No. 22-1440

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLOTTE CATHOLIC HIGH SCHOOL, MECKLENBURG AREA CATHOLIC SCHOOLS, and ROMAN CATHOLIC DIOCESE OF CHARLOTTE,

Defendants- Appellants,

v.

LONNIE BILLARD,

Plaintiff-Appellee.

On Appeal from the United States District Court for the Western District of North Carolina, Charlotte Division
Case No. 3:17-cv-00011 – Judge Max O. Cogburn Jr.

BRIEF OF CHRISTIAN LEGAL SOCIETY AND CRISTA MINISISTRIES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

Thomas C. Berg
Religious Liberty Appellate Clinic
Univ. of St. Thomas School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
tcberg@stthomas.edu
651/962-4918

Kimberlee Wood Colby
Counsel of Record
Laura Nammo
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151
kcolby@clsnet.org/laura@clsnet.org
703/894-1087

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 22-1440 Caption: Charlotte Catholic High School et al v. Billard

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Signature: /s/ Kimberlee Wood Colby Date: September 29, 2022

Counsel for: CLS and CRISTA

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INTEREST OF *AMICUS CURIAE*[1]

Christian Legal Society ("CLS") is a nondenominational association of Christian attorneys, law students, and law professors. CLS's legal advocacy division, the Center for Law & Religious Freedom, works to protect all Americans' right to the free exercise of their religious beliefs. This brief particularly concerns one key protection for religious exercise: the Religious Freedom Restoration Act ("RFRA"). CLS was instrumental in RFRA's passage and has a longstanding interest in ensuring that courts interpret the statute, as Congress intended, to give it "sweeping" scope and to "reaffirm[ ] our national commitment to the 'free exercise of religion as an unalienable right.'" *Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013) (quoting 42 U.S.C. §2000bb(a)(1)). CLS has represented parties in this Court in *Child Evangelism Fellowship v. Montgomery Cty. Public* Schools, 457 F.3d 376 (4th Cir. 2006); and has filed *amicus* briefs in this Court in, e.g., *Ansley v. Warren*, 861 F.3d 512 (2017).

[1] Pursuant to FRAP 29(a)(4)(E), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person (other than the *amicus curiae,* its members, or its counsel) contributed money that was intended to fund preparing or submitting the brief.

CRISTA Ministries ("CRISTA"), founded in 1948 and headquartered in the Pacific Northwest, is a family of five Christian ministries including senior living, schools, radio, camping, and international relief that are united and empowered to serve the needs of the world with the Gospel of Jesus Christ. CRISTA believes that the ability of religious organizations to preserve religion-based conduct standards for its employee is of paramount concern with long-lasting impact on religious expression in our nation. It shares the belief that RFRA should be available as a defense whenever the government substantially burdens religious exercise.

Both plaintiff-appellee and defendants-appellants have given blanket consents for the filing of *amicus* briefs in this case.

OVERVIEW AND SUMMARY OF ARGUMENT

Lonnie Billard was a substitute teacher, and former full-time teacher, at Charlotte Catholic High School, which is operated for religious and educational purposes by the Roman Catholic Diocese of Charlotte (collectively, the "Defendants"). D. Ct. Op. at 3 (Doc. 69) (hereinafter "Op."). Defendants removed Billard from the list of substitute teachers after he made a public Facebook post announcing he

was marrying his same-sex partner, an act that contravenes the school's policy and official Catholic teaching. His post also criticized Catholic teaching, expressing admiration for people "who refused to back down and accept anything but 'equal.'" *Id.* at 8. After he was removed from the substitute list, Billard sued under Title VII. The district court granted his motion for partial summary judgment, finding that the school had committed sex discrimination.

The district court's judgment reflects fundamental errors. A religious school must have the freedom to ensure that an employee does not contravene and publicly denounce its religiously grounded moral standards but instead models these standards to students. Billard's lawsuit would impose substantial liability on Defendants for making that determination.

Amici write specifically to discuss one issue on which the district court erred. Defendants are protected under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* ("RFRA"), which prohibits the federal government from imposing a "substantial burden" on religious exercise unless the application of that burden furthers "a compelling governmental interest" and does so by the "least restrictive

means." *Id.* at §2000bb-1. Penalizing defendants for dismissing Billard substantially burdens their religious exercise and cannot satisfy strict scrutiny.

I. The district court held that RFRA is inapplicable to an employment discrimination suit brought by a private party. That ruling errs as a matter of RFRA's text, the precedent and case law, and the statute's core purposes.

