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., *et al.*,
Petitioners,
v.
MELISSA ZARDA, *et al.*,
Respondents.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, *et al.*,
Respondents.

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

BRIEF OF NATIONAL ASSOCIATION OF EVANGELICALS; CHURCH OF GOD IN CHRIST, INC.; AMERICAN ISLAMIC CONGRESS; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; AGUDATH ISRAEL OF AMERICA; LUTHERAN CHURCH-MISSOURI SYNOD; CHRISTIAN LEGAL SOCIETY; JEWISH COALITION FOR RELIGIOUS LIBERTY; ORTHODOX CHURCH IN AMERICA; AND THE CHRISTIAN AND MISSIONARY ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF EMPLOYERS

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INTERESTS OF *AMICI CURIAE*[1]

Religious organizations representing tens of millions of Americans appear on this brief. *Amici* are the National Association of Evangelicals; the Church of God in Christ, Inc.; American Islamic Congress; The Church of Jesus Christ of Latter-day Saints; the General Conference of Seventh-day Adventists; Agudath Israel of America; the Lutheran Church-Missouri Synod; Christian Legal Society; Jewish Coalition for Religious Liberty; Orthodox Church in America; and The Christian and Missionary Alliance. These *amici* hold differing religious beliefs. And *amici* have nuanced views on the proper policy mix for ensuring freedom and equality for all Americans. Some of these *amici* have called for federal "fairness for all" legislation balancing LGBT equality and religious freedom, while others have cautioned that such legislation will unavoidably pose risks to First Amendment rights. But *amici* are united in their support for the religious liberty of faith-based organizations. Their religious liberty will be profoundly threatened if this Court construes "sex" in Title VII to encompass sexual orientation and gender identity. Individual statements of interest may be found in the Appendix.

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[1] Respondents filed blanket consent and petitioners have all consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For these religious *amici*, as for tens of millions of religious Americans, marriage is the sacred union of a man and a woman. While marriage between persons of the same sex is now constitutionally protected, that recent change in the law has not altered our religious beliefs or practices. Cf. *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2607 (2015) ("[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.").

These beliefs about marriage are inextricably intertwined with *amici*'s beliefs and practices regarding sexuality and gender and are foundational to their faith. As the individual statements demonstrate, major religions—including Judaism, Islam, and Christianity—have fundamental and long-standing doctrines holding that sexual relationships are divinely sanctioned only between a man and a woman who are married. For example, Jewish and Christian scripture teaches that "[i]n the beginning[,] God created" the first human beings as "male and female." Genesis 1:1, 27 (King James). The divine command regarding sexual relations is that "a man shall * * * cleave unto his wife[;] and they shall be one flesh." Genesis 2:24 (King James). Hence, *amici*'s faith traditions imbue maleness and femaleness with deep religious significance. *Amici* and other major faiths share the belief that God determines a person's status as male or female: gender is divinely given and

intrinsically connected to one's sex at birth. *Amici* recognize that some people experience same-sex attraction or gender dysphoria. *Amici* believe such persons—often our family members, friends, neighbors, and fellow believers—deserve love, dignity and respect, and *amici* oppose unjust acts of discrimination.

Amici maintain that the law should protect the right of religious organizations to hold their beliefs regarding sexuality and gender and to have those beliefs reflected in their employment practices. *Amici*'s religious organizations, as associations of like-minded believers, are guided by their beliefs in all they do. Their practices, including acts of charity, education, and healthcare, are an expression of those beliefs. Government should not seek to coerce the abandonment of these beliefs and practices, or punish *amici* for upholding them in their religious employment standards. *Amici* and their fellow believers seek "proper protection" for the right to live the religious "principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Obergefell*, 135 S. Ct. at 2607. Such protection includes the proper judicial interpretation of Title VII.

Construing "sex" in Title VII to encompass sexual orientation and gender identity (SOGI) will trigger open conflict with the faith-based employment practices of numerous churches, synagogues, mosques, and other religious institutions, such as religious schools, colleges, and charities. The right of a religious organization to control the make-up of its workforce is

fundamental to achieving its religious mission, promoting its religious beliefs, and being a true faith community. While the ministerial exception and Title VII's existing religious exemption would provide some defense to SOGI discrimination claims, some lower courts already give cramped interpretations to those protections, denying their application to employees and employment practices that are crucial to a religious organization's autonomy and mission. In the face of a new SOGI nondiscrimination rule from this Court, the pressure on lower courts to interpret existing religious protections narrowly so as not to undermine this nascent norm will be enormous. Resolving these conflicts will require years of wrenching litigation. Many religious organizations lack the financial and institutional fortitude to weather such battles of attrition.

These predictions are not mere conjecture. The careful balances state legislatures across the country have struck clearly and repeatedly demonstrate that any expansion of SOGI nondiscrimination in employment must include corresponding religious liberty protections to avoid trampling religious exercise. Congress's own longstanding practice of including additional religious liberty protections when legislating new civil rights also confirms the likelihood of such conflicts and the wisdom of judicial restraint here. Only Congress possesses the institutional authority and flexibility to balance these competing interests. Whether to make such a fundamental change in the 1964 Civil Rights Act, and if so, how to mitigate the

serious religious conflicts that would inevitably follow, are policy decisions that belong to Congress.

ARGUMENT

I. Construing "sex" in Title VII to encompass "sexual orientation" and "gender identity" seriously threatens religious liberty.

Adopting the Employees' reading of Title VII will impose a heavy burden on many religious employers. It will expand the catalog of protected classes while leaving the scope of statutory religious exemptions unchanged.[2] The 1964 Civil Rights Act (as amended) contains religious exemptions reflecting Congress's determination that combating employment discrimination does not justify denying religious institutions the ability to retain their religious character and govern themselves. While Title VII bans employment discrimination based on race, color, national origin, religion, and sex, religious employers depend on the statutory exemptions in sections 702(a) and 703(e), which Congress tailored to safeguard religious employers from a range of known conflicts. See 42 U.S.C. § 2000e-1(a) (exempting from Title VII's nondiscrimination rule any "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

[2] *Amici* use the shorthand "Employees"—with a capital "E"—when referring to the employee-plaintiffs, or their respective arguments, in the Title VII cases before this Court.

