No. 22-2954

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHELLE FITZGERALD,
Plaintiff-Appellant,

v.

RONCALLI HIGH SCHOOL, INC., AND
ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana
Case No. 1:19-cv-04291-RLY-TAB

BRIEF OF AMICI CURIAE THE CHRISTIAN AND MISSIONARY ALLIANCE; EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY; BILLY GRAHAM EVANGELISTIC ASSOCIATION; CROSS CATHOLIC OUTREACH; YOUNG LIFE; CRISTA MINISTRIES; CHRISTIAN CARE MINISTRY, INC.; TYNDALE HOUSE MINISTRIES; SAMARITAN'S PURSE; FOCUS ON THE FAMILY; TRANS WORLD RADIO; FAR EAST BROADCASTING COMPANY, INC.; THE CROWELL TRUST; THE CATHOLIC DIOCESE OF COLORADO SPRINGS; THE NAVIGATORS; SKY RANCHES, INC.; AND CALVARY CHAPEL FORT LAUDERDALE IN SUPPORT OF DEFENDANTS-APPELLEES

John Melcon
Stuart Lark
SHERMAN & HOWARD L.L.C.
90 South Cascade Avenue, Suite 1500
Colorado Springs, CO 80903
(719) 475-2440
jmelcon@shermanhoward.com
slark@shermanhoward.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page(s)

RULE 26.1 DISCLOSURE STATEMENT OF JOHN MELCON i
RULE 26.1 DISCLOSURE STATEMENT OF STUART LARK iii
TABLE OF AUTHORITIES vi
INTEREST OF AMICI CURIAE 1
INTRODUCTION AND SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. Faith communities like *amici* employ fellow believers as a form of associational religious exercise, which Title VII accommodates 5
II. Title VII does not apply at all to a religious organization's employment actions that are based on an employee not sharing the organization's particular religion 8
A. Section 702 is triggered when a religious organization takes an employment action because the religious belief, observance, or practice of an employee does not align with that of the organization 8
B. When an employment action triggers the 702 exemption, none of Title VII applies 12
III. The ACLU's position, that section 702 only exempts religious organizations from claims for religious discrimination, is wrong 15
A. The ACLU's incorrect focus on the type of claim asserted misreads caselaw and ignores the text of the 702 exemption 16
B. The ACLU's approach undermines certain religious beliefs and leads to absurd results 18
IV. This Court need not decide whether section 702 exempts other religiously-motivated employment actions 19
CONCLUSION 22
CERTIFICATE OF COMPLIANCE 23
CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Page(s)

Cases

Bostock v. Clayton County,
140 S. Ct. 1731 (2020) 14, 15

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 6

Boyd v. Harding Acad. of Memphis, Inc.,
88 F.3d 410 (6th Cir. 1996) 16

Burwell v. Hobby Lobby,
573 U.S. 682 (2014) 5, 8

Christian Legal Society v. Walker,
453 F.3d 853 (7th Cir. 2006) 6

Cline v. Catholic Diocese of Toledo,
206 F.3d 651 (6th Cir. 2000) 14, 19

Corp. of the Presiding Bishop v. Amos,
483 U.S. 327 (1987) 7, 15

Curay-Cramer v. Ursuline Acad. of Wilmington,
450 F.3d 130 (3d Cir. 2006) 12

DeMarco v. Holy Cross High Sch.,
4 F.3d 166 (2d Cir. 1993) 16

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 13

EEOC v. Pac. Press Publ'g Ass'n,
676 F.2d 1272 (9th Cir. 1982) 16

Fitzgerald v. Roncalli High Sch., Inc.,
No. 1:19-cv-04291-RLY-TAB, 2021 WL 4953237
(S.D. Ind. Mar. 31, 2021) 4, 12

Ganzy v. Allen Christian Sch.,
995 F. Supp. 340 (E.D.N.Y. 1998) 14

Hall v. Baptist Memorial Health Care Group,
215 F.3d 618 (6th Cir. 2000) 12, 13, 14

Herx v. Diocese of Fort Wayne-S. Bend Inc.,
48 F. Supp. 3d 1168 (N.D. Ind. 2014) 17

