UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LYNN STARKEY, Plaintiff, v. ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC. and RONCALLI HIGH SCHOOL, INC., Defendants.	)	Case No. 1:19-cv-03153-RLY-TAB

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Bostock is relevant to this case in two ways. First, it establishes that Title VII extends to claims of sexual orientation discrimination. Second, it strengthens the Archdiocese's argument that Ms. Starkey's claims are barred by Title VII's "express statutory exception for religious organizations." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

Bostock strengthens the religious exemption argument in three distinct ways. First, *Bostock* mandates that Title VII will now be interpreted only in light of its "plain terms," not congressional intent. *Id.* at 1743. Here, the religious exemption's "plain terms" cover employment decisions, such as the Archdiocese's, based on the "observance" of religious tenets. 42 U.S.C. § 2000e(j). Second, *Bostock* lists Title VII's religious exemption among the "doctrines protecting religious liberty" available in "future cases" asserting sexual orientation discrimination. 140 S. Ct. at 1754. This forecloses Starkey's argument that the religious exemption is limited to claims of religious discrimination. Third, *Bostock* emphasizes that religious organizations remain protected by the ministerial exception. *Id.* That understanding of the First

Amendment strengthens the Archdiocese's constitutional avoidance argument, particularly after the Court's decision last week in *Our Lady of Guadalupe v. Morrissey-Berru*, No. 19-267, 2020 WL 3808420 (U.S. July 8, 2020).

I. *Bostock* establishes that Title VII covers sexual orientation claims.

In *Bostock*, the Supreme Court held that "[a]n employer who fires an individual merely for being gay or transgender defies the law" under Title VII. 140 S. Ct. at 1754. This precludes the Archdiocese's argument that the *Hively* majority was mistaken on this point. Br. Supp. Mot. J., Dkt. 59 at 19. Title VII now clearly authorizes claims of sexual orientation discrimination.[1]

II. *Bostock* confirms that religious organizations are exempt from Title VII for decisions based on observance of religious standards.

In authorizing claims of sexual orientation discrimination in *Bostock*, the Supreme Court also emphasized that it is "deeply concerned with preserving the promise of the free exercise of religion" in the face of such claims. 140 S. Ct. at 1754. In fact, *Bostock* ultimately supports judgment on the pleadings here in three different ways: (a) it adopts a text-based approach to Title VII that supports application of the religious exemption here; (b) it invokes the religious exemption as relevant in future cases about sexual orientation discrimination, rebutting Starkey's attempt to limit the religious exemption here; and (c) it invokes the ministerial exception, which supports the Archdiocese's constitutional avoidance argument here.

A. *Bostock*'s text-based interpretation of Title VII requires application of the religious-employer exemption.

As we've explained, a text-based interpretation of Title VII's religious exemptions requires that Starkey's Title VII claims be dismissed. Reply, Dkt. 69 at 1-4; *see*

[1] *Bostock* declined to "prejudge" whether its analysis equally applied to "other laws," including Title IX. 140 S. Ct. at 1753; *see id.* at 1778 (Alito, J., dissenting). Thus, *Bostock* does not affect the Archdiocese's preservation, for future review, of an argument as to Title IX's scope.

Dkt. 59 at 9-12. In *Bostock*, the Supreme Court confirmed that this approach to Title VII—one focused above all on the statute's "plain statutory commands"—"is the law." 140 S. Ct. at 1745, 1754.

Bostock was insistent on this point. Although the employers in *Bostock* argued that entertaining claims of sexual orientation and gender identity discrimination would violate Congress's expectations in passing Title VII and have far-reaching consequences, *id.* at 1749-54, the Court found these "extratextual considerations" irrelevant. *Id.* at 1737. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest"—"the written word" prevails. *Id.* Thus, because the Court concluded that sexual orientation discrimination is "prohibited by Title VII's plain terms," that was "the end of the analysis." *Id.* at 1743 (internal quotation marks omitted).

