No. 22-1440

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LONNIE BILLARD,
Plaintiff-Appellee,
v.
CHARLOTTE CATHOLIC HIGH SCHOOL, MECKLENBURG AREA CATHOLIC SCHOOLS, and DIOCESE OF CHARLOTTE
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
The Honorable Max O. Cogburn, Jr.
Case No. 3:17-cv-00011

BRIEF OF THE INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
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No. 22-1440 Caption: Billard v. Charlotte Catholic High School et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Institute for Free Speech
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Miles Coleman Date: 09/29/2022

Counsel for: Institute for Free Speech

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INTEREST OF *AMICUS CURIAE*[1]

Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. Besides scholarly and educational work, the Institute represents individuals and civil-society organizations in litigation to secure their First Amendment liberties.

[1] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part, or contributed money intended to fund preparing or submitting the brief. No person other than the Institute and its counsel have contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Defendants Charlotte Catholic High School ("Charlotte Catholic"), Mecklenburg Area Catholic Schools, and the Roman Catholic Diocese of Charlotte's First Amendment expressive association rights shields them from Lonnie Billard's claim. Analytically, this defense lies downstream (thanks to the constitutional avoidance doctrine) from the initial question of whether Title VII's religious exemption or RFRA insulates Defendants from liability; however, if the Court rejects Defendants' statutory defense, it should still reverse based on their expressive association right.

Courts ask three questions in considering whether the doctrine of expressive association applies: (1) Is the organization an expressive association? (2) If so, does forcibly including an individual in the expressive association significantly burden its expression, deferring to the association's own view of what would impair its expression? (3) If so, can the government's action survive strict scrutiny? The answer to each of these questions here supports the doctrine's application and counsels reversal of the lower court's judgment.

As to the first question, Defendants—a private religious school, a regional religious school system, and ecclesiastical district of the Roman Catholic Church—are, by nature and purpose, expressive. As to the second question, any governmental action that forces Defendants to employ Mr. Billard, whose beliefs and behaviors he admits diverge starkly from Catholic teaching and doctrine, would significantly burden and undermine the message Defendants convey. And as to the third, no compelling governmental interest outweighs Defendants' expressive association

interests. Thus, each step of the analysis favors Defendants and supports reversing the District Court's judgment.

While the expressive association right does not encompass every organization or situation, its protections are robust when it applies, shielding expressive organizations in the selection or exclusion of members or employees whose presence would affect the organization's expressive purpose or message. For example, Christian law students, gay softball leagues, the Boy Scouts, the Democratic Party, and pro-life nonprofits (to name but a few) have all relied on the doctrine to exclude those whose presence would detract from their expressive purpose. *See infra*, Argument I (compiling and discussing cases). But the strength of the doctrine's protection and the exception it creates to otherwise applicable employment and anti-discrimination laws do not negate such laws entirely. The doctrine does not exempt organizations from employment laws of general applicability if the organization lacks an expressive purpose, or if the employment decision is unrelated to and does not affect the organization's expressive purpose or message. And even when government action burdens an expressive association's message, the government may still prevail if its action serves a compelling state interest unrelated to the suppression of ideas, which cannot be achieved through less restrictive means.

Notably, Defendants' expressive associational interests are distinct from any ministerial exception claim that they may have. The associational right, rooted in the Assembly and Speech Clauses, differs from the ministerial exception, which derives from both the Free Exercise and Establishment Clauses, in origin, scope, and legal

review standard. The ministerial exception is available only to religious organizations and only to their selection, control, or removal of individuals qualifying as "ministers." In contrast, the expressive association doctrine protects all expressive purpose organizations (not just religious ones), securing their decisions to include or exclude anyone (not just ministers) in furtherance of the association's message.

The expressive association doctrine focuses on whether an *organization* is expressive and, if so, what message it conveys. This analysis can, at times, be a simpler inquiry than the ministerial exception analysis, which focuses on what an *employee* does. Thus, in situations like this, where both doctrines may apply, the Court should first look to the more-straightforward associational right. Here, that analysis calls for reversal.