Herx v. Diocese of Fort Wayne-S. Bend Inc.,
772 F.3d 1085 (7th Cir. 2014) 17

Hively v. Ivy Tech Cmty. Coll. of Indiana,
853 F.3d 339 (7th Cir. 2017) 2, 14

Kennedy v. St Joseph's Ministries,
657 F.3d 189 (4th Cir. 2011) 4, 8, 12, 16, 17

Korte v. Sebelius,
735 F.3d 654 (7th Cir. 2013) 6

Little v. Wuerl,
929 F.3d 944 (3rd Cir. 1991) 4, 7, 11, 12, 17

Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n,
138 S. Ct. 1719 (2018) 15

Obergefell v. Hodges,
576 U.S. 644 (2015) 15

Rabé v. United Air Lines, Inc.,
636 F.3d 866 (7th Cir. 2011) 13

Rayburn v. Gen. Conf. of Seventh-Day Adventists,
772 F.2d 1164 (4th Cir. 1985) 3

Redhead v. Conf. of Seventh-Day Adventists,
440 F. Supp. 2d 211 (E.D.N.Y. 2006) 14

Slattery v. Hochul,
61 F.4th 278 (2d Cir. 2023) 6

Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.,
41 F.4th 931 (7th Cir. 2022) 3, 12, 16, 18

Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.,
496 F. Supp. 3d 1195 (S.D. Ind. 2020) 4

The Nature Conservancy v. Wilder Corp. of Delaware,
656 F.3d 646 (7th Cir. 2011) 2

Vigars v. Valley Christian Ctr. of Dublin,
805 F. Supp. 802 (N.D. Cal. 1992) 14

Wisconsin v. Yoder,
406 U.S. 205 (1972) 5

Statutes

42 U.S.C. § 2000e(f) 13

42 U.S.C. § 2000e(j) 9, 11, 13, 22

42 U.S.C. § 2000e-1(a) ..... passim

Title VII of the Civil Rights Act of 1964 ..... passim

Other Authorities

Alex Reed, *Religious Organization Staffing Post-Bostock*, 43 BERKELEY J. EMP. & LAB. L. 203 (2022) 20

EEOC Compliance Manual §12-I.C.1 9

H.R. Rep. No. 914, 88th Cong. § 703 (1963) 9

John Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J. L. & RELIGION 280 (2018) 20

INTEREST OF AMICI CURIAE [1]

Amici are nonprofit Christian religious organizations involved in many different activities including humanitarian relief, social services, education, evangelism, discipleship, missions, Bible teaching, broadcasting, publishing, health care sharing, campus ministry, camping, and congregational care. *Amici* are located throughout the United States and are active in every state and in many other countries. Collectively, *amici* employ thousands of individual workers.

Amici conduct all their activities as an exercise of their Christian beliefs and in furtherance of their respective Christian missions. In addition, and importantly, *amici* are guided by their beliefs to carry out their activities as *associations* of like-minded believers, and doing so is an expression of those beliefs. Indeed, the experience of community within religious associations often inspires and energizes their service to others. Moreover, the shared religious beliefs and practices among those carrying out *amici*'s activities ensure that these activities are conducted in a manner that distinctly expresses and exercises each organization's religious convictions.

With respect to federal and state laws limiting associational rights, *amici* have a vital interest in, and increasingly rely upon, religious exemptions such as those contained in Title VII of the Civil Rights Act of 1964. These exemptions preserve

[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no person other than *amici* made a monetary contribution toward the preparation or submission of this brief.

amici's legal rights to exercise and express their religious beliefs not just through their activities but also through their associations as faith communities.

In this case, the district court below misinterpreted Title VII's religious exemption in a flawed decision that threatens to undermine *amici*'s rights to associational religious exercise and expression. Moreover, the ACLU's recently-filed amicus brief invites this Court to perpetuate the district court's error. *See* Br. of Amici ACLU and ACLU of Indiana ["ACLU Br."], at 3–10. The present appeal provides an important opportunity for this Court to confirm the proper meaning of the religious exemption in Title VII and the protections it offers for faith communities like *amici*, an issue this Court previously set aside "for another day." *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351 (7th Cir. 2017). That day is today.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether religious organizations can require their employees to agree with or live in accordance with their religious beliefs, including their beliefs pertaining to marriage and human sexuality. Although several considerations speak to this issue—including the First Amendment principles of church autonomy and expressive association, not to mention the ministerial exception doctrine on which the district court ultimately relied—this Court need look no further than the text of Title VII itself to resolve the appeal. *See The Nature Conservancy v. Wilder Corp. of Delaware*, 656 F.3d 646, 653 (7th Cir. 2011) (recognizing this Court "may affirm summary judgment on any basis . . . f[ou]nd in the record.").