Applying *Bostock*'s text-based approach to Title VII here, the religious exemptions foreclose Starkey's claims. Section 702(a) of Title VII provides that "[t]his subchapter"—meaning all of Title VII, *see* Dkt. 59 at 9-10—"shall not apply to" religious employers "with respect to the employment of individuals of a particular religion." 42 U.S.C. § 2000e-1(a); *see also* 42 U.S.C. § 2000e-2(e)(2) (similar exemption specifically for religious schools). Title VII then defines "religion" to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Under these plain terms, then, if a religious employer makes an employment decision based on an individual's "particular" "religious observance," "practice," or "belief," the employer isn't liable under Title VII. Here, the Complaint acknowledges that the Archdiocese declined to renew Starkey's contract because she failed to follow Catholic observance and practice on marriage and expressed beliefs opposing the Church's teachings. Compl., Dkt. 1 at ¶¶ 56, 62; *see* Pl.'s Suppl. Br., Dkt. 76 at 4 ("If she had been a man married to a woman instead of a woman married to a woman,

she would not have been terminated (or not renewed)."). So under the text of Title VII, Starkey's claims are barred.

Strikingly, Starkey has offered no textual counterargument to this plain reading of the Title VII exemptions. *Cf.* Pl.'s Resp. Opp'n, Dkt. 67 at 7-10. Instead, she cites the district court's decision in *Herx*, which suggests that Title VII's religious exemptions apply "only if" the plaintiff's claim "alleges … religious discrimination," rather than some other ground of discrimination prohibited by Title VII. *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1174-76 (N.D. Ind. 2014). *Herx* reached that conclusion not based on the statute's text, but by invoking "the history of Congressional action relating to Title VII," offering legislative history purportedly supporting the notion that religious organizations "'remain subject to the provisions of Title VII with regard to race, color, sex or national origin,'" even when an employment decision is based on an individual's particular religious belief, observance, or practice. *Id.* at 1175 (citation omitted).

Bostock precludes this approach to Title VII. Under *Bostock*, "legislative history can never defeat unambiguous statutory text." 140 S. Ct. at 1749-50. Indeed, arguments that a statute's "plain text" should be interpreted to reflect only the legislature's "expected applications" "impermissibly seek[] to displace the plain meaning of the law in favor of something lying beyond it." *Id.* at 1750-51. As the Archdiocese explained previously, the most natural reading of both "text and legislative history" is that Congress intended "to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) (citation omitted) (barring "gender discrimination" claim); *see* Dkt. 59 at 11-12. But even assuming tension between the text and legislative history, after *Bostock*, the text controls: "Ours is a society of written laws." 140 S. Ct. at 1754.

"At bottom," resolving Starkey's Title VII claims "involve[s] no more than the straightforward application of" the plain language of Title VII's religious exemptions. *Bostock*, 140 S. Ct. at 1743. Because the text of those exemptions permits the Archdiocese to make employment decisions based on religious observance and practice, any "suppositions … or guesswork" about legislative purpose is beside the point. *Id.* at 1754. Starkey's Title VII claims must be dismissed.

B. *Bostock* identifies the religious-employer exemption as relevant to sexual orientation claims.

But it isn't just *Bostock*'s interpretive approach to Title VII that forecloses Starkey's theory of the religious exemptions; the face of the opinion does too. After reaching its holding that Title VII encompasses claims of discrimination on the basis of sexual orientation and transgender status, the *Bostock* Court expressed "deep[] concern[] with preserving the promise of the free exercise of religion enshrined in our Constitution." 140 S. Ct. at 1753-54. The Court therefore listed three different "doctrines protecting religious liberty" available in "future cases" involving sexual orientation-discrimination claims—one of which was Title VII's "express statutory exception for religious organizations." *Id.* at 1754 (citing § 2000e-1(a)).

If the Title VII exemption is relevant to cases like *Bostock*, then that's fatal to Starkey's reading. According to her, the exemption doesn't apply when the plaintiff alleges "sexual orientation discrimination, not religious discrimination." Dkt. 67 at 10. But *Bostock* was (like this case) about sexual orientation discrimination—and the Court specifically cited § 702(a) as relevant "in cases like ours." *Id.* at 1753. While Starkey encourages the Court to dismiss this guidance, Dkt. 76 at 3, a lower court "must respect" the Supreme Court's guidance. *See U.S. v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).