ARGUMENT

Expressive associations like Charlotte Catholic, Mecklenburg Area Catholic Schools, and the Diocese enjoy a First Amendment right to exclude those who would detract from their expressive purpose. Defendants are not required to employ Mr. Billard, because his admitted divergence in belief and behavior from Roman Catholic faith and practice undermines their expressive message, and no compelling governmental interest outweighs their associational right.

I. Expressive associations enjoy a First Amendment right to exclude those who do not share their purpose or support their message.

The First Amendment guarantees the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000); *Dawson v. Del.*, 503 U.S.

159, 163 (1992). This right is essential because it buttresses other First Amendment activities, such as free speech, assembly, petition for redress of grievances, and the exercise of religion. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

The expressive association doctrine secures the right to associate for the purpose of speaking by protecting a group's membership decisions. *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 600 (6th Cir. 2013). Freedom of expressive association requires both a freedom to associate and *not* to associate. *U.S. Jaycees*, 468 U.S. at 623. "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire," because "[s]uch a regulation may impair the ability of the original members to express only those views that brought them together." *Id.*

The freedom of expressive association protects any group's right *not* to associate, regardless of its viewpoint. As with "all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 124 (1981); *see also Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit First Amendment protection.").

Courts have consistently held that forced inclusion of members who do not share a group's viewpoints significantly affects the group's ability to associate under the First Amendment. In *Our Lady's Inn v. City of St. Louis*, the court held that mandating inclusion of individuals who did not share the nonprofit's commitment against abortion would "significantly affect the ability of Our Lady's Inn to advocate for its services" and would hinder its ability to express its views if it were "required to employ dissenters from [its] pro-life message." 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018). In *Apilado v. North American Gay Amateur Athletic Alliance*, the court allowed a gay softball league to exclude a heterosexual team because it "interfere[d] with its chosen expressive purpose." 792 F. Supp. 2d 1151, 1161 (W.D. Wash. 2011). The court cited the Supreme Court's decision in *Dale*, noting that it must "give deference to an association's view of what would impair its expression." *Id.* (quoting *Dale*, 530 U.S. at 648). *Apilado* found that because the league's efforts to promote a unique set of values are protected by the First Amendment, "[f]orced inclusion of straight athletes would distract from and diminish those efforts." *Id.* Courts uphold the freedom of association even-handedly, providing consistent protection to groups across political and social spectrums.

II. The First Amendment secures Defendants' right to exclude Billard from their expressive association.

Courts evaluate expressive association claims under a three-step analysis. *Sebelius*, 705 F.3d at 600. First, courts ask whether a group is an expressive association entitled to First Amendment protection. *Id.* Second, courts determine whether the government action in question significantly burdens the group's

expression, deferring to the group's view of what would impair its expression. *Id.* And third, courts weigh the government's interest in the restriction against the group's right of expressive association. *Id.* Each of these elements favor Defendants.

A. Defendants are expressive associations.

Charlotte Catholic, a Catholic high school within the Mecklenburg Area Catholic Schools system, operates under the Diocese's direction. *See* Sacred Congregation for Catholic Education, *The Catholic School*, at ¶ 43 (1977); JA769; JA938. Churches and religious organizations "are the archetype of associations formed for expressive purposes." *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 565 U.S. 171, 200–01 (2012) (Alito, J., concurring). Religious activity is among the core freedoms the associational right protects. *See Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (recognizing that courts have consistently upheld freedom of association claims when individuals are engaging in "protected speech" or "religious activities"); *see also U.S. Jaycees*, 468 U.S. at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

Overtly ecclesiastical districts of a religious group, such as the Diocese, are not the only religious groups that qualify as expressive associations. Rather, courts have recognized a wide range of associations buttressed by a commitment to religious beliefs, including associations like Charlotte Catholic and Mecklenburg Area Catholic Schools, as expressive associations entitled to First Amendment protection. For

example, the associational right protects religious organizations like the Christian Legal Society ("CLS"), an association of lawyers and law students united by a common faith in Christianity. *See Christian Legal Soc'y v. Walker*, 453 F.3d 853, 857–58 (7th Cir. 2006). Because members join CLS to express their religious beliefs and convictions, *id.* at 860, 862, courts have routinely held that CLS and organizations like it are expressive associations. *See id.* at 862 ("It would be hard to argue—and no one does—that CLS is not an expressive association."); *see also Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 859, 862 (2d Cir. 1996) (holding that a high school Bible club formed and conducted for expressive purposes was entitled to protection as an expressive association).