Accordingly, *amici* urge this Court to start and end with the statute and its religious exemption, a straightforward reading of which requires reversal. *See*

Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc., 41 F.4th 931, 947 (7th Cir. 2022) (Easterbrook, J., concurring) (noting that starting with the statute "is the proper sequence"). *See also Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) (beginning with statutory analysis because "we must first determine whether Title VII and the First Amendment necessarily collide").

Title VII's primary religious exemption, codified at 42 U.S.C. section 2000e-1(a) ("section 702" or the "702 exemption"), reflects this country's long tradition of recognizing religious association as a form of protected religious exercise and expression. Religious organizations like *amici* commonly require their employees to embrace and model their religious beliefs—a requirement that emerges from these organizations' religious convictions about how their associational practices impact the carrying out of their respective missions and activities.

The 702 exemption accommodates and preserves associational religious exercise by permitting religious employers to maintain religious requirements for their employees. Under the exemption's plain language, Title VII's substantive provisions—including its prohibitions on religious discrimination and sex discrimination—"shall not apply" to religious organizations like *amici* when they make employment decisions based on the religious beliefs, observance, or practice of individual employees. As other courts of appeals have recognized, the purpose of the 702 exemption is "to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices" and "to employ only persons whose beliefs and conduct are consistent with the

[organizations'] religious precepts." *Kennedy v. St Joseph's Ministries*, 657 F.3d 189, 194 (4th Cir. 2011) (quoting *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991)).

The district court below came to the opposite conclusion and denied the motion to dismiss filed by the Roman Catholic Archdiocese of Indianapolis and Roncalli High School (collectively, "Roncalli Catholic"), which was premised in part on the 702 exemption. The district court erroneously held that the 702 exemption does not permit religious organizations to maintain associational requirements connected with their beliefs about marriage and sexuality. *Fitzgerald v. Roncalli High Sch., Inc.*, No. 1:19-cv-04291-RLY-TAB, 2021 WL 4953237, at *3 (S.D. Ind. Mar. 31, 2021) (adopting the "reasoning and conclusions" of *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195 (S.D. Ind. 2020)). Instead, according to the district court's logic, religious organizations must—under Title VII—employ individuals who reject, violate, or disparage their beliefs on these topics.

In short, the district court ignored the statutory text and applied an incorrect, narrow reading of the 702 exemption. The ACLU, in its amicus brief, advances the same mistaken view. This narrow interpretation overlooks the fact that regardless of the claims asserted, Title VII does not apply (i.e., imposes no liability) where a religious organization makes an employment decision based on an employee not sharing the organization's particular religion. The ACLU's brief goes further astray by considering and rejecting only the broadest alternative to its narrow interpretation, an alternative this Court need not consider in order to resolve this appeal.

ARGUMENT

I. Faith communities like *amici* employ fellow believers as a form of associational religious exercise, which Title VII accommodates.

Religious exercise often includes both individual and associational (or communal) elements. In a case protecting employers' religious exercise rights, Justice Kennedy described how our country's commitment to religious liberty encompasses the individual element as exercised throughout society:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

Burwell v. Hobby Lobby, 573 U.S. 682, 737 (2014) (Kennedy, J., concurring).

On this same foundation, the Supreme Court has regularly recognized that our laws also protect the communal element of religious exercise. For example, in *Wisconsin v. Yoder*, the Court observed that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." 406 U.S. 205, 210 (1972). The Court further noted that the Amish base this concept on "their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, 'be not conformed to this world . . . .'" *Id.* at 216.

Different religious organizations, even those of the same general faith tradition, will reach different conclusions regarding the associational requirements of their faith. Perhaps not many religious organizations believe the requirements apply as

extensively as do the Amish. What matters is that in each case the determination is based on religious beliefs as interpreted and applied by the religious organization and is therefore an instance of religious exercise.[2]

Religious organizations like *amici* intertwine their carrying out of activities in service to God and society with their cultivating of an association of employees committed to their beliefs and mission. Indeed, the latter often energizes the former. To this end, religious organizations commonly require employees to embrace and model the organization's religious beliefs. Such requirements help these organizations ensure that their activities—some of which may be similar to those of secular organizations—maintain their distinctive religious character. For *amici*, the point is not just that services are provided, but that services are provided by individuals committed to the organization's religious beliefs as an expression and exercise of those beliefs.