A. Government "burdens" religion, under RFRA's terms, when a court imposes liability pursuant to a federal law like Title VII; RFRA explicitly provides a defense to such burdens. The proposition that government can burden First Amendment rights, including religious exercise, in suits by private plaintiffs is well accepted in constitutional cases. And RFRA explicitly protects that constitutional interest in the free exercise of religion.

B. Precedent from the Supreme Court and case law from other circuits strongly support holding that RFRA provides a defense to liability in Title VII private-plaintiff suits. The Court has expressed "deep[ ] concern[ ]" with protecting religious liberty in clashes with nondiscrimination laws and has said that RFRA may provide such

protection and "supersede Title VII's commands." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020). These assurances would be meaningless if a RFRA defense were inapplicable to private-party suits, which constitute the vast majority of Title VII suits (as opposed to government suits by the Equal Employment Opportunity Commission ("EEOC")).

Moreover, multiple circuits have applied RFRA as a defense to a private-party employment discrimination suit or have suggested it should apply. Several of these circuits have expressed concern, among other things, that making RFRA's applicability in such suits depend on whether the government (the EEOC) or a private plaintiff sues would produce arbitrary results (as indeed it will: see section I-D *infra*). No circuit has declined to apply RFRA in private-plaintiff employment discrimination suits. No circuit has ruled the way the district court did here.

C. The textual phrases on which the district court relied do not exclude RFRA defenses in private-plaintiff employment discrimination suits. RFRA is not excluded in private-plaintiff suits just because it says that "government" must demonstrate a compelling interest to justify

burdening religion. The government still imposes the burden; the private plaintiff may then shoulder the government's obligation to demonstrate a compelling interest. Nor is RFRA excluded in private-plaintiff cases because it says that parties can raise it as a claim or defense "and obtain appropriate relief against a government." Rather, that phrase expanded protection by providing the explicit statement required to abrogate state sovereign immunity.

D. Finally, excluding RFRA defenses in Title VII private-plaintiff suits would undercut the statute's core purposes. The text specifies that RFRA applies to "all federal law"; the Supreme Court and circuits have emphasized that RFRA sweeps across federal law and gives very broad protection to religious liberty. RFRA will not give broad protection if it is irrelevant in private-plaintiff suits. Even worse, if RFRA is unavailable in such suits, an EEOC hostile to employers' religious liberty defenses could unilaterally make the statute unavailable in any or all employment-discrimination cases.

II. RFRA prohibits the application of Title VII in this case.

A. The application of Title VII substantially burdens Defendants' religious exercise. Liability would impose substantial pressure on

Defendants to disregard their religious judgment on whether a teacher's conduct will undercut the school's religious moral teachings. Billard not only violated Catholic teachings but also spoke publicly against them in a Facebook post that some school staff and parents would see.

B. The substantial burden on religion cannot satisfy strict scrutiny. RFRA's text requires showing a compelling interest in burdening this specific claimant, not a compelling interest underlying the law in general. The generalized interest in prohibiting sex discrimination in employment cannot justify penalizing a religious school for acting when a teacher not only violates school policies and its animating religious teaching but also publicly criticizes those teachings.

ARGUMENT

I. RFRA PROVIDES RELIGIOUS EMPLOYERS A DEFENSE IN EMPLOYMENT DISCRIMINATION SUITS BROUGHT BY PRIVATE PLAINTIFFS.

RFRA's text, precedent from the Supreme Court and caselaw from other circuits, and RFRA's core purposes all show that the statute provides a defense to religious employers in discrimination suits brought by private plaintiffs.

A. By RFRA's Terms, Government "Burdens" Religion when a Court Imposes Liability through a Federal Law; and RFRA Provides a Defense against such Burdens.

RFRA's text states that the "[g]overnment shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person" furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. §2000bb-1(a), (b). A party whose religious exercise is burdened "may assert [RFRA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* at §2000bb-1(c).