[entity] of its activities"); see also *id.* § 2000e-2(e)(1) (allowing employers to make employment decisions based on religion where "religion * * * is a bona fide occupational qualification"); *id*. § 2000e-2(e)(2) (allowing religious educational institutions "to hire and employ employees of a particular religion"). But Congress did not design these exemptions to address the unique challenges that arise from claims of SOGI discrimination.

To read SOGI into Title VII will upset the careful balance Congress struck between the rights of employees and the rights of religious employers by adding LGBT protections to one side of the scale without adding religious protections to the other. See *Dooley* v. *Korean Air Lines Co.*, 524 U.S. 116, 124 (1998) ("[W]e will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt."). The Employees' interpretation of Title VII will burden religious employers with fresh sources of liability without the benefit of corresponding exemptions. See *Chamber of Commerce of U.S.* v. *Brown*, 554 U.S. 60, 76 (2008) ("Congress has the authority to create tailored exceptions to otherwise applicable federal policies * * *."). That is a recipe for serious and on-going conflict.

A. Misconstruing Title VII will threaten the free exercise rights and institutional integrity of religious employers.

1. Churches, synagogues, and mosques; religious denominations, orders, and church conventions

Churches and other religious employers exercise their religion, in part, by forming workplaces composed of employees who not only superficially share the same faith, but who more importantly share a commitment to the employer's religious mission. Because religion includes how one lives, not merely what one believes, a religious employer cannot form a workplace that truly reflects its faith unless it has the legal right to make employment decisions based on shared religious beliefs and compliance with those beliefs. Being a nominal member of the religion may be necessary, but it is often not sufficient. Religious organizations need employees who actually live the faith. Personnel is policy and message. This truth "applies with special force with respect to religious groups" because their "very existence is dedicated to the collective expression * * * of shared religious ideals" and because "the content and credibility of a religion's message depend vitally upon the character and conduct of its teachers." *Hosanna-Tabor Evangelical Lutheran Sch.* v. *EEOC*, 565 U.S. 171, 200–01 (2012). (Alito, J., joined by Kagan, J., concurring). Thus, courts have insisted that religious groups must have "the ability to select, and to be selective about, those who will serve as the very 'embodiment of its message.'" *Id.* at 201 (Alito, J., joined

by Kagan, J., concurring) (quoting *Petruska* v. *Gannon Univ.*, 462 F.3d 294, 306 (3d Cir. 2006)).

Indeed, their existence may depend on it. Without freedom to hire those whose lives uphold and reflect the faith, a religious employer will lose its ability to form and maintain a workplace that faithfully advances its religious mission.[3] Even a denominational headquarters would lack the right to ensure full, united support for its religious teachings and ministries. Serious differences of outlook and lifestyle will divide employees from each other and from the employer's religious mission. Church employment will cease to reflect the faith and mission of the sponsoring religious organization, with devastating effects for that faith community.

Construing Title VII as covering SOGI would generate numerous conflicts with the rights of religious organizations to form workplaces that advance their religious missions. To take just a few likely scenarios:

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[3] This is not something unique to religious organizations—all organizations focus on developing "corporate culture" because "that culture isn't just one aspect of the game, it is the game." *The 50 Most Inspirational Company Culture Quotes of All-Time*, Northpass, https://www.northpass.com/blog/the-50-most-inspirational-company-culture-quotes-of-all-time (quoting former IBM CEO Louis V. Gerstner, Jr.) (last visited Aug. 20, 2019). But for religious organizations, identity, culture, and mission is far more than a "game"—it is existential.

- A man sues a church for being dismissed as an in-house attorney after he enters a same-sex marriage in violation of the church's doctrines on marriage.
- A woman in a same-sex relationship sues an association of churches for rejecting her application to be chief financial officer based on failure to believe and comply with church doctrines on sexuality.
- A transgender woman sues when not hired as a chapel architect at a denominational headquarters.

Religious organizations will of course invoke Title VII's religious exemption. That exemption permits religious organizations to hire individuals "of a particular religion," and it defines religion to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. §§ 2000e(j), 2000e-1(a). *Amici* believe a proper reading of the exemption allows religious employers to limit hiring to those "whose beliefs and conduct are consistent with the employer's religious precepts." *Little* v. *Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991).[4]

Some courts have narrowed the religious exemption significantly. For example, some courts have held

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[4] 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 (2015) (advocating this view); Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 Tex. Rev. L. & Pol. 295 (2016) (same).

that the exemption bars *only* claims of *religious* discrimination. So if the plaintiff alleges discrimination based on other grounds, such as sex, the religious exemption doesn't apply. See, *e.g.*, *EEOC* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986) (holding that disparate benefits based on religious beliefs about head-of-household status were not permitted under Title VII because the school "remain[ed] subject to the provisions of Title VII" with respect to sex); *Redhead* v. *Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) (noting Title VII would bar the male-only priesthood absent the ministerial exception). The same reasoning would apply to SOGI discrimination claims.

Even assuming the religious exemption bars other types of claims, some courts limit the religious exemption by applying a kind of disparate impact analysis. That is, if a religious employer's standards of moral conduct are applied in a way that disproportionately affects a protected class, they are unlawful. So, for example, the Sixth Circuit has concluded that if a religious school's "premarital sex policy" was "enforced solely through observing pregnancy"—which would detect more women than men—then this constitutes sex discrimination "regardless of the justification" for the policy. *Cline* v. *Catholic Diocese of Toledo*, 206 F.3d 651, 667 (6th Cir. 2000) (quoting *Vigars* v. *Valley Christian Ctr.*, 805 F. Supp. 802, 808 (N.D. Cal. 1992)).