Nor is *Bostock* the only recent statement from the Justices recognizing the exemptions' scope. In *Our Lady*, Justices Sotomayor and Ginsburg dissented from the

majority's application of the First Amendment's ministerial exception to "lay teachers" at a Catholic school, in the process invoking Title VII's religious exemptions as an alternative protection for religious schools in employment disputes. *See* 2020 WL 3808420, at *17, *20, *25. In describing the exemptions, the Justices didn't say their applicability turned on whether the plaintiff had characterized his claims as religious discrimination. Instead, Justice Sotomayor wrote that the exemptions "protect a religious entity's ability to make employment decisions—hiring or firing—for religious reasons," *id.* at *17 (Sotomayor, J., dissenting)—precisely the reading the Archdiocese has pressed here. *See also* Tr. of Oral Arg. at 11-12, *Our Lady,* No. 19-267 (May 11, 2020) (Breyer, J.) (similar).[2]

In short, *Bostock* and *Our Lady* confirm what the plain language of Title VII's religious exemptions already shows: that the exemptions apply when the religious employer's decision was based on the employee's religious "belief," "observance," or "practice," 42 U.S.C. § 2000e(j)—regardless of whether the plaintiff styles her claim as one of religious discrimination or not.

C. *Bostock* holds out the ministerial exception as relevant to the Archdiocese's avoidance argument.

Bostock also strengthens the argument for dismissal of this case based on the doctrine of constitutional avoidance. As we have explained (Dkt. 59 at 32-33), the plain-language reading of Title VII and Title IX's religious exemptions would avoid serious conflicts with other "doctrines protecting religious liberty." *Bostock*, 140 S. Ct. at 1754. *Bostock* strengthens this argument by highlighting the ministerial exception, which "bar[s] the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its min-

[2] The majority did not dispute this understanding of Title VII's scope, but rather went further, holding that the First Amendment barred the claims at issue without regard to whether the schools had religious reasons for their actions. *Id.* at *14.

isters.'" *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).

Last week, the Supreme Court further clarified that the ministerial exception bars all claims relating to the "selection and supervision" of educators involved in students' religious formation:

> The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission. Judicial review of the way in which religious schools discharge those responsibilities would undermine the independence of religious institutions in a way that the First Amendment does not tolerate.

Our Lady, 2020 WL 3808420, at *3. As stated in the Complaint, Starkey was the "Co-Director of Guidance" at a Catholic school, and a member of its governing "Administrative Council." Dkt. 1 at ¶¶ 13, 39. As such, her claims raise a serious constitutional question as to whether her leadership at Roncalli related to the "religious … formation" of students, *Our Lady*, 2020 WL 3808420, at *3, such that the First Amendment bars "the application of" Title VII, *Bostock*, 140 S. Ct. at 1754. Interpreting Title VII's religious exemption in accordance with its plain meaning—to cover an employment decision based on an individual's particular religious observances, practices, or beliefs—would avoid deciding the broader constitutional question of the ministerial exception's applicability, as well as the questions regarding the First Amendment's protection of church autonomy and expressive association.[3]

[3] The Court has before it objections to the Magistrate Judge's order denying bifurcation of discovery to first address the ministerial exception and allow for a threshold motion for summary judgment on that issue. *See* Defs.' Objs., Dkt. 42. For the reasons discussed in the briefing on the Motion for Judgment on the Pleadings, no further discovery or court resources are required to resolve this case. But if the Motion for Judgment on the Pleadings is denied, *Our Lady* makes unlikely the Magistrate Judge's conclusion that "it is hard to conclude at this juncture that the applicability of the ministerial exception can be resolved at the summary judgment stage." Or-

As *Catholic Bishop* makes clear, the threshold for avoidance is simply "giv[ing] rise to serious constitutional questions," including in cases involving "the critical and unique role of the teacher in fulfilling the mission of a church-operated school." *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979). After *Bostock*, a failure to apply Title VII and IX's exemptions by their plain terms would give rise to serious questions under the ministerial exception and other First Amendment defenses. *Bostock*, 140 S. Ct. at 1754. Nothing in the text of these exemptions indicates the "clear expression of an affirmative intention of Congress" to limit their application to Starkey's claims. *Catholic Bishop*, 440 U.S. at 504.

CONCLUSION

Bostock confirms that while Title VII permits sexual orientation discrimination claims against secular employers, the Court remains "deeply concerned with preserving the promise of the free exercise of religion." *Bostock*, 140 S. Ct. at 1754. Both that promise and the plain language of Title VII protect the right of a religious school to make employment decisions based on an individual's particular religious belief, observance, or practice. Accordingly, the Archdiocese's Motion for Judgment on the Pleadings should be granted.

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der, Dkt. 40 at 6 (indicating that "unbridled discovery" would be inappropriate if it were "likely" that the exception applied).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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