These provisions provide a defense in suits brought by private parties. As the Second Circuit has reasoned, that result "easily" follows because RFRA applies to "'all federal law, and the implementation of that law'" and allows a party to assert the statute "'as a … defense in a judicial proceeding.'" *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006) (ellipsis in original) (quoting 42 U.S.C. §§2000bb-3(a), 2000bb-1(c)). When a court applies a federal law in a way that burdens religion, it is the government that is burdening religion. The statute defines "government" to include "a branch, department, agency, instrumentality, and official." 42 U.S.C. §2000bb-2(1). Federal courts

are a branch of the federal government. On this ground, the Eighth Circuit applied RFRA as a defense against a suit brought by a bankruptcy trustee to recover contributions the debtors had made to their church. The court explained: "The bankruptcy code is federal law, the federal courts are a branch of the United States, and [the court's] decision in the present case would involve the implementation of federal bankruptcy law." *In re Young*, 82 F.3d 1407, 1417 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir. 1998), cert. denied, 525 U.S. 811 (1998). Thus, even though the suit was between private parties, the burden was ultimately imposed by the government. *Id.*

The proposition that government can burden First Amendment rights, such as speech and religious exercise, in suits by private plaintiffs is well accepted in constitutional cases. In the landmark decision of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that the application of state defamation law in a suit brought by an individual violated the First Amendment. "Although this is a civil lawsuit between private parties," the Court said, the state courts "have applied a state rule of law which petitioners claim to

impose invalid restrictions on … freedoms of speech and press…. The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised." *Id.* at 265.

Decisions involving the "ministerial exception" apply the same principle to free exercise rights in nondiscrimination suits. The nondiscrimination plaintiffs were private parties in the Supreme Court's most recent decision, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), as well as in leading earlier decisions in this circuit and others. See, e.g., *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). Lawsuits by private parties, no less than suits by government agencies, violate free exercise; the court's imposition of liability creates "[s]tate interference in th[e] sphere" of a religious organization's control over matters of "faith and doctrine." *Our Lady*, 140 S. Ct. at 2060. Other civil actions by private plaintiffs against religious organizations likewise create state action that burdens religion. To take just one example: in *Paul v. Watchtower Bible and Tract Soc.*, 819 F.2d 875 (9th Cir. 1987), an individual sued a

church for defamation, invasion of privacy, fraud, and outrageous conduct after she was shunned by members for leaving the church. The court barred the action because imposing tort damages on a church for its religiously motivated practice "constitute[s] state action" and "would constitute a direct burden on religion." *Id.* at 880 (citing *Sullivan*, 376 U.S. at 265); see *id.* ("application of tort law to activities of a church or its adherents in their furtherance of their religious belief is an exercise of state power"). *See also Molko v. Holy Spirit Ass'n.*, 762 P.2d 46 (Cal. Sup. Ct. 1988) (cited at Op. at 41) (holding that tort liability for a church's allegedly fraudulent recruiting practices imposes a burden on free exercise). All these cases teach that government burdens a right, including religious exercise, when it creates the law burdening the right and courts apply that law to impose liability.

The district court erred in holding these cases irrelevant to RFRA's application here. Op. at 32-33, 41. The statute is designed to protect the "free exercise of religion … secured … in the First Amendment." 42 U.S.C. §2000bb(a)(1). RFRA gives that right more protection than the Supreme Court recognizes under the Constitution, by applying strict scrutiny to burdens from laws that are "'neutral'

toward religion" as well as those that discriminate against religion. *Id.* at §2000bb(a)(2)). But the statute still aims to protect the interest in free exercise against substantial burdens. As this Court has stated, quoting RFRA's statement of purpose:

> In RFRA, Congress explicitly reinstated the application of the compelling interest test set out in *Sherbert* [*v. Verner*], 374 U.S. 398 [(1963)], and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), to 'all cases where free exercise of religion is substantially burdened....' 42 U.S.C. §2000bb(b)(1)."

Goodall v. Stafford Cty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995) (parallel citations omitted; ellipses in original).

The district court erred in ignoring the explicit language of the purpose clause. A statutory statement of purpose, whether "it resides" in a prefatory or a later section, is "'an appropriate guide' to the 'meaning of the statute's operative provisions.'" *Gundy v. United States*, 139 S. Ct. 2116, 2127 (2019) (bracket omitted) (quoting Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 218, 220 (2012)). RFRA's explicit purpose is to "guarantee [strict scrutiny] in *all* cases where free exercise of religion is substantially burdened"—not just cases where government brings the suit. RFRA aims "to provide a claim or defense to persons whose religious exercise is substantially

burdened *by government*"—not just when the liability burden imposed by government occurs in a government-plaintiff suit. 42 U.S.C. §2000bb(b)(1), (2) (emphases added).

The district court's only answer was that certain other phrases in the text require holding RFRA irrelevant to government burdens in private-party suits. Op. at 41. As we show *infra (*section I-C), those phrases in no way require reaching that result and contravening the explicit statutory purpose.

B. Supreme Court Precedent and Other Circuits' Case Law Strongly Support Holding that RFRA Provides a Defense in Title VII Private-Plaintiff Suits.