Statutory religious exemptions—like the 702 exemption in Title VII—accommodate and preserve this associational aspect of religious exercise and expression. *See Korte v. Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) ("The religious-employer exemptions in Title VII and the ADA are legislative applications of the

[2] This Court and others have also recognized that expressive religious association is protected by the associational rights embodied in the First Amendment. *See, e.g.*, *Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006). *Cf. Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). The ACLU argues that this line of cases does not apply in the employment context, *see* ACLU Br. at 19, but that position was just definitively rejected by the Second Circuit in *Slattery v. Hochul*, 61 F.4th 278, 286–91 (2d Cir. 2023) (applying strict scrutiny to law burdening expressive association in employment context).

church-autonomy doctrine."). Specifically, the 702 exemption enables religious employers to "create and maintain communities composed solely of individuals faithful to their doctrinal practices" and "employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Little*, 929 F.2d at 951. These exemptions recognize that religious standards for employees, when applied by religious organizations, are not the type of invidious discrimination that civil rights laws aim to eliminate.[3]

In the Supreme Court's leading case upholding the 702 exemption, Justices Brennan and Marshall accurately captured the associational aspect of religious exercise when they observed that "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 . . . a means by which a religious community defines itself." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (emphasis added) (Brennan and Marshall, JJ., concurring). They further explained:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations . . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. *Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals*.

Id. at 341–43 (emphasis added) (internal quotation omitted).

[3] Accordingly, these exemptions do not, as the ACLU suggests, "gift religious organizations a license to discriminate." ACLU Br. at 22.

Moreover, the protections for associational religious exercise embodied in the 702 exemption are not diminished by any "commercial nature of the employment relationship." ACLU Br. at 18. Just as corporations do not forfeit protections for religious exercise if they organize under a for-profit model, *Hobby Lobby*, 573 U.S. at 710–15, so too faith communities do not lose their religious associational rights if they establish employment relationships with some of their members.

II. Title VII does not apply at all to a religious organization's employment actions that are based on an employee not sharing the organization's particular religion.

In crafting the 702 exemption, Congress "painted with a broad brush" to ensure associational religious exercise and expression would remain "free from government intervention." *Kennedy*, 657 F.3d at 194. Section 702 accomplishes this by permitting religious organizations to maintain religious requirements for employees. Under the plain language of section 702, the entirety of Title VII—including its prohibition on sex discrimination—does not apply to religious organizations like *amici* (and Roncalli Catholic) when they make employment decisions based on the particular religion—i.e., the religious beliefs, observance, or practice—of individual employees or job applicants.

A. Section 702 is triggered when a religious organization takes an employment action because the religious belief, observance, or practice of an employee does not align with that of the organization.

By its terms, the 702 exemption kicks in whenever a religious employer exercises selectivity in favor of individuals whose religious beliefs and/or conduct align with the employer's religious requirements. In full, the exemption reads:

> 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).

To be sure, this language does not create a blanket exemption for religious employers, although Congress considered such an approach. *See* H.R. Rep. No. 914, 88th Cong. § 703 (1963). Instead, the 702 exemption applies to a religious organization's "employment of individuals of a particular religion." But what is the meaning of "individuals of a particular religion"?

The answer is found in Title VII's inclusive definition of "religion," which confirms that an individual's "particular religion" is much more than his or her self-described denominational affiliation. Throughout Title VII, "religion" means "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Thus, the 702 exemption comes into play when a religious employer makes an employment decision based on the alignment of an individual's religious belief, observance, or practice with the organization's own.[4]

---

[4] The ACLU asserts both that "the relevant religion referred to in Section 702 is the religion of the 'individual,' not the religion of the employer," ACLU Br. at 8, and that the exemption "covers only discrimination *against* individuals of a particular religion." *Id.* at 7 (emphasis added). These assertions, which seemingly seek to mischaracterize the 702 exemption as a mechanism for employers to exclude disfavored religions, are just plain wrong. *See* EEOC Compliance Manual §12-I.C.1 (explaining that section 702 "allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs").

i. Shared beliefs

At the core of what the 702 exemption protects is a religious organization's preference for employees who are *fellow believers*. For most *amici*, the associational requirements of their faith compel them to limit employment opportunities to individuals who share and embrace *amici*'s religious beliefs. Often, these beliefs are expressed in a "doctrinal statement" or "statement of faith"—a document employees must personally agree with in order to work for the organization. If a job applicant expresses that he or she does not share—and cannot accept—the employer's religious beliefs, no job offer is made.