Some courts have gone still further, allowing plaintiffs to avoid the religious exemption by alleging that religious standards of conduct were enforced

inconsistently and were therefore a pretext for discrimination. In *Herx* v. *Diocese of Fort Wayne-South Bend*, No. 1:12-CV-122, 2015 WL 1013783 (N.D. Ind. Mar. 9, 2015), for example, a teacher at a Catholic school was dismissed for using in vitro fertilization in violation of Catholic teaching. Nevertheless, she successfully claimed her dismissal was a pretext for sex discrimination, based in part on the fact that two male employees had visited a strip club and had not been dismissed. *Id.* at *3. If Title VII is expanded to cover SOGI, such logic will become a license for courts to bypass the religious exemption whenever plaintiffs claim a religious organization enforces other doctrines less stringently than its views on sex and gender.

Thorny problems will also arise because LGB identity (a status or class) is highly correlated with same-sex intimacy (an action). Religions with traditional doctrines on marriage and sexuality draw important theological distinctions between desires and orientation on the one hand, and actions on the other. Relying on such distinctions, a traditional church will judge a believing, celibate gay man to be in full fellowship and thus fully eligible for religious employment, but then deem the same man ineligible if he later engages in homosexual intimacy. Would that be legal under Title VII if sex includes SOGI? This Court in *Christian Legal Society* v. *Martinez*, 561 U.S. 661, 688–89 (2010), rejected a private religious student organization's status-conduct defense when it allowed a public university's "all-comers" policy to override the religious organization's requirement that its leaders

and members agree with, and conduct themselves in accordance with, its religious teachings regarding marriage and sexual conduct, including same-sex conduct. The Court's rejection of the status-conduct defense may suggest—and advocates will surely argue—that longstanding religious standards requiring church employees to comply with Biblical teachings on marriage and sexuality are nothing more than a smokescreen for sexual orientation discrimination. See Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2564 (2015). One can agree or disagree with these beliefs and theological distinctions, but there is no doubt that a sex-includes-SOGI ruling will spark legal disputes between churches and their employees.

Such conflicts risk fatally undermining the outcome in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987), where the Court upheld Title VII's religious exemption against a challenge by an employee who was a member of the faith but was terminated for failing to live up to its standards. *Id.* at 330 & n.4. If it becomes illegal for a religious organization to require its employees to comply with all the faith's standards—including those pertaining to sexuality—then much of the rationale and import of *Amos*, including Justice Brennan's important concurrence, will fail. See *id.* at 342 (Brennan, J., concurring) ("Determining that * * * only those committed to [a religious] mission should"

conduct a religious organization's activities is "a means by which a religious community defines itself.").

Absent express statutory provisions addressing these conflicts, plaintiffs will seek to dramatically contract the scope of the religious exemption. Years of litigation will be necessary to distinguish between lawful religious standards under the exemption and religious standards that (it will be argued) constitute unlawful SOGI discrimination. Some advocates who now assure us that construing sex to include sexual orientation and gender identity poses no threat to religious freedom will certainly argue in subsequent cases for the narrowest possible interpretation of the religious exemption. Can a church hire only employees who live the traditional Biblical sexual ethic? Or is that just a form of unlawful sexual orientation discrimination? Does the answer depend on whether the ethic is consistently enforced as to both heterosexual and homosexual misconduct? Will courts oversee inquests into a church employer's religious consistency? Or will that fraught oversight ultimately result in courts construing sections 702(a) and 703(e) as spare co-religionist exemptions, with no right to set standards that adversely affect LGBT employees? These and numerous other questions will quickly become hot judicial controversies. The circuits will inevitably split, forcing national religious organizations to straddle conflicting demands.

The "ministerial exception" will not prevent these risks. That exception offers critical protection for religious employers, but its coverage is not broad enough

to fully protect religious organizations. True, the First Amendment unquestionably shields a religious employer from discrimination claims that interfere with a church's ability to select its "ministers." See *Hosanna-Tabor*, 565 U.S. at 188–89. But while the term "minister" should be broadly construed, many employees who are important in the eyes of religious organizations—even those working for churches or denominational headquarters—will not qualify as ministers in the eyes of lower courts. The custodian in *Amos* would not. The number and kind of ministerial exception cases would expand into a massive docket of expensive, disruptive, high-stakes litigation.

That will produce frequent disputes not only between religious organizations and their employees but also between religious organizations and the courts. For instance, a religious organization's budget director may not strike a court as ministerial enough, although many religious organizations view stewardship over sacred tithing funds as a profoundly spiritual responsibility. Expanding Title VII as the Employees propose will create numerous occasions for such conflicts. Adding a whole new font of religiously-fraught SOGI claimants on the mistaken assumption that the ministerial exception can handle the additional burden will prejudice both religious autonomy and church-state relations.

In short, even a generous interpretation of the ministerial exception cannot prevent religious conflicts if this Court holds that sex includes SOGI. The ministerial exception cannot cover all religious

employment—that was never its purpose. After numerous legal battles over which positions are "ministerial enough" to merit exemption under *Hosanna-Tabor*, the result of a holding that "sex" includes sexual orientation and gender identity will still be a legal mandate forcing religious organizations—including churches, synagogues, and mosques—to employ those who do not uphold the faith and whose lives may indeed openly oppose it. The Employees' position will ensure open and prolonged conflict between intensively religious organizations and the state.[5]

Lastly, although the Religious Freedom Restoration Act (RFRA) provides an additional defense, courts

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[5] While some religious organizations claim there will be no burdens on religious liberty if "sex" is construed to include SOGI under Title VII, that view in part reflects the fact that the legal rule they advocate is consistent with their religious beliefs—but not those of *amici*—and thus will impose no burden on them. See Brief for The Presiding Bishop and President of the House of Deputies of the Episcopal Church et al. as *Amici Curiae* Supporting Employees 11–12, *Bostock* v. *Clayton Cty., Ga.*, No. 17-1618 (filed July 3, 2019). It also reflects a cramped view of religious liberty as merely the freedom "to shape [one's] *beliefs* concerning sexual orientation and gender identity, as a religious matter, to comport with religious tenets," *id.* at 27–28 (emphasis added), or limiting religious liberty to the context of "the purely religious realm," *id.* at 29. But the threat here is not to the narrow freedom to believe or to engage in purely religious conduct in a chapel, synagogue, or mosque, as vital as that is. It is rather the freedom to establish a religious organization with workers who believe and fully support its religious mission. One can imagine a rather different response from those *amici* if they were forced to employ workers who officially belong to the faith but who engage in overt acts in their personal lives that run afoul of church doctrine on, say, protecting the environment or welcoming refugees.

tend to narrowly construe RFRA in the SOGI context, as demonstrated by the *Harris Funeral* case itself. See *EEOC* v. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 583–90 (6th Cir. 2018) (denying RFRA defense). Some courts appear to treat nondiscrimination laws as *per se* satisfying RFRA's strict scrutiny test, see *id.* at 596, nullifying protection for religious organizations. Moreover, a growing movement in Congress seeks to preclude RFRA's application in civil rights cases. See Do No Harm Act, H.R. 1450, 116th Cong. (2019).