Precedential authority and case law also support applying RFRA here.

1. The Supreme Court's decision in *Bostock* strongly indicates that RFRA provides a defense in Title VII private-plaintiff lawsuits. *Bostock* is the very decision on which Billard's Title VII suit depends; it held that discrimination against an employee for being homosexual or transgender is illegal sex discrimination under Title VII. 140 S. Ct. at 1737. And *Bostock* spent two full paragraphs addressing the danger "that complying with Title VII's requirements in cases like ours may

require some employers to violate their religious convictions." *Id.* at 1753. The Court emphasized that it was "deeply concerned with preserving the promise of the free exercise of religion; that guarantee lies at the heart of our pluralistic society." *Id.* at 1754. It discussed RFRA, among other religious-liberty provisions, noting that by enacting RFRA Congress had gone "a step further" than the Constitution in protecting religious liberty. *Id.* The Court said that RFRA "might supersede Title VII's commands in appropriate cases" because it "operates as a kind of super statute, displacing the normal operation of other federal laws." *Id.* Although none of the employers in the case had presented the Supreme Court with a RFRA defense, the Court stated that "other employers in other cases may raise free exercise arguments that merit careful consideration." *Id.*

Excluding a RFRA defense in private-plaintiff Title VII suits would make *Bostock*'s statements meaningless. Suits brought by individuals, as opposed to suits brought by the EEC, "constitute the vast majority of Title VII enforcement litigation." Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 Yale L. & Pol'y Rev. 119, 130 & n.58 (2014); see *Romasanta v. United*

Airlines, Inc., 537 F.2d 915, 918 (7th Cir. 1976) ("The primary burden of enforcing Title VII rests with private plaintiffs."). The "vast majority" of discrimination charges filed with the EEOC end with the agency issuing a "right to sue" letter that authorizes the complaining individual to sue in federal court. Bornstein, *supra*, at 130. For example, in fiscal years 2000-2013, "the agency filed lawsuits to enforce between 0.2% and 0.6% of the charges it received each year. In contrast, during the same time period plaintiffs filed … on average *55 times as many lawsuits as filed by the EEOC each year*." *Id.* (emphasis added).

If RFRA applied only in government suits, it would likely provide protection in less than one-fiftieth of the lawsuits where Title VII burdened religious exercise. (There is no reason to think the 55:1 ratio described above changes significantly in suits burdening religious exercise.) When the Supreme Court said that RFRA "may supersede Title VII" when "employers raise free exercise claims," it gave no indication that this should happen only in government suits, less than 2 percent of the cases. Such meager, sporadic protection would negate *Bostock*'s goal of "preserving the promise of the free exercise of religion." 140 S. Ct. at 1754.

2. Case law from other circuits also points to applying RFRA here. Multiple circuits have applied RFRA as a defense to a private-party employment discrimination suit or have suggested it should apply; no circuit has declined to apply it in such cases. No circuit has ruled as the district court did here. If this Court holds that RFRA applies in private-plaintiff employment discrimination cases, it will harmonize with the other circuits that have addressed the issue.

The Second Circuit explicitly applied RFRA as a defense to a private-party employment discrimination suit in *Hankins v. Lyght*, noting that "RFRA's language surely seems broad enough to encompass" such a case. 441 F.3d at 103. The Eighth Circuit held that RFRA applied in private-party suits generally. *In re Young*, 82 F.3d at 1416-17. And the D.C. Circuit applied RFRA to refute a private plaintiff's arguments specifically in a Title VII suit brought by both the EEOC and the private plaintiff. *EEOC v. Catholic Univ.*, 83 F.3d 455, 469-70 (D.C. Cir. 1996).

Among its rationales for applying RFRA in private-party as well as EEOC discrimination suits, the Second Circuit emphasized that holding the statute inapplicable would produce arbitrary results.

Antidiscrimination prohibitions, it said, "cannot change depending on whether it is enforced by the EEOC or an aggrieved private party." *Hankins*, 441 F.3d at 103. Section I-D *infra* details the arbitrary results that would follow if RFRA's applicability depended on which plaintiff brought suit. The point here is that these results have concerned other circuits.