Even organizations whose purpose is not advocacy may be expressive associations if they operate according to sincerely held religious beliefs. *See Bear Creek Bible Church & Braidwood Mgmt., Inc.* v. *E.E.O.C.*, 571 F. Supp. 3d 571, (N.D. Tex. 2021) (citing *Dale*, 530 U.S. at 648 (2000)). In *Bear Creek*, the court found that one of the plaintiffs, Braidwood Management, was an expressive association because the business was owned by Christians who repeatedly expressed that Braidwood was a Christian business and required its employees to conform with biblical notions of sexuality and gender. *Id.* at *3. Braidwood Management's lack of engagement in public religious advocacy did not undermine its claim as an expressive association because the business engaged in private expression of its religious beliefs. *Id.* at *27.

Like religious groups, schools are entitled to First Amendment protection as expressive associations. In *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, the Court

unanimously assumed that law schools enjoyed freedom of association. 547 U.S. 47, 49, 68, 69 (2006). The Court repeatedly referenced "the law schools' freedom of expressive association." *Id.* at 49. Lower court holdings suggest that law schools are not unique in their expressive nature and that freedom of expressive association applies to all kinds of educational institutions. *See, e.g.*, *Circle Schools v. Pappert*, 381 F.3d 172 (3d Cir. 2004). Plaintiffs in *Circle Schools* included secular private schools who objected to a state statute requiring the schools to lead their students in the national anthem or pledge of allegiance each morning. *Id.* at 175. The schools argued that the statute constrained their educational and intellectual freedom through its mandatory participation requirement. *Id.* at 182. The court agreed, holding that the statute violated the schools' right of expressive association because "[b]y nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students." *Id.*

The holding in *Circle Schools* applies to religious schools as well. When parents choose to send their children to private schools—whether secular or religious—they are engaging in expressive association. *Beahn* v. *Gayles*, No. GJH-20-2239, 2021 WL 3172272, at *12 (D. Md. July 26, 2021); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("[W]e have long recognized the rights of parents to direct the 'religious upbringing' of their children . . . many parents exercise that right by sending their children to religious schools, a choice protected by the Constitution."). Religious schools, like their secular counterparts, have an expressive interest in inculcating their values into their students. *Heartland Acad. Cmty. Church* v.

Waddle, 427 F.3d 525, 535 (8th Cir. 2005); *see also Cent. UTA of Monsey* v. *Vill. of Airmont*, No. 18 CV 11103 (VB), 2020 WL 377706, at *19 (S.D.N.Y. Jan. 23, 2020) (finding an expressive association right where a religious organization planned to operate a religious school). Specifically, schools which educate children in a faith tradition are associations that engage in religious activity and are expressive by nature. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) ("[I]mplicit in our decision in *Hosanna-Tabor* was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school."). Thus, religious schools are entitled to all the rights of an expressive association under the First Amendment, including the freedom not to associate with those who would detract from their message.

Charlotte Catholic's mission statement reveals its expressive purpose to educate and mold students through Catholic teachings. JA770. Charlotte Catholic seeks "to graduate students who are faith-filled and possess a strong moral compass informed by Catholic teaching." *Id*. The Diocese administers the Mecklenburg Area Catholic School system, which is a regional system of Catholic schools in the Charlotte, North Carolina area affiliated with the Roman Catholic Church. *Id.* The Diocese's mission statement conveys a similarly expressive purpose: to "spread[] the Gospel of Jesus Christ." JA769. "Evangelization is . . . the mission of the Church; that is she must proclaim the good news of salvation to all, generate new creatures in Christ through Baptism, and train them to live knowingly as children of God." *Id.*

(internal citations omitted). To fulfill this mission, "Jesus Christ gave to the Church the authority, 'always and everywhere to announce moral principles, including those pertaining to the social order, and to make judgments on any human affairs to the extent that they are required by the fundamental rights of the human person or the salvation of souls." JA938–39. Thus, Charlotte Catholic, the Mecklenburg Area Catholic Schools, and the Diocese are "the archetype of associations formed for expressive purposes" because they are committed to communicating their religious beliefs. *Hosanna-Tabor*, 565 U.S. at 200–01 (Alito, J., concurring).