2. Religious schools and colleges

Religious education is critical to the existence and perpetuation of faith communities. It is a vital means by which they transmit their beliefs and practices to the next generation. One of the most effective methods of transmitting faith is to model it in an academic setting. Judicially amending Title VII to add SOGI will disrupt the ability of traditional religious schools to teach and model the religious tenets they were created to uphold. It will prevent them from establishing academic communities that faithfully pursue a religious mission.

In particular, a ruling that "sex" includes SOGI will immediately trigger disputes over the right of religious schools to restrict hiring to those who share the institution's faith and live its religious standards. Coercing a religious college with traditional beliefs on marriage, family, gender, and sexuality—beliefs the

college was created in part to teach and model—to hire a professor whose life rejects those beliefs will directly undermine the school's religious mission and the reasons its faith community supports it. Here again, the fight will first turn on whether religiously based hiring criteria constitute permissible religious distinctions under the religious exemption. Courts will then have to determine the scope of the ministerial exception and ultimately RFRA.

To take a current example making its way toward this Court: In *Biel* v. *St. James School*, 926 F.3d 1238, 1239 (9th Cir. 2019), a divided panel of the Ninth Circuit recently refused to recognize a fifth-grade Catholic school teacher as a "minister," despite her role in regularly leading school children in prayer and religious doctrinal instruction. *Biel* split with a 2018 Seventh Circuit decision in *Grussgott* v. *Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018), which applied the exception to an elementary-school teacher who regularly led students in prayer and religious doctrinal instruction. Dissenting from denial of rehearing en banc, nine judges on the Ninth Circuit sharply criticized the panel's decision in *Biel* as drastically wrong. See 882 F.3d at 1239–51. The Seventh Circuit, underscoring the conflict, recently reaffirmed *Grussgott* and expressly rejected *Biel* as embracing "precisely" what the ministerial exception forbids. *Sterlinski* v. *Catholic Bishop of Chicago*, No. 18-2844, 2019 WL 3729495 at *2 (7th Cir. 2019) (Easterbrook, J.) (expressly disagreeing with *Biel*). But see, *e.g.*, *Morrissey-Berru* v. *Our Lady of Guadalupe School*, 769 F. App'x 460, 461

(9th Cir. 2019) (applying *Biel* to conclude that a Catholic school teacher, trained as a certified Catechist, who taught religion, led students in daily prayer, and prepared them for mass and other important liturgical activities, such as feast days, Lenten services, and an annual performance of the Passion of the Christ, was not a minister for purposes of the ministerial exception); *Su* v. *Stephen Wise Temple*, 32 Cal. App. 5th 1159, 1168 (2019) (applying *Biel* to conclude that teachers who play an "important role in the life of the Temple" because they "transmit[] Jewish religion and practice to the next generation" are nonetheless not ministerial). The Employees' reading of "sex" will only increase the frequency and ferocity of these conflicts. It will also trigger church-state entanglement problems, which have long been a concern in the religious education context, see *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499 (1979), as courts seek to examine religious beliefs and their relationship to hiring standards.

And if the Court holds that "sex" includes SOGI, it would be anomalous for this Court to deny the same interpretation for Title IX of the Education Amendments of 1972, with the vast ramifications that would have for religious education. The *amicus* brief of Religious Colleges and Universities explains in further detail the severe consequences to religious higher education of adopting the Employees' position.

These adverse consequences will also invade the sensitive precincts of PK–12 religious education. Over three-quarters of the nation's PK–12 students attending private schools do so at a religiously affiliated

school, meaning one in thirteen American school children attends a religious school. See *FAQs About Private Schools*, Council for Am. Priv. Educ., https://www.capenet.org/facts.html (last visited Aug. 20, 2019). Catholic and Jewish, Lutheran and Islamic, Adventist and Baptist—at these schools, education *is* an exercise of religion. With impressionable children, the messenger *is* the religious message.

In the mind of a child, an employee—be it a principal, teacher, or guidance counselor—who does not live the school's religious standards undermines the truth of those standards and the school's religious authority. The power of example for the young and impressionable cannot be overstated. Here too the fight will turn on the uncertain scope of the religious exemption, the ministerial exception, and RFRA.[6] Expensive litigation will ensue, draining strapped schools of scarce resources, diverting attention from their religious missions and causing deep divisions in these sensitive communities of learning and faith.

3. Faith-based social service providers (charities)

Conflicts will also arise over the employment standards of faith-based social service providers. Religious

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[6] See, *e.g.*, *Goodman* v. *Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577, 586 n.5 (D. Md. 2016) (ministerial exception did not apply to a school librarian at a Catholic high school); *Dias* v. *Archdiocese of Cincinnati*, No. 1:11-CV-251, 2012 WL 1068165, at *5 (S.D. Ohio Mar. 29, 2012) (ministerial exception did not apply to a computer teacher at a Catholic school).

charities are significant because religion is not merely what happens in a house of worship. Many religions teach the importance of caring for the poor and needy. Religious charities comprise an essential safety net undergirding Americans' welfare. They supply billions of dollars in valuable services that taxpayers otherwise would have to fund.[7] And because they are often a public face of the religious institution that sponsors them, it would be incongruous if their employees did not reflect the faith and standards of those institutions.