Even circuits that have held generally against applying RFRA in private-party suits emphasized the arbitrariness of denying its application in private-plaintiff discrimination suits while allowing it in government suits. In *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015), the Seventh Circuit held RFRA inapplicable in a bankruptcy-related suit between private creditors and the archbishop of the debtor diocese. In that situation, there was no government agency that could bring suit.[2] By contrast, Title VII and other employment discrimination suits can be brought by the government—the EEOC—as well as by private parties. The Seventh Circuit emphasized that

[2] Bankruptcy trustees may be able to bring suits to recover assets for the estate, but such a trustee is not a government official. *In re Archdiocese of Milwaukee*, 485 B.R. 385, 391 (Bkrtcy. E.D. Wis. 2013), rev'd, 496 B.R. 905 (E.D. Wis. 2013), rev'd *sub nom. Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015) (collecting cases in which "courts have declined to deem the [bankruptcy] trustee a governmental actor in various contexts").

discrimination cases involve a "limited situation whe[re] the government *could* have been a party." *Listecki*, 780 F.3d at 737 (emphasis in original). The Sixth Circuit also noted the distinction. Although the court refused to apply RFRA in a trademark suit between private parties where no government entity could sue, it expressly distinguished discrimination cases, where it noted that courts might apply RFRA "to avoid disparate application of the statute based on who brings discrimination charges." *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010).

The district court also relied, erroneously, on *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (9th Cir. 1999). There the plaintiff filed a RFRA suit against a private company that refused to hire him because he refused, on religious grounds, to record his social security number in an employment form. *Id.* at 829-30. The court held RFRA inapplicable because the private employer, the entity imposing the employment denial, was not "the government." The court concluded that the plaintiff had not alleged the necessary "nexus between the private entity and the government." *Id.* at 838.

Sutton was not a case, like this one, in which a private plaintiff sued to enforce a law that allegedly made the defendant's religiously motivated behavior illegal. It was not a case in which the court—an indisputable part of government—was the final instrument by which the burden on religious exercise was imposed. Here the federal government imposes the burden by the law it enacted (Title VII) and by the federal court decision that imposes liability under that law.

C. The Textual Phrases on which the District Court Relied Do Not Exclude RFRA Defenses in Private-Plaintiff Suits.

The district court relied on two statutory phrases to exclude RFRA defenses in private-plaintiff suits. Neither phrase supports that conclusion.

1. The district court pointed to the statement that "the government" must "demonstrate" the existence of a compelling interest to justify substantially burdening religious exercise. See 42 U.S.C. §2000bb-1(b). The court reasoned that the government cannot "demonstrate" these elements without being a party.

That argument is mistaken. As already discussed, when a court in a private-party suit enforces a law that substantially burdens religious

exercise, it is still "the government" imposing the burden. See *supra* pp. 9-11. The private plaintiff may then undertake the government's obligation to justify the substantial burden.

Title VII's enforcement structure makes it especially clear that private plaintiffs in such cases are shouldering "the government's" obligation. As already noted, a private individual cannot simply bring a Title VII suit but must first file a charge with the EEOC. 42 U.S.C. §2000e-5(e)(1); see *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019) (describing process). In order to sue, the individual must receive a "notice of right to sue" from the EEOC, either because the agency has closed its investigation or because the individual requests the notice before the investigation's close. U.S. Equal Employment Opportunity Commission, *Filing a Lawsuit*, https://www.eeoc.gov/filing-lawsuit. Even if the EEOC finds "reasonable cause" to believe discrimination has occurred, and even if its conciliation efforts with the employer are unsuccessful, the agency still "has discretion which charges to litigate" and which to authorize for private litigation by a right-to-sue notice. *Id.*

Thus, if the private plaintiff sues, it's because the EEOC—the "government"—has authorized it through a right-to-sue notice. The

private plaintiff thus shoulders the litigation obligation that the government would have had, including RFRA's obligation to justify any substantial burden on religious exercise. If the EEOC does sue, the private plaintiff's avenue to court is to intervene in the government's suit, which again reinforces that the person is undertaking the government's obligation. See 42 U.S.C. §2000e-5(f)(1) (giving "he person or persons aggrieved … the right to intervene in a civil action brought by the Commission").[3] The statement that government must demonstrate a compelling interest provides no warrant to cripple RFRA by rendering it irrelevant in private-plaintiff suits.

The district court argued that applying RFRA in private-plaintiff suits would render meaningless the statute's language that to "demonstrate" a compelling interest "means meets the burdens of going forward with the evidence and of persuasion." Op. at 40 (citing 42 U.S.C. §2000bb-2(3)). That is untrue. Whether the government makes the demonstration or a private party shoulders that obligation, the definition of "demonstrates" is far from meaningless. It still makes the

[3] Not only does the private plaintiff undertake the government's obligation to "demonstrate" a compelling interest. In addition, the *court*, the government actor enforcing the burdensome law, must demonstrate that the burden is justified. The court must make that demonstration by applying the compelling interest test.

vital point that the term requires meeting both the burden of production ("going forward with the evidence") and "the burden of persuasion."