B. Requiring Defendant Catholic educational institutions to employ individuals who do not share and, in fact, oppose their expressive purpose and message would impair their ability to convey their message.

Courts apply a deferential standard when analyzing an organization's self-identified expressive purpose or message and the question of who or what would impair that purpose or message. The Supreme Court requires little proof of an organization's expressive purpose. *Dale*, 530 U.S. at 651 ("We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs."). And just as courts "give deference to an association's assertions regarding the nature of its expression, [courts] must also give deference to an association's view of what would impair its expression." *Id.* at 648. But little deference is needed to see that forcing Defendants to retain Mr. Billard would undermine their ability to express their message on human sexuality.

Defendants' expressive purpose is to live and advance the doctrines of the Catholic Church, which instructs that marriage is a "covenant" between a "man and a woman." JA941 (quoting Catechism of the Catholic Church ¶¶ 2360–79). The Catholic Church believes that homosexual acts are "contrary to natural law" and "do not proceed from a genuine affective and sexual complementarity." JA942 (quoting Catechism of the Catholic Church ¶ 2357). Indeed, the Catholic Church states that "[u]nder no circumstances can [homosexual acts] be approved." *Id.* Charlotte Catholic requires its teachers to "serve as role models for students" in support of the Diocese's "Catholic educational mission," and "may not publicly engage in conduct . . . opposed to the fundamental moral tenets of the Roman Catholic faith, including those concerning marriage." JA771–772 (internal citations omitted).

Forcing Defendants to include Mr. Billard, a gay man now married to a man, in a leadership capacity as a substitute teacher, would impair their ability to achieve their expressive purpose, which includes disapproval of same-sex activity. *Walker*, 453 F.3d at 863; *see also Dale*, 530 U.S. at 654 ("[T]he Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members . . . [and] the presence of Dale [ ] would [ ] surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."). *Walker*'s reasoning applies with equal force to the facts here. *See* 453 F.3d 853. In *Walker*, the court considered "whether application of [a university's] antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity."

Id. at 862. "To ask this question is very nearly to answer it," because "[t]here can be little doubt that requiring CLS to make this change would impair its ability to express disapproval of active homosexuality." *Id.* at 862–63.

The court in *Our Lady's Inn v. City of St. Louis* reached a similar conclusion about Catholic school employees who reject the Church's teachings on abortion. 349 F. Supp. 3d 805, 821 (E.D. Mo. 2018). It held that freedom of association protected the Archdiocese of St. Louis's elementary schools from liability under a city ordinance prohibiting employment discrimination on the ground of "reproductive health decisions" because forcing the schools to hire "teachers or other staff who do not adhere to [their] values"—including "the Catholic Church's longstanding and widely known opposition to abortion—would significantly affect [their] ability to advocate their viewpoints, through . . . teachers and staff, to their students." *Id.* at 813, 820–22. "[T]he forced inclusion of individuals who do not share Our Lady's Inn's commitment against abortion would significantly affect the ability of Our Lady's Inn to advocate for its services and encourage women to forgo abortion." *Id.* at 822. Likewise, "[its] ability to organize its staff and circulate expressive materials with their views on controversial reproductive rights issues would be hindered if they were required to employ dissenters from their pro-life message." *Id.*

So too here. It would be difficult, if not impossible, for Charlotte Catholic, Mecklenburg Area Catholic Schools, and the Diocese to convey their message of traditional marriage if, at the same time, they must employ Mr. Billard, who openly rejects the Catholic Church's view of marriage.

C. *Defendants' interests in expressive association outweigh the government's interests.*

To justify interfering with freedom of expressive association, a law must pass strict scrutiny, meaning that it must serve a compelling state interest unrelated to the suppression of ideas, and which cannot be achieved through a less restrictive means. *Dale*, 530 U.S. at 648. The government has an interest in eliminating discriminatory conduct and providing for equal access to opportunities. *See, e.g.*, *U.S. Jaycees*, 468 U.S. at 624. But the Supreme Court has explained that anti-discrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint. *See Dale*, 530 U.S. at 659–61; *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 578–79 (1995). "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579; *see also Dale*, 530 U.S. at 661.

