VII from religious employers in the view that "the government interest in eliminating religious discrimination by religious organizations is outweighed by the rights of those organizations to be free from government intervention." *Little*, 929 F.2d at 951. Denying that exemption to a Catholic archdiocese and high school forces an issue that Congress's handiwork has avoided. Can federal law constitutionally prevent religious employers from using religious criteria to employ those best suited to carry out their religious missions? The simple answer is no. Appellees have robust constitutional rights to remove Starkey once her personal choices put her at odds with established Catholic practices and beliefs.

*Employment Division v. Smith*, 494 U.S. 872 (1990), holds that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (quotation omitted). But "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1868 (cleaned up). In *Fulton*, a city contract that allowed exceptions to a nondiscrimination requirement triggered strict scrutiny when the city declined to grant an exception to Catholic Social Services. *Id.* at 1881. That no exception had ever been made for others made no difference. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given … ." *Id.* at 1879.

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

offers no compelling reason why it has a particular interest in denying an exemption to [Catholic Social Services] while making them available to others." *Id.* at 1882.

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

Under *Fulton* and *Tandon*, the Archdiocese and Roncalli High have a free exercise right to discharge Starkey for entering a same-sex marriage.

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

Title VII, as construed in *Bostock*, is not neutral toward religion either. "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877. A rule punishing religious employers for long-standing religious practices upholding traditional beliefs regarding marriage and sexuality has "prohibiting the exercise of religion" as its necessary "object." *Smith*, 494 U.S. 878. Major Abrahamic religions commonly teach the biblical principle that sexual expression is reserved for a man and a woman in a traditional marriage—and often require all employees to comply with it. Hewing to that principle is an important aspect of exercising religion. But what these religions teach as immoral, Title VII now generally requires employers to accept. Unless 702(a) provides an exemption as argued above, this creates a direct conflict between federal law and widespread religious beliefs. That conflict renders the nondiscrimination rule of Title VII less than neutral toward religion.

Strict scrutiny thus applies, and Starkey must show that denying the Archdiocese and Roncalli High an exemption or accommodation serves a compelling government interest through the least restrictive means. This she cannot do. "The creation of a system of exceptions" like the granting of BFOQs "undermines [Starkey's] contention that [Title VII's] non-discrimination policies can brook no departures." *See Fulton*, 141 S. Ct. at 1882. The Supreme Court has never suggested that applying nondiscrimination norms to churches or religious schools serves a compelling governmental interest.

Nor can Starkey show that applying Title VII to the Archdiocese and Roncalli High satisfies the least restrictive means prong of strict scrutiny. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. Since Title VII can lift the burdens of compliance for small businesses and BFOQs, it must relieve the burdens from religious organizations like Appellees when the duty to avoid employment discrimination clashes with sincere religious beliefs.

Starkey fares no better under *Tandon*. Title VII treats comparable secular activities "more favorably than religious exercise." 141 S. Ct. at 1296. Small businesses and businesses operating under a BFOQ inflict the same harms by discriminating against LGBT employees as any other category of employers, yet Title VII exempts them. *See* 42 U.S.C. §§ 2000e(b); 2000e–2(e). Strict scrutiny therefore applies. Starkey cannot satisfy that test because the government lacks a compelling interest in requiring the Archdiocese of Indianapolis and Roncalli High School to employ a woman in a same-sex marriage (or compensate her for the loss of employment) when Title VII admits exemptions for secular interests.

*Fulton* and *Tandon* dictate that Appellees have the right under the Free Exercise Clause to discharge an employee like Starkey who violates religious standards.

* * * *

This Court need not rule on these constitutional issues. It can avoid them by construing Title VII's religious exemption to cover employment decisions based on religious beliefs and practices, as the plain terms of 702(a) direct.

## CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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*/s/R. Shawn Gunnarson*
R. Shawn Gunnarson

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

*Counsel for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *amicus* brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a) and Cir. R. 32(b) because it has been prepared in a proportionally spaced typeface using Century Schoolbook in 12-point font. The brief likewise complies with the type volume limitation of Cir. R. 29(b)(4) because it contains 6,175 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

*/s/R. Shawn Gunnarson*
R. Shawn Gunnarson

## CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, the foregoing *amicus* brief was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

*/s/R. Shawn Gunnarson*
R. Shawn Gunnarson