The district court argued that the EEOC's issuance of a right-to-sue letter means that government is not involved in the case. Op. at 43. But this ignores that the EEOC makes a key decision with respect to each initial Title VII complaint: it decides whether to bring its own enforcement action or authorize the private plaintiff's suit. That choice itself is government involvement. And as section I-D will explain, making RFRA's applicability turn on that choice invites manipulation by the EEOC or the private plaintiff—an example of the arbitrariness that several circuits have found troubling (see *supra* pp. 17-18).

2. The district court also claimed that applying RFRA in private-plaintiff suits would render meaningless the phrase saying that a party may assert RFRA "'as a claim or defense in a judicial proceeding *and obtain appropriate relief against a government*.'" Op. at 40-41 (citing 42 U.S.C. §2000bb-1(c)) (emphasis added). The italicized language, the court said, means that "the government must be an adversary to the party asserting RFRA in the suit" since "the court can only grant relief

against parties to the suit." *Id.* The court read the phrase about obtaining "relief from the government" to limit the "proceeding[s]" in which RFRA could be raised—and thus to narrow the relief available. But the context makes clear that the phrase in fact expanded relief, by making an explicit abrogation of the sovereign immunity of state governments.

As written, the statute includes two different verbs allowing a person to do two different things: (1) "assert a violation of RFRA as a claim or defense in a judicial proceeding" and (2) "obtain appropriate relief against a government." 42 U.S.C. §2000bb-1(c). The latter phrase, as the Second Circuit has recognized, is "most reasonably read as broadening, rather than narrowing" relief. *Hankins*, 441 F.3d at 103. That is so for three reasons.

First, the narrowing interpretation adopted by the district court makes the phrase "against the government" into a misplaced modifier. It takes that phrase, which accompanies a reference to "relief," and changes it into a reference—a limiting reference—to a party's ability to invoke the statute in the first place. The district court rewrites the statute to say that a party may assert RFRA as a claim or defense …

against a government and obtain appropriate relief ~~against a government~~." That is not what the statute says as written.

Second, the district court's interpretation assumes that "obtain[ing] appropriate relief against a government" is all that can happen when RFRA is asserted "as a claim or defense." But that makes no sense for cases where RFRA is asserted as a defense rather than as a claim. A litigant who raises a defense does not obtain any "relief" at all: not an injunction, or damages, or a declaratory judgment. A defense merely defeats liability. *Sikorsky Aircraft Corp. v. U.S.,* 102 Fed. Cl. 38, 48 n.14 (Fed. Cl. 2011) ("Affirmative defenses are not claims for additional relief."); *Resolution Tr. Corp. v. Love*, 36 F.3d 972, 977 (10th Cir. 1994) ("affirmative defenses are not 'claims' or 'actions,' but rather are responses to claims or actions"). Because "relief" is not applicable when a "defense" is raised, it makes no sense to read the phrase "obtain appropriate relief against a government" to modify the phrase "assert a claim *or defense* in a judicial proceeding."

Rather, RFRA's context shows that the phrase "obtain appropriate relief against a government" serves a different purpose: to provide relief against a government by abrogating sovereign immunity. When RFRA

was enacted in 1993, it applied to burdens imposed by state and local governments (those applications were later struck down in *City of Boerne v. Flores*, 521 U.S. 507 (1997)). At the time of enactment, Supreme Court precedent allowed Congress to abrogate state sovereign immunity only if Congress made its intention to abrogate "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Thus, if Congress wanted religious adherents to be able to rely on RFRA in suits against states or state agencies, it was not enough to say that RFRA could be asserted "as a claim or defense in a judicial proceeding." It also had to say that RFRA could provide "appropriate relief against a government." Merely allowing the assertion "of a claim or defense" might suffice to authorize appropriate relief in suits brought by private parties. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2262-63 (2021). But it would not suffice to authorize relief against state entities; that required separate, explicit phrasing, which Congress provided.

A *Virginia Law Review* note examines this background in detail, showing that abrogating "state sovereign immunity provides the animating purpose behind Congress's inclusion of the 'obtain relief'

parenthetical." Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343, 351-52 (2013). The note further details how any ambiguity on whether "obtain appropriate relief against a government" narrows or expands RFRA's protections "arose as an incidental result of grammatical restructuring" and was not "intended to limit the judicial relief available under RFRA." *Id.* at 353.