Reinterpreting Title VII to prohibit SOGI discrimination will create many difficult questions and conflicts. For example:

- May a religious charity's teenage homeless shelter decline a job applicant whose same-sex relationship violates religious doctrines regarding marriage?
- May an Orthodox Jewish adoption agency limit employment to Orthodox Jews who affirm and comply with traditional marriage standards?
- May a religious shelter for abused girls and women decline to hire a transgender woman as a counselor?

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[7] The annual socio-economic impact of religion in the United States is presently valued at nearly $1.2 trillion, with social services and health care comprising $256 billion of that share. See Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisc. J. Res. on Religion 2, 24–25 (2016).

These and similar conflicts will burden religious social service providers with employment disputes, negative publicity, and litigation. *Even religious charities that take no public funding will have to shoulder these risks and costs.* Many faith-based social service providers operate with small budgets. For them, the prospect of serious conflict with federal law may force them to close their doors and cease their vital work.

B. Misconstruing Title VII will have consequences far beyond Title VII.

If this Court construes sex to include SOGI under Title VII, that reading will reverberate far beyond Title VII to other federal and state laws and regulations that use the term "sex." This will multiply the religious conflicts noted above, particularly in the context of healthcare, social services, and education.

For example, in 2016, the Department of Health and Human Services promulgated a regulation that interpreted the Affordable Care Act's ban on "sex" discrimination to include discrimination based on gender identity. See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92). That interpretation meant that religious doctors and hospitals across the country would be penalized if they declined to "perform (or refer patients for) transition-related procedures." *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 672 (N.D. Tex. 2016). Similarly, private plaintiffs have brought multiple lawsuits under the Affordable Care

Act and state laws claiming that declining to perform gender transition surgery and provide hormone therapy is a form of "sex" discrimination. See, *e.g.*, *Tovar* v. *Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018); *Conforti* v. *St. Joseph's Healthcare Sys.*, No. 2:17-cv-50 (D.N.J. filed Jan. 5, 2017); *Enstad* v. *PeaceHealth*, No. 2:17-cv-1496 (W.D. Wash. filed Oct. 5, 2017). And courts have already begun to reason that "[b]ecause Title VII, and by extension Title IX, recognize that sex discrimination encompasses gender-identity discrimination," all other federal statutes relating back to those titles should be interpreted likewise. *Tovar*, 342 F. Supp. 3d at 953.

The same reasoning affects religious homeless shelters. A 2016 Housing and Urban Development regulation has prohibited homeless shelters from making any distinctions based on biological sex, even when such distinctions are both rooted in religious doctrine and deemed necessary to accommodate the health and safety of shelter residents. See 24 C.F.R. §§ 5.100, 5.106(c). Similarly, a religious homeless shelter in Anchorage has been investigated for discrimination based on "sex" and gender identity for limiting overnight stays at a women's shelter to "persons who were determined to be female at birth." *The Downtown Soup Kitchen d/b/a Downtown Hope Ctr.* v. *Municipality of Anchorage*, No. 3:18-cv-190, 2019 WL 3769623, at *1, *9 (D. Alaska Aug. 9, 2019) (granting preliminary injunction to enforcement).

A ruling that "sex" covers sexual orientation and gender identity will also affect the interpretation of

state laws governing a wide variety of social service providers. For example, several state and local governments have penalized religious adoption and foster care agencies that decline to provide written evaluations of same-sex couples that conflict with their religious beliefs. The Third Circuit has already upheld such laws over Free Exercise Clause and Free Speech Clause challenges. *Fulton* v. *City of Phila.*, 922 F.3d 140 (3d Cir. 2019), *petition for cert. filed* (U.S. July 25, 2019) (No. 19-123); see also *Dumont* v. *Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018). States sometimes rely on federal regulations to justify shutting down these agencies. See State's Opp'n Prelim. Inj. at 30, 34, *Buck* v. *Gordon*, No. 1:19-cv-00286 (W.D. Mich. May 29, 2019), ECF No. 34 (relying on federal regulations pronouncing general anti-discrimination policies for state limits on religious foster care agencies). An expansion of Title VII could motivate states in other contexts to interpret general federal statements of national policy against discrimination as commands to be enforced against all social service providers with any connection to federal funds.

As the decision in *Obergefell* has demonstrated, the teaching role of this Court is powerful in this morally contested and complex area. This Court's decisions affect popular opinion[8] and culture and can unleash

[8] Public opinion polls before the Court granted certiorari in *Obergefell* found about 50% of Americans supported same-sex marriage, but now that support is around 70%. Compare Peyton M. Craighill & Scott Clement, *Support for same-sex marriage hits new high; half say Constitution guarantees right*, Wash. Post (March 5, 2014), https://www.washingtonpost.com/politics/support-for-same-sex-marriage-hits-new-high-half-say-constitution-

adverse social, political, and cultural forces against tens of millions of religious Americans. Placing sexual orientation and gender identity on the list of protected classes, with no corresponding accommodation for religion, will in the minds of millions elevate those classes to the same level of moral sensitivity as race—rendering those with traditional religious beliefs on sexuality and gender morally suspect if not bigots. See *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) (cautioning against judicial statements that assume traditional views of human sexuality as "bigoted," in light of their impact "in society and in court").

These concerns, and the First Amendment landmines discussed above, counsel adherence to the well-established meaning of "sex" in Title VII. To avoid creating constitutional threats where none currently exist, this Court should avoid going where Congress has yet to tread. Cf. *Nielsen* v. *Preap*, 139 S. Ct. 954, 971 (2019) (cautioning that when a particular reading of a statute raises constitutional concerns, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided" (citations omitted)).

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guarantees-right/2014/03/04/f737e87e-a3e5-11e3-a5fa-55f0c77bf39c_story.html?utm_term=.2ef8fe5a746e, with Jennifer De Pinto, *50 years after Stonewall: Most see progress in ending LGBTQ discrimination*, CBS News (June 24, 2019), https://www.cbsnews.com/news/50-years-after-stonewall-most-see-progress-in-ending-gay-and-lesbian-discrimination/.