In some cases, even if an employee proclaims allegiance to a certain faith tradition—e.g., Christianity—and does not disclose disagreement with any specific beliefs held by the organization (beliefs the employee is required to affirm and hold), the employee's rejection of the organization's beliefs may nevertheless be exposed by the employee's conduct and practice. In such circumstances, a religious employer may—through careful spiritual discernment—conclude the employee does not in fact share its religious beliefs. This dynamic is not limited to Christian organizations. An Orthodox Jewish or Muslim organization that expects employees to maintain a kosher or halal diet might reasonably conclude that an employee who consumes pork is not actually a fellow believer. Either way, the fundamental issue is the disconnect between the organization's religious beliefs and those of the individual.

ii. Belief-based conduct

Some *amici* and other religious organizations choose—for religious and mission-based reasons—not to require certain employees to agree with all their beliefs. Yet

these organizations still require employees to *respect* and *live in accordance with* their beliefs, e.g., to refrain from *conduct* that contradicts the organization's beliefs. Encompassed in this standard is a requirement that employees not advocate for religious beliefs contrary to those of the organization. For *amici*, one key reason for such a standard is that even employees who do not provide formal teaching or instruction play a role in exercising and expressing the organization's beliefs, both internally and to the public. Employees engaging in conduct or advocacy contrary to *amici's* religious beliefs would undermine the ability of *amici* to maintain spiritual unity and effectively carry out their religious missions.

The 702 exemption clearly applies when a religious organization requires employees—even those who are not fellow believers—to live in accordance with its religious beliefs and not to advocate for contrary positions. As Title VII's definition of "religion" confirms, the exemption is triggered when a religious employer prefers individuals because of their "religious observance and practice," not just "belief." 42 U.S.C. § 2000e(j). In other words, when the 702 exemption authorizes religious employers to select individuals because of their "particular religion," this includes individuals' particular conduct and advocacy. A religious employer is permitted to select individuals who conform to and respect its religious beliefs and expectations and to reject others who do not.

iii. Supporting caselaw

The caselaw bears all this out. In the seminal case *Little v. Wuerl*, the Third Circuit upheld a Catholic school's decision not to renew the contract of a *non-Catholic* teacher who had remarried in violation of Catholic teaching on marriage. 929 F.3d

944. Noting Title VII's "broad" definition of religion, 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. *Accord Curay-Cramer v. Ursuline Acad. of Wilmington*, 450 F.3d 130, 141 (3d Cir. 2006) (holding section 702 barred sex discrimination claim brought by teacher dismissed for engaging in pro-choice advocacy in violation of Catholic teaching); *Hall v. Baptist Memorial Health Care Group*, 215 F.3d 618, 623 (6th Cir. 2000) (holding 702 protected Baptist college when it fired Student Services Specialist after she—a lesbian—became ordained in church known for pro-LGBT stance).

Here, there is no dispute that Plaintiff-Appellant was discharged because she "engaged in conduct at odds with the moral or religious teachings of Roncalli and the Archdiocese." *Fitzgerald v. Roncalli High Sch., Inc.*, No. 1:19-cv-04291-RLY-TAB, 2022 WL 16707372, at *4 (S.D. Ind. Sept. 30, 2022). Section 702 is therefore triggered.

B. When an employment action triggers the 702 exemption, none of Title VII applies.

When a religious employer makes an employment decision because of an individual's religious beliefs, observance, or practice under section 702, as here, "then all of Title VII drops out." *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring).

The 702 exemption provides that "with respect to the employment of individuals of a particular religion" at a religious organization, "*[t]his subchapter shall not apply*." 42 U.S.C. § 2000e-1(a) (emphasis added). In context, "[t]his subchapter" refers to Title 42, Chapter 21, Subchapter VI, i.e., all of Title VII. *See Kennedy*, 657 F.3d at 194. Thus, where a covered religious organization makes an employment decision on the

grounds of the employee's religion—i.e., "all aspects of religious observance and practice, as well as belief," 42 U.S.C. § 2000e(j)—then none of Title VII's other substantive provisions apply.