D. Excluding a RFRA Defense in Title VII Private-Plaintiff Suits Would Undercut RFRA's Purposes.

Finally, excluding RFRA as a defense in private-plaintiff suits undermines the statute's purposes as reflected in its text. RFRA "specifies that it 'applies to all Federal law, and the implementation of that law.'" *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (quoting 42 U.S.C. §2000bb-3(a)). This language, the Supreme Court says, shows "beyond dispute" that Congress intended RFRA to have comprehensive reach. *Id.* As noted *supra* (pp. 11-13), RFRA's explicit purpose is to "guarantee [strict scrutiny's] application *in all cases* where free exercise of religion is substantially burdened." 42 U.S.C. §2000bb(b)(1) (emphasis added) (quoted by this Court in *Goodall*, 60 F.3d at 171).

Indeed, RFRA is a "sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach." *Korte*, 735 F.3d at 673 (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code,* 56 Mont. L. Rev. 249, 253 (1995)). This comprehensive sweep likewise follows from "RFRA's statement of purpose[, which] explicitly reaffirms our national commitment to the 'free exercise of religion as an unalienable right,' existing prior to and above ordinary law." *Id.* (quoting 42 U.S.C. §2000bb(a)(1)). See also *Little Sisters*, 140 S. Ct. at 2383 (the free exercise right is "described by RFRA as 'unalienable'").

The Supreme Court has also said, and reemphasized, that "RFRA 'provide[s] very broad protection for religious liberty.'" *Little Sisters*, 140 S. Ct. at 2383 (bracket in original) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). RFRA aims to mediate "the inevitable clashes between religious freedom and the realities of the modern welfare state." *Korte*, 735 F.3d at 673.

Excluding RFRA's application in private-plaintiff suits, which constitute the "vast majority" of Title VII suits (*supra* p. 14), negates these purposes. If RFRA barely ever applies in Title VII cases, it cannot

"mediate" the sensitive set of "clashes" between religious freedom and antidiscrimination laws, and it cannot "broad[ly] protec[t]" the "inalienable right" of religious exercise.

Even worse, if RFRA is unavailable in private-plaintiff suits, an EEOC hostile to employers' religious liberty defenses could unilaterally make the statute unavailable in any or all employment discrimination cases. Given Title VII's enforcement structure, the EEOC could strategically decline to bring suit itself, relying on private plaintiffs entirely or in cases where it disliked the employer's religious belief or practice. Private plaintiffs too could take advantage of the enforcement structure and make RFRA inapplicable, by requesting that the EEOC issue a right-to-sue letter or by intervening in the case. The EEOC and private plaintiffs, perhaps in tandem, could thus render the important religious-liberty defense irrelevant. Protection that depends on government's whim or private persons' gamesmanship is not the "broad protection" that RFRA secures for an "unalienable right." See *supra* p. 27.

Thus, interpreting RFRA to provide no defense in private-plaintiff suits would produce an absurd conclusion. The district court

nevertheless held that the interpretation should control because the result would not be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Op. at 43 (quoting, *inter alia*, *Sturges v. Crowninshield*, 17 U.S. 122, 202-03 (1819)). But the Supreme Court has not required meeting the "monstrous[ness]" standard to invoke the absurdity doctrine. It is enough that a literal reading of a statute "would compel an odd result." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989); *see U.S. v. Husted*, 545 F.3d 1240, 1245 (10th Cir. 2008) (quoting *Green* and stating "the Supreme Court no longer requires a 'monstrous' result to invoke the absurdity doctrine"). Interpreting RFRA such that it barely ever applies to an important set of clashes is an odd result for a statute meant to have a "comprehensive" reach.

III. APPLICATION OF TITLE VII HERE VIOLATES RFRA.

Applying Title VII in this case violates RFRA. As just noted, RFRA provides "'very broad protection'" for religious liberty. *Little Sisters*, 140 S. Ct. at 2383 (quoting *Hobby Lobby*, 573 U.S. at 693). The application of Title VII here substantially burdens religious exercise. And the government's interests in preventing discrimination, however

compelling in the abstract, are not compelling as applied to the employment decision concerning an employee who is publicly speaking out against the employing school's deeply rooted religious teachings. The undisputed facts here support the RFRA defense on the merits, so this Court can reverse outright even though the district court did not discuss the merits.