II. State legislatures have consistently balanced laws protecting LGBT persons with corresponding protections for religious liberty.

State legislatures have long recognized that SOGI nondiscrimination laws can uniquely burden religious organizations. Accordingly, when states have elected to enact such laws, they have coupled them with broad religious exemptions. Some states exempt religious organizations from their employment discrimination laws entirely; others exempt religious organizations specifically from bans on SOGI discrimination; still others broadly protect the right of religious organizations to take employment actions consistent with their religious mission or to require employees to conform to their religious tenets. Many of these religious exemptions are significantly broader than Title VII's religious exemption, and they have long received support from LGBT advocacy groups.

1. To date, twenty-two states and the District of Columbia have statutes prohibiting private-sector employment discrimination based on sexual orientation, gender identity, or both.[9] All of these prohibitions are coupled with religious exemptions.[10] The majority of these exemptions are broad and unequivocal.

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[9] *State Maps of Laws & Policies: Employment*, Hum. Rights Campaign, https://www.hrc.org/state-maps/employment (last updated June 7, 2019). Eleven additional states prohibit such discrimination in the public sector. *Id.*

[10] Cal. Gov't Code §§ 12922, 12926(d), 12926.2; Colo. Rev. Stat. § 24-34-401; Conn. Gen. Stat. §§ 46a-81p, 46a-81aa; Del.

Five states—California, Colorado, New Hampshire, Utah, and Washington—exempt all or most religious organizations from their employment discrimination laws entirely.[11] This is typically done by excluding religious organizations from the definition of "employer." In several cases these broad exemptions were expressly motivated by concerns about bans on SOGI discrimination.

In Utah, for example, the legislature in 2015 adopted new prohibitions on SOGI discrimination; at the same time, it also broadened its religious exemptions to protect additional religious organizations and individual religious leaders. See 2015 Utah Laws ch. 13, § 1 (codified at Utah Code Ann. § 34A-5-102(1)(i)(ii)). The drafters and sponsors of the bill

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Code Ann. tit. 19, §§ 710(6), 711; Haw. Rev. Stat. § 378-3(5); 775 Ill. Comp. Stat. 5/2-101; Iowa Code § 216.6(6)(d); Me. Stat. tit. 5, § 4573-A; Md. Code Ann. State Gov't §§ 20-604, 20-605; Mass. Gen. Laws ch. 151B, § 4; Minn. Stat. §§ 363A.20(2), 363A.26; Nev. Rev. Stat. §§ 613.320, 613.350; N.H. Rev. Stat. Ann. §§ 354-A:2, 354-A:18; N.J. Stat. Ann. § 10:5-12(a); N.M. Stat. Ann. § 28-1-9(B)–(C); N.Y. Exec. Law § 296(11); Or. Rev. Stat. § 659A.006; 28 R.I. Gen. Laws § 28-5-6; Utah Code Ann. §§ 34A-5-102(1)(i)(ii), 34A-5-106(3)(a)(ii); Vt. Stat. tit. 21, § 495(e); Wash. Rev. Code § 49.60.040(11); Wis. Stat. § 111.337(2); D.C. Code § 2-1401.03(b).

[11] Cal. Gov't Code § 12926(d) (exempting nonprofit religious employers); Colo. Rev. Stat. §§ 24-34-401(3), 24-34-402(6)–(7) (exempting religious organizations not supported in part by public funds, and allowing religious organizations to make employment decisions based on religion whether or not receiving such funds); N.H. Rev. Stat. Ann. § 354-A:2 (exempting nonprofit religious employers); Utah Code Ann. § 34A-5-102(1)(i)(ii) (exempting all religious organizations and leaders); Wash. Rev. Code § 49.60.040(11) (exempting nonprofit religious organizations).

repeatedly emphasized that these exemptions were designed to strike an appropriate balance between SOGI protections and religious freedom.[12] Colorado also clarified and expanded its religious exemption at the same time it adopted protections for sexual orientation and gender identity. See 2007 Colo. Sess. Laws ch. 295, § 2 (codified at Colo. Rev. Stat. § 24-34-402).

Eight more states—Connecticut, Delaware, Iowa, Maryland, Minnesota, Nevada, New Mexico, and Oregon—exempt all or most religious organizations *specifically* from prohibitions on SOGI discrimination.[13] In

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[12] Dennis Romboy, *LDS Church, LGBT advocates back anti-discrimination, religious rights bill*, Deseret News (Mar. 5, 2015), https://www.deseretnews.com/article/865623399/Utah-lawmakers-unveil-anti-discrimination-religious-rights-legislation.html.

[13] Conn. Gen. Stat. §§ 46a-81p, 46a-81aa; Del. Code Ann. tit. 19, § 710(7) (excluding religious organizations from the definition of "employer" "with respect to discriminatory practices based upon sexual orientation or gender identity"); Iowa Code § 216.6(6)(d) (exempting "[a]ny bona fide religious institution * * * with respect to any qualifications for employment based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose"); Md. Code Ann. State Gov't § 20-604; Minn. Stat. § 363A.26 (exempting "any religious association" that takes "any [employment] action" "in matters relating to sexual orientation"); *id.* § 363A.20 (exempting religious employment with "bona fide occupational qualification[s]" based on religion or sexual orientation); Nev. Rev. Stat. § 613.320(2) (exempting all tax-exempt organizations from laws "concerning unlawful employment practices related to sexual orientation and gender identity or expression"); N.M. Stat. Ann. § 28-1-9(C); Or. Rev. Stat. § 659A.006 (exempting most employment actions "based on a bona fide religious belief about sexual orientation"). Three of these states also have separate provisions allowing religious schools to hire employees of a particular

other words, religious organizations are still prohibited from discriminating based on *other* protected categories, like race and sex, but they are exempt from prohibitions on SOGI discrimination.