This is true regardless of how the aggrieved individual frames his or her Title VII claims. The operation of section 702's religious exemption dovetails with its alien exemption: Where an employment decision involves "aliens outside any State," none of Title VII's substantive provisions apply. 42 U.S.C. § 2000e-1(a).[5]

This means Title VII permits a religious employer to maintain religious standards even if the prohibited conduct or advocacy might be said to implicate matters of sex, such as where a religious employer prohibits employees from engaging in same-sex intimate conduct or from promoting such conduct. As courts have recognized, the statutory language requires this result—the text dictates that *none* of Title VII's substantive prohibitions apply to employment decisions based on religious requirements for employees. In *Hall*, for example, the Sixth Circuit held that the 702 exemption allowed a Baptist school to terminate an employee for "assum[ing] a leadership position in an organization that publicly supported

[5] The ACLU's assertion that the alien exemption in section 702 is superfluous is both incorrect and irrelevant. ACLU Br. at 9 n.5. The Supreme Court's decision in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), and Congress's subsequent revision to the definition of "employee" in 42 U.S.C. § 2000e(f), pertain to the employment of U.S. citizens abroad, not aliens. The alien exemption has always meant that if an employment decision involves an alien working abroad, none of Title VII's substantive provisions apply. *See Rabé v. United Air Lines, Inc.*, 636 F.3d 866, 869 (7th Cir. 2011). Likewise, when an employment decision by a religious employer involves an individual's religious beliefs, observance, or practice, the whole of Title VII drops out.

homosexual lifestyles," that is, for displaying public support for conduct in violation of the religious employer's requirements for employees. 215 F.3d at 627.[6]

Bostock supports this result, contra the ACLU's argument. *See* ACLU Br. at 2, 6. In *Bostock*, the Supreme Court ruled that discrimination because of a person's sexual orientation or gender identity is a form of "sex" discrimination prohibited under section 703(a) of Title VII. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740–41 (2020). But nothing in *Bostock* narrows the scope of the 702 exemption, which—again—provides that Title VII's prohibition on sex discrimination does not apply to a religious employer's enforcement of its religious requirements for employees. Indeed, the Supreme Court expressly highlighted the 702 exemption in *Bostock*, acknowledging its role in protecting religious employers from being forced to "violate their religious convictions." *Id.* at 1753–54. This Court did likewise in *Hively*, citing the 702 exemption and recognizing that "a religious employer may be exempted from Title VII liability because they have a bona fide need to discriminate on the basis of a protected characteristic," e.g., sex. 853 F.3d at 351 & n.7.

[6] Similarly, numerous courts have correctly held that even though firing a female employee because of pregnancy generally constitutes unlawful sex discrimination, it is nevertheless permissible for a religious organization to discharge an employee for violating the organization's religious prohibition on extramarital sex, even where the employee's pregnancy serves as the evidence of the prohibited conduct. *See, e.g.*, *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000); *Redhead v. Conf. of Seventh-Day Adventists*, 440 F. Supp. 2d 211 (E.D.N.Y. 2006), *adhered to on reconsideration*, 566 F. Supp. 2d 125 (E.D.N.Y. 2008); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340 (E.D.N.Y. 1998); *Vigars v. Valley Christian Ctr. of Dublin*, 805 F. Supp. 802 (N.D. Cal. 1992).

Furthermore, *Bostock* articulates no policy basis for extending Title VII to a religious organization's employment decisions maintaining its religious beliefs pertaining to marriage and sexuality. Instead, the Supreme Court has repeatedly characterized traditional religious beliefs on these topics as "decent and honorable" and entitled to "proper protection." *Obergefell v. Hodges*, 576 U.S. 644, 672, 679 (2015). *See also Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

In sum, the plain language of Title VII protects associational religious exercise by permitting religious employers like *amici* to base hiring decisions on the alignment of their religious beliefs, observance, or practice with those of their employees. This is a crucial "means by which a religious community defines itself." *Amos*, 483 U.S. at 342 (Brennan and Marshall, JJ., concurring).

III. The ACLU's position, that section 702 only exempts religious organizations from claims for religious discrimination, is wrong.

Ignoring the plain text of the 702 exemption, the ACLU, like the court below, says Title VII requires religious organizations like *amici* and Roncalli Catholic to employ individuals who engage in conduct contrary to the organizations' religious beliefs—namely, their religious beliefs about marriage and human sexuality. To support this view, the ACLU attempts to distinguish "religious discrimination" from "sex discrimination" and reasons that "Section 702 . . . exempts religious organizations from claims for religious discrimination only," not from claims of sex discrimination. ACLU Br. at 3–4. But this position not only improperly conflates claims with liability, it also leads to absurd results.

A. The ACLU's incorrect focus on the type of claim asserted misreads caselaw and ignores the text of the 702 exemption.

In suggesting the 702 exemption affords no protection to Roncalli Catholic against claims framed as sex discrimination claims, the ACLU purports to rely on several 702 cases from other circuits, but these cases do not resolve the issue at hand.