In *Walker*, the court found that the university did not have a compelling interest "in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed." 453 F.3d at 863. "The only apparent point of applying the policy to an organization like CLS is to induce CLS to modify the content of its expression or suffer the penalty of derecognition." *Id.* Thus, the court concluded that this factor favored CLS and that

"CLS's interest in exercising its First Amendment freedoms is unquestionably substantial." *Id.*

The same is true here. Charlotte Catholic, Mecklenburg Area Catholic Schools, and the Diocese have "unquestionably substantial" interests in exercising their First Amendment right to expressive association. Were the government to force Defendants to employ Mr. Billard, it would both compel them to modify their expressive messages and would entangle itself in the governance decisions of religious organizations. The government's motivation for doing so, whatever it may be, is not a compelling interest because "[t]he First Amendment protects expression, be it of the popular variety or not." *Dale*, 530 U.S. at 660. "[P]ublic or judicial disapproval of a tenet of an organization's expression does not justify the [government's] effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message." *Id.* at 661.

III. The expressive association doctrine is distinct from the ministerial exception.

The expressive association doctrine and the ministerial exception share some similarities but are distinct in several significant ways. *See Hosanna-Tabor*, 565 U.S. at 189 (rejecting the EEOC's argument that there was "no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves" because "religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right 'implicit' in the First Amendment"); *see also id.* at 199 ("Throughout our Nation's history, religious bodies have been the preeminent

example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'" (Alito, J., concurring) (quoting *U.S. Jaycees,* 468 U.S. at 619)). They differ in their origin, scope, and application.

Origin. While *Hosanna-Tabor* marked the first time that the Supreme Court recognized the ministerial exception, that doctrine's origins predate the twenty-first century. The First Amendment was adopted to prevent the repetition of 16th-century British statutes that had enabled the Crown to fill religious offices and to control the exercise of religion. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2061; *see Watson v. Jones*, 80 U.S. 679, 727 (1871) ("[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them."); *see also Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (the selection of clergy, "where no improper methods of choice are proven" is "part of free exercise of religion"). Considering this history and plain meaning of the constitutional text, the Court in *Hosanna-Tabor* held that acknowledging the ministerial exception was necessary to avoid violating both the Free Exercise and Establishment Clauses. 565 U.S. at 184 ("The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.").

The freedom of expressive association, in contrast, is rooted in the Assembly and Speech Clauses rather than the Free Exercise or Establishment Clauses. The

"freedom of expressive association" is a term the Court coined to refer to the specific right to "associate for the purpose of speaking." *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 68 (2006).

Scope. The doctrines also differ in their breadth and depth. The protection provided by the ministerial exception applies only to religious organizations and to a far more limited class of persons than does the right of expressive association. Specifically, the ministerial exception only applies to individuals within religious organizations found to be "ministers" by a court of law. Thus, the ministerial exception "does not protect churches . . . and religious schools as to *non-ministerial* employees, nor does it protect Christian-owned businesses." *Bear Creek Bible Church*, 571 F. Supp. 3d at 590. If the ministerial exception applies, the religious organization may terminate the minister for any reason. *Hosanna-Tabor*, 565 U.S. at 184. Expressive association, by contrast, applies more broadly, encompassing both religious and secular organizations alike. And it applies to anyone within an organization who "affects in a significant way the group's ability to advocate public or private viewpoints." *Dale*, 530 U.S. at 648.

Application. The right of expressive association may be "overridden" by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *U.S. Jaycees*, 468 U.S. at 623. Under this framework, the inclusion of an unwanted member into a religious organization might be permitted if no less restrictive means of furthering a compelling government interest exists. The

standard under the ministerial exception, however, is absolute if the individual meets the definition of a minister. *See Hosanna-Tabor*, 565 U.S. at 184. If the ministerial exception applies, the inquiry ends—the Court cannot interfere in an organization's choice of ministers without violating the Free Exercise and Establishment Clauses. *Id.* A court may not scrutinize why an organization terminated a minister but must "stay out of" such employment disputes altogether. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2060.