Connecticut, for example, provides that its laws banning SOGI discrimination "shall not apply to a religious corporation, entity, association, educational institution or society with respect to the employment of individuals to perform work connected with * * * its activities." Conn. Gen. Stat. §§ 46a-81p, 46a-81aa. There is no comparable exemption from the prohibitions on race or sex discrimination. Likewise, Maryland provides that its employment discrimination law "does not apply to * * * a religious [entity] with respect to the employment of individuals of a particular religion, sexual orientation, or gender identity to perform work connected with the activities of the religious entity"—again without any comparable exemption for race or sex discrimination. Md. Code Ann. State Gov't § 20-604. And Oregon provides that "[i]t is not an unlawful employment practice for a * * * religious institution," in "employment positions that involve religious activities," to "take any employment action based on a bona fide religious belief about sexual orientation." Or. Rev. Stat. § 659A.006. The legislature specifically amended this law before passage "to strengthen [its] exemption

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religion. Del. Code Ann. tit. 19, § 711(l)(2); Md. Code Ann. State Gov't § 20-605; Nev. Rev. Stat. § 613.330(4).

for religious groups" and enumerate specific organizations that might face conflicts.[14]

Five states—Hawaii, Maine, Massachusetts, New York, and Vermont—provide a broad exemption for religious organizations whenever they take an employment action "calculated by such organization to promote the religious principles for which it is established or maintained," or when they "require that all applicants and employees conform to the religious tenets of that organization."[15] In Massachusetts, this exemption was expanded in the same bill that barred sexual orientation discrimination. See 1989 Mass. Legis. Serv. 516 (West).

The last four states—Illinois, New Jersey, Rhode Island, and Wisconsin—and the District of Columbia allow all or most religious organizations to make employment decisions based on religion, which is often defined to include "all aspects of religious observance and practice, as well as belief."[16] These exemptions resemble Title VII's religious employer exemption.

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[14] Brad Cain, *Oregon House OKs gay rights bill*, The World (Apr. 18, 2007), https://theworldlink.com/news/local/oregon-house-oks-gay-rights-bill/article_88f6f06f-0add-5f9f-bff0-040a78b340da.html (summarizing debate).

[15] Mass. Gen. Laws ch. 151B, §§ 1(5), 4; Me. Stat. tit. 5, § 4573-A(2); see also Haw. Rev. Stat. § 378-3(5); N.Y. Exec. Law § 296(11); Vt. Stat. tit. 21, § 495(e).

[16] 775 Ill. Comp. Stat. 5/2-101(B)(2), 5/2-101(F); N.J. Stat. Ann. § 10:5-12; 28 R.I. Gen. Laws §§ 28-5-6(8)(ii) & (15); Wis. Stat. § 111.337(2); D.C. Code § 2-1401.03(b).

In short, state legislatures have been balancing sexual-orientation and gender-identity protections with corresponding religious exemptions for decades. The result of that balancing is that *every* jurisdiction that has enacted SOGI protections has also enacted religious exemptions. And in over three-quarters of those jurisdictions, the religious exemptions are *broader* than the current religious exemption in Title VII. This uniform experience in the states further demonstrates that SOGI nondiscrimination laws implicate significant religious liberty concerns.

2. These exemptions have not been unduly controversial. Rather, they have often been supported by the LGBT community. Groups such as the National Gay and Lesbian Task Force,[17] the American Civil Liberties Union,[18] the Human Rights Campaign,[19] and

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[17] Phil Reese, *Connecticut adds gender identity to non-discrimination laws*, Wash. Blade (July 7, 2011), https://www.washingtonblade.com/2011/07/07/connecticut-adds-gender-identity-to-non-discrimination-laws; *Hawaii Governor Signs Employment Nondiscrimination Bill*, Nat'l LGBTQ Task Force, https://www.thetaskforce.org/hawaii-gov-abercrombie-signs-employment-non-discrimination-bill (last visited Aug. 20, 2019).

[18] *Iowa Legislature Outlaws Discrimination Based On Sexual Orientation And Gender Identity*, ACLU (Apr. 26, 2007), https://www.aclu.org/press-releases/iowa-legislature-outlaws-discrimination-based-sexual-orientation-and-gender-identity; *ACLU of Utah And Equality Utah Celebrate SB 296, Reject The Harmful Provisions of HB 322*, ACLU (Mar. 12, 2015), https://www.aclu.org/press-releases/aclu-utah-and-equality-utah-celebrate-sb-296-reject-harmful-provisions-hb-322.

[19] *Vermont Governor Signs Non-Discrimination Bill Into Law*, Buzzflash.com (May 23, 2007), http://legacy.buzzflash.com/

Freedom for All Americans[20] have all praised state SOGI discrimination laws that included broad religious exemptions. For example, when Maryland expanded its anti-discrimination act in 2001 to include sexual orientation—and specifically exempted religious organizations—the ACLU called the law an "enormous victory."[21] When Maine amended its Human Rights Act in 2005 to include sexual orientation and gender identity—while recognizing the right of religious organizations to require employees to conform to their religious tenets—Equality Maine called it a "resounding victory."[22] And when Delaware enacted a law forbidding SOGI discrimination in 2013—and exempted religious organizations—Equality Delaware praised the law for making the state "a fair and welcoming place."[23]

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commentary/vermont-governor-signs-nondiscrimination-bill-into-law.

[20] Shane Stahl, *Breaking: New Hampshire Governor Signs Transgender Nondiscrimination Protections Into Law!*, Freedom For All Am. (June 8, 2018), https://www.freedomforallamericans.org/breaking-new-hampshire-governor-signs-transgender-non discrimination-protections-into-law; *Victory: New York Passes Transgender Nondiscrimination Protections*, Freedom For All Am. (Jan. 15, 2019), https://www.freedomforallamericans.org/victory-new-york-passes-transgender-nondiscrimination-protections.

[21] *Maryland's Antidiscrimination Act Goes Into Effect After ACLU Defeats Attempts To Derail Landmark Law*, ACLU (Nov. 21, 2001), https://www.aclu.org/press-releases/marylands-anti-discrimination-act-goes-effect-after-aclu-defeats-attempts-derail.