The ACLU cites a string of cases supposedly holding that Title VII still applies "to a religious organization charged with sex discrimination," notwithstanding section 702. ACLU Br. at 4 (citing *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996); *Kennedy*, 657 F.3d at 192; *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993); and *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982)). But these cases do not support the ACLU's position or the district court's ruling in this case. "[W]hat these decisions are getting at is that § 702(a) does not exempt all employment decisions by religious organizations." *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring). To be protected by section 702, "[t]he decision must itself be religious, as that word is defined in Title VII." *Id.* "This means . . . sex discrimination unrelated to religious doctrine falls outside the scope of § 702(a)," which is undisputed. *Id.*

Take *Kennedy v. St Joseph's Ministries*, for instance. That case involved claims premised on religious discrimination, not sex discrimination. 657 F.3d at 191. The Fourth Circuit held as a matter of straightforward statutory interpretation that section 702 barred all these religion-based claims. But the decision does not address situations where—as here—an individual's disapproved religious beliefs or conduct also implicate sex. If anything, *Kennedy* supports the application of the 702

exemption to such cases insofar as the court expressly characterized the exemption's purpose as "to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices" and "to employ only persons whose beliefs and conduct are consistent with the [organizations'] religious precepts." 657 F.3d at 194 (quoting *Little*, 929 F.3d at 951). For this purpose to be achieved, the 702 exemption must be interpreted according to its plain text: the exemption is triggered whenever a religious organization makes an employment decision based on an individual's religious beliefs, observance, or practice.

The ACLU also cites *Herx v. Diocese of Fort Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014), *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014) [*Herx II*], for the proposition that section 702 does not insulate a religious organization's employment decisions just because the decision "was based in its religious beliefs." ACLU Br. at 5. But *Herx* actually weighs against the ACLU's position. The courts allowed the case to proceed on the assumption that if the religious employer—a Catholic school—could show that it in fact discharged the plaintiff for her violations of Catholic teaching about in vitro fertilization, then it would face no liability, i.e., the employment decision would fall within the scope of the 702 exemption, notwithstanding the plaintiff's framing of her claim as a sex discrimination claim. *See Herx*, 48 F. Supp. 3d at 1183; *Herx II*, 772 F.3d at 1088.

In short, the cases cited by the ACLU merely stand for the unobjectionable proposition that section 702 does not exempt all employment actions of religious employers. But the fact that Title VII permits a variety of claims against a religious

employer says nothing about the scope of the 702 exemption from liability. Had the ACLU (not to mention the district court) performed the appropriate textual analysis, it would have been obliged to conclude that, because Roncalli Catholic's decision was based on Plaintiff-Appellant's lack of religious alignment, Title VII's prohibition on sex discrimination does not apply, and the school is therefore not subject to liability.

B. The ACLU's approach undermines certain religious beliefs and leads to absurd results.

The ACLU's proffered interpretation of the 702 exemption, created out of whole cloth, is also flawed because it ignores religious beliefs regarding sexuality, except when those beliefs apply to heterosexual conduct.

First, the ACLU's approach sets up an untenable distinction between religious discrimination and sex discrimination. Yet, in many situations like the present case, these are just two sides of the same coin. What appears from one vantage point to be religious discrimination is, from another, sex discrimination. As Judge Easterbrook framed it in a related case: "The Diocese is carrying out its theological views; that its adherence to Roman Catholic doctrine produces a form of sex discrimination does not make the action less religiously based." *Starkey*, 41 F.4th at 947 (Easterbrook, J., concurring).

To say—as the ACLU does in its brief—that religious employers are permitted to engage in religious discrimination but not sex discrimination is to completely miss the issue in cases like these. The real issue is what the 702 exemption says about situations where a religious employer's religious requirements yield what might otherwise be characterized as sex discrimination. The answer, again, is that where

the religious employer's decision is based on an individual's compliance with applicable religious requirements, the rest of Title VII, including its prohibition on sex discrimination, does not apply.

Second, the ACLU's approach would create an intolerable "favored nation" status for same-sex couples. On the ACLU's distorted treatment of the 702 exemption, same-sex intimate conduct prohibited under a religious employer's religious beliefs and standards would be afforded an untouchability not available for prohibited opposite-sex intimate conduct, a result remarkably incongruent with the goal of eliminating sex discrimination.