A. The Application of Title VII Substantially Burdens CCHS's Religious Exercise.

There can be little doubt that the application of Title VII would substantially burden Defendants' religious exercise. Government imposes a substantial burden when it places "substantial pressure on" a claimant "to modify" its religiously motivated conduct, "undermin[ing its] ability to give witness to the moral teachings of [its] church." *Korte*, 735 F.3d at 682-83. That is precisely what happens when a court penalizes a religious high school for determining that an employee who contravenes and publicly criticizes the school's religious-moral teachings cannot advance the school's mission. Application of Title VII pressures the school to refrain from making that determination, by subjecting the school to substantial liability for making it.

B. Application of Title VII Liability here Fails Strict Scrutiny.

Nor can the substantial burden on religion here be justified on the ground that it "further[s] … a compelling governmental interest"—let alone that it furthers it by "the least restrictive means." 42 U.S.C. §2000bb-1(b). RFRA requires showing "that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (quoting 42 U.S.C. §2000bb–1(b)); accord *Hobby Lobby*, 573 U.S. at 726.

Strict scrutiny, under RFRA or the First Amendment, means that "[r]ather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (quoting *O Centro*, 546 U.S. at 431). Thus in *Fulton*, the Court acknowledged that the nondiscrimination laws could serve "weighty" or "important" interests in general, but it held those interests "insufficient" as applied to the religious foster-care agency in question. 141 S. Ct. at 1881-82. Under this focused approach, the law in

question can apply in the many cases where it would not substantially burden religious exercise. But it cannot apply where it would impose a substantial burden on religious exercise unless the application of the burden in that case furthers a compelling interest.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Supreme Court held that a state prohibition on discrimination in public accommodations could not apply to forbid the Boy Scouts from dismissing an openly gay scoutmaster, because that application would "serious[ly] burden" the Scouts' First Amendment expressive decision to affirm traditional moral values. 530 U.S. at 658. Dale did an interview with a newspaper where he advocated for having gay role models in the lives of homosexual teenagers. *Id.* at 645. This interview was published in the newspaper along with Dale's photo that had a caption identifying him as the copresident of the Lesbian/Gay Alliance. *Id.*

Applying the compelling interest test (*id.* at 657-58), *Dale* held that imposing liability to pressure the Scouts to retain an openly gay and activist scoutmaster would "force the organization to send a message" it did not wish to send—that it "accepts homosexual conduct" (*id.* at 653). The general interests underlying nondiscrimination laws

could not "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659.

In this case, Billard made a post on Facebook announcing his marriage to another man and criticizing policies that denied equal marriage to same-sex relationships. Op. at 8. Billard had earlier walked out of school staff trainings presenting the Catholic teaching on marriage. *Id.* at 7. These public statements directly oppose Catholic teaching. Like the Boy Scouts, Defendants here cannot be forced to allow their own agent to send messages undercutting their beliefs and teachings.

Indeed, the case for protecting Defendants here is far stronger than the case in *Dale*. There the Court found a "severe intrusion" on the Boy Scouts' expressive association, 530 U.S. at 659, even though the organization's statements were mostly inexplicit about homosexuality and it "d[id] not trumpet its views about homosexuality from the housetops." *Id.* at 650, 656; see also *id.* at 677 (Stevens, J., dissenting) (arguing that the Scouts "fail[ed] to establish any clear, consistent, and unequivocal position on homosexuality" or that same-sex conduct "was contrary to the group's values").

By contrast, the Catholic Church could hardly be more "clear, consistent, and unequivocal" (*id.* at 677) in its teaching that same-sex conduct is wrong. And Billard was well aware of these teachings and of Defendants' expectations concerning teachers' conduct and public statements. Appellants' Opening Br. 17, 14. If the government could not satisfy strict scrutiny as to the Scouts' muted message about sexuality, it certainly cannot satisfy strict scrutiny here.

CONCLUSION

This Court should reverse the district court's judgment and direct entry of summary judgment for Defendants.

Respectfully submitted.

Thomas C. Berg
Religious Liberty Appellate Clinic
Univ. of St. Thomas School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
tcberg@stthomas.edu
651/962-4918

Kimberlee Wood Colby
Counsel of Record
Laura Nammo
Center for Law & Religious Freedom
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, VA 22151
kcolby@clsnet.org/Laura@clsnet.org
703/894-1087

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1. This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29 because it contains 6,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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/s/ Laura Nammo
Laura Nammo
Dated: September 29, 2022

CERTIFICATE OF SERVICE

I certify that on September 29, 2022, the foregoing brief was served on counsel for all parties by means of the Court's ECF system.

/s/ Laura Nammo
Laura Nammo