IV. It is often easier to secure the right of expressive association than to apply the ministerial exception.

The expressive association doctrine may be easier to apply in many cases than the ministerial exception because, unlike the latter, it can require little, if any, factual development. Whether an individual qualifies as a minister can require complex factual development. *Hosanna Tabor,* 565 U.S. at 184. Chief Justice Roberts noted the Court's "reluctan[ce] [ ] to adopt a rigid formula for deciding when an employee qualifies as a minister." 565 U.S. at 190. Instead, the Court found that the ministerial exception applied after considering (1) the employee's formal title, (2) the substance reflected in that title, (3) the employee's use of that title, and (4) the religious functions the employee performed. *Id.* at 192.

The Court has clarified that, in recognizing the four *Hosanna-Tabor* factors, it "did not mean that they must be met—or even that they are necessarily important—in all other cases." *Our Lady of Guadalupe Sch.*, 140 S. Ct.. at 2063. It noted that "attaching too much significance to titles would risk privileging religious traditions with formal organizational structures over those that are less formal," *id.* at 2064,

and "insisting in every case on rigid academic requirements could have a distorting effect." *Id.* Instead, "[w]hat matters, at bottom, is what an employee does." *Id.* Thus, to determine whether the ministerial exception applies, courts consider whether the employee's role includes "core responsibilities" that equate with those of a minister. *Id.* at 2066.

In contrast, rather than examine whether an employee performs a ministerial function, expressive association's three-part analysis focuses on the organization and its message. The court must determine whether (1) the organization is an expressive association, and (2) the forced inclusion of an individual "impairs" or "burdens" that expression. *Dale*, 530 U.S. at 652, 656. If both elements are met, the third step of the analysis provides that the government may only force the organization to include the individual if there is no less restrictive means of furthering a compelling interest. *Id.* at 640–41.

In *Dale*, the Court spent little time determining whether the Boy Scouts qualified as an expressive association. The Court considered the Boy Scouts's mission statement, the Scout Oath, and the Scout Law, and then held that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive association." 530 U.S. at 649–50. This Court in *Walker*, relying on *Dale*, devoted only a paragraph to whether CLS was an expressive association, concluding, "[i]t would be hard to argue—and no one does—that CLS is not an expressive association." 453 F.3d at 862. On the other end of the spectrum, the Seventh Circuit quickly determined that "the First Amendment does not protect

coming together at a local bar to smoke." *Goodpaster v. City of Indianapolis*, 736 F.3d 1060 (7th Cir. 2013).

The second step of the expressive association analysis is likewise undemanding, because "[courts] give deference to an association's assertions regarding the nature of its expression [and] must also give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 648. Thus, federal courts have had little difficulty determining whether an organization has an expressive purpose and if the inclusion of a certain individual would impair or burden the group's message. The final step of the analysis asks courts to apply the familiar strict scrutiny standard to governmental action—an inquiry which is required in many other contexts.

Mr. Billard does not dispute any of the expressive association factors—nor could he. There can be little doubt that forcing Charlotte Catholic, Mecklenburg Area Catholic Schools, and the Diocese to employ him would undermine the organizations' expressive purpose because Mr. Billard's same-sex marriage contradicts their message on marriage and human sexuality. Acknowledging this much is easier than engaging in a factual inquiry as to whether Billard is or is not akin to a minister.

CONCLUSION

The First Amendment protects the right of the Diocese, Mecklenburg Area Catholic Schools, and Charlotte Catholic to dissociate from people who undermine their expressive purpose. The district court's ruling should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g)(1) and Circuit Rule 32, I certify that this brief complies with the type-volume limitation of 4th Cir. R. 32 because this brief contains 5,145 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(f). It complies with typeface requirements for Fed. R. App. P. 32(a)(5) and the Circuit Rules because it has been set in a monospaced font in a size measuring 12 points or larger.

Dated: September 29, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2022, I electronically filed this Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished electronically by the CM/ECF system.

Dated: September 29, 2022

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