This strange consequence follows from the fact that courts have already established that religious organizations may, under the 702 exemption, discharge employees for engaging in opposite-sex intimacy that violates the organizations' religious beliefs; namely, a belief that intimate sexual conduct must be confined to traditional one-man, one-woman marriage. *See Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (collecting cases). It would violate the non-discrimination norms underlying Title VII to say that religious organizations are prohibited from discharging employees if the offending sexual conduct happens to involve two persons of the *same sex*.

IV. This Court need not decide whether section 702 exempts other religiously-motivated employment actions.

The ACLU further errs—and commits a straw man fallacy—by ignoring the best alternative to a reading of the 702 exemption the ACLU rejects as too broad. The ACLU agonizes about an interpretation of section 702 that would allow religious

employer's "to fire any employee . . . as long as the employer alleges a religious motivation." ACLU Br. at 23. *See also id.* at 10 (arguing against "[e]xpanding [section 702] to encompass all religiously motivated discrimination against employees"). But the ACLU fails to credit or grapple with the better alternative interpretation; namely, that the exemption is triggered only where the employment action is based on the alignment of *the individual's* religious beliefs, observance, or practice with those of the religious employer, not just the employer's religious motivation.

To be sure, some commentators have argued that what matters for purposes of the 702 exemption is only that the decision was motivated by *the organization's* religious beliefs. *See* Alex Reed, *Religious Organization Staffing Post-Bostock*, 43 BERKELEY J. EMP. & LAB. L. 203, 213–16 (2022) (labeling this view the "Religiously Motivated Interpretation" and providing critique); John Melcon, *Thou Art Fired: A Conduct View of Title VII's Religious Employer Exemption*, 19 RUTGERS J. L. & RELIGION 280, 293–95 (2018) (labeling this interpretation the "Broad View" and providing critique). However, this minority view has not been adopted by the courts and should not have been the ACLU's foil, nor does this Court need to consider it to resolve this appeal.

The better alternative is the view articulated above, i.e., when a religious organization makes a hiring decision based on alignment of *the individual's* religious beliefs, observance, or practice with the organization's, none of Title VII applies. This rule applies even where the religious beliefs, observance, or practice at issue relate to marriage and human sexuality.

Thus, Title VII permits religious organizations like *amici*—as a matter of associational religious exercise—to hire only individuals who *agree with* their religious beliefs about marriage and sexuality. Indeed, such a policy does not even raise concerns about sex discrimination, since an individual's religious beliefs are wholly distinct from the individual's sex. It is self-evident that when a religious employer refuses to hire an applicant that, say, rejects the employer's religious views about the Trinity, the applicant's sex is irrelevant to the employer's action. The same is also true when a religious employer refuses to hire an applicant that rejects the employer's religious beliefs about marriage and human sexuality, including when something about the applicant's conduct exposes the lack of shared beliefs.[7] (But even if the religious employer's actions in these sorts of "shared belief" scenarios could be said to raise concerns about sex discrimination, it would be immaterial because Title VII's prohibition on sex discrimination "shall not apply" when a religious employer selects an individual because of the alignment of the individual's particular religious beliefs.)

Additionally, the 702 exemption permits a religious organization like Roncalli Catholic to employ only individuals who *respect* and *live in accordance with* the organization's religious beliefs about marriage and sexuality, even if such individuals

[7] In these instances, one might be inclined to think sex is a but-for cause in the employment decision, but it is not. The employee's sex is—at most—a factor in the circumstances exposing the employee's personal rejection of the organization's beliefs. Beliefs about marriage and sexuality are not themselves "sexed" and do not turn on an individual's sex any more than beliefs about predestination, holy communion, or the afterlife.

are not required to share the organization's beliefs on these topics. The basis for this approach is, again, the expansive definition Congress assigned to "religion" in Title VII—it includes "all aspects of religious observance and practice," not just "belief." 42 U.S.C. § 2000e(j). It is irrelevant whether the conduct or advocacy proscribed by the religious employer—such as sexual intimacy outside a one-man, one-woman marriage—might otherwise be protected by Title VII's ban on sex discrimination, since this ban does not apply where, as here, the religious employer acts on its determination that the individual is not of the employer's particular religion as reflected in the employer's religious requirements and standards of conduct.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the district court's summary judgment order on the grounds of the 702 exemption, as articulated above.

Respectfully submitted,

/s/ John Melcon
John Melcon
Stuart Lark
SHERMAN & HOWARD L.L.C.
90 South Cascade Avenue, Suite 1500
Colorado Springs, CO 80903
(719) 475-2440
jmelcon@shermanhoward.com
slark@shermanhoward.com

Counsel for Amici Curiae