[22] *Non-Discrimination*, Equality Me., https://equalitymaine.org/non-discrimination (last visited Aug. 20, 2019).

[23] Michael K. Lavers, *Delaware Senate approves transgender rights bill*, Wash. Blade (June 7, 2013), https://www.washington

Had Title VII not been confined to its original meaning by federal courts prior to 2017, these legislative compromises would have been short-circuited by a one-sided, judicially imposed mandate that threatened religious liberty. Judicial modesty left space for state legislatures to act. As a result, for decades state legislatures have successfully enacted SOGI nondiscrimination laws while also protecting "decent and honorable" religious beliefs and practices about human sexuality that remain "central to the[ ] lives and faiths" of millions of Americans. *Obergefell*, 135 S. Ct. at 2602, 2607.

III. Whether to add SOGI to Title VII is for Congress to decide.

Given the conflicting interests at stake, only Congress has both the constitutional authority and the policy-making flexibility to decide whether and how to accommodate those interests in federal law. Notably, protecting religious exercise has been Congress's consistent pattern when enacting civil rights laws. Nearly every time it has added civil rights protections, it has also added corresponding religious liberty protections.

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blade.com/2013/06/07/delaware-senate-approves-transgender-rights-bill.

A. Only Congress has the authority and competence to balance competing interests.

Article I of the Constitution vests Congress with the lawmaking power of the United States. U.S. Const. art. I, § 1. An appropriate respect for the separation of powers requires the coordinate branches of government to defer to Congress's authority to make law. As the Chief Justice has reminded, "[f]ederal courts are blunt instruments when it comes to creating rights." *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). They "do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right." *Id.* Only Congress possesses the institutional capacity of "weigh[ing] and apprais[ing]" competing values and interests in adopting a national policy that "is most advantageous to the whole." *Northwest Airlines, Inc.* v. *Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 98 n.41 (1981) (quoting *United States* v. *Gilman*, 347 U.S. 507, 511–13 (1954)).

Thus, statutory interpretation "is not a license for the judiciary to rewrite language enacted by the legislature." *United States* v. *Albertini*, 472 U.S. 675, 680 (1985). Nor may courts "fashion remedies" or enlarge definitions "that Congress has specifically chosen not to extend." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 285 n.38 (1994).

This Court has long respected Congress's lawmaking authority to craft civil rights legislation. In

Northwest Airlines, the Court was asked to add a right of contribution under the Equal Pay Act and Title VII. 451 U.S. at 79. Although the Court recognized that "almost any statutory scheme" may require "judicial interpretation of ambiguous or incomplete provisions," the Court refused to "fashion new remedies that might upset carefully considered legislative programs." *Id.* at 97. In hewing to the statute as written, the Court noted that "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Id.*

Principles of judicial modesty and deference have repeatedly constrained the interpretation of civil rights statutes. See, *e.g.*, *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 371–72 (2001) (deferring to Congress's judgment in declining to abrogate states' immunity under the Eleventh Amendment under Title I of the ADA); *Landgraf*, 511 U.S. at 286 (noting that until 1991, Title VII did not allow for damages and refusing to grant petitioner remedies beyond those stated in the statute); cf. *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004) ("Congress was justified in concluding that th[e] 'difficult and intractable proble[m]'" of accommodating people with disabilities under Title II "warranted 'added prophylactic measures in response'" based on "considerable evidence of the shortcomings of previous legislative responses." (citations omitted)).

This case is no different.

Whether and how to protect SOGI and other classes not currently covered by Title VII is a profound question of public policy that demands a "considered legislative response." *Dist. Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 72–73 (2009). Lawmakers have the institutional capacity to address the issue holistically, rather than within the rigid constraints of a particular case. See *Nw. Airlines, Inc.*, 451 U.S. at 94 ("It is, of course, not within our competence as federal judges to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress."). "[J]udicial imposition" of a "categorical remedy," such as the one proposed by the Employees, would "pretermit other responsible solutions being considered in Congress and state legislatures." *Murray* v. *Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring).

B. Congress typically enacts civil rights laws with corresponding protections for religious liberty.

Like state lawmakers, Congress has repeatedly acknowledged the need for protecting religious freedom when legislating civil rights. In addition to Title VII's religious protections, the Fair Housing Act balances protections against sex discrimination in the sale or rental of housing, 42 U.S.C. § 3604, with an exemption for religious property holders, *id.* § 3607(a). Title IX couples protections against sex discrimination by educational institutions with an exemption for "an educational institution which is controlled by a

religious organization." *Id.* § 1681(a)(3). The Americans with Disabilities Act qualifies its ban on disability discrimination by exempting "religious organizations or entities controlled by religious organizations, including places of worship." *Id.* § 12187. Introduced in Congress every year from 1994 to 2013, the proposed Employment Non-Discrimination Act ("ENDA"), which would expressly ban employment discrimination against LGBT persons, fully exempted all religious organizations covered under Title VII's religious exemption, S. 815, 113th Cong. § 6(a) (2013), and further shielded these employers from government retaliation, *id.* § 6(b). LGBT groups supported this exemption for many years.

Congress is now considering the Equality Act, H.R. 5, 116th Cong. (2019), which radically departs from this pattern and reflects a new strategy by some LGBT advocates. The bill adds SOGI protections to Title VII without tailored protections for religious organizations and precludes a RFRA defense. *Id.* §§ 7(b) & 1107. This one-sided approach has generated fierce controversy. Although it passed the House of Representatives, the bill is now stalled in the Senate.[24] It has little chance of becoming law without amendments to address religious liberty concerns.

In short, Congress has a long history of including religious liberty protections in civil rights legislation.

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[24] *Actions Overview H.R.5—116th Congress (2019–2020)*, Congress.gov, https://www.congress.gov/bill/116th-congress/house-bill/5/actions (last visited Aug. 20, 2019).

Congress is also acutely aware of the grave conflicts with religious freedom that will arise from merely adding SOGI to Title VII. Adopting the Employees' reading of Title VII would usurp Congress's prerogative to address these vitally important issues.

CONCLUSION

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

Respectfully submitted,

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