No. 24-3259

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUBRY MCMAHON,

Plaintiff-Appellee,

v.

WORLD VISION INC.,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON (HON. JAMES L. ROBART)
CASE NO. 2:21-CV-00920-JLR

BRIEF FOR *AMICI CURIAE* MASSACHUSETTS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, VERMONT, WASHINGTON, AND WISCONSIN IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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INTERESTS OF AMICI

The *Amici* States—Massachusetts, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Vermont, Washington, and Wisconsin[1]—share sovereign and compelling interests in protecting workers within our jurisdictions from employment discrimination. States have long been at the forefront of this fight. "[B]y the time Congress passed Title VII to the Civil Rights Act of 1964, nearly two dozen states had already enacted laws mandating equal treatment in employment and engaged in nearly two decades' worth of enforcement efforts." David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972*, 63 Stan. L. Rev. 1071, 1073 (2011). Today, nearly every State has enacted some form of employment discrimination law.[2]

These efforts to level the playing field in the labor market have borne fruit. The Equal Employment Opportunity Commission reports that from 1965 to 2015, participation rates for African-Americans, Hispanics, Asian Americans, American

[1] *Amici* States file as of right under Fed. R. App. P. 29(a)(2).

[2] *See* Iris Hentze and Rebecca Tyus, *Discrimination and Harassment in the Workplace*, National Conference of State Legislatures, https://www.ncsl.org/labor-and-employment/discrimination-and-harassment-in-the-workplace.

Indians/Alaskan Natives, and women improved in most of nine different job categories.[3]

We also share interests in upholding First Amendment rights. We respect and do not seek to abridge the right to hold and express views regarding the nature of marriage, including views founded in religious faith. But Defendant advances extremely broad theories of the First Amendment right of expressive association, church autonomy, and the ministerial exception, which go well beyond existing precedent and threaten our ability to combat employment discrimination. We urge this Court to reject them.

ARGUMENT

Upon learning McMahon was in a same-sex marriage, Defendant rescinded her job offer "because of … sex"—an act of invidious discrimination that federal law forbids. 42 U.S.C. § 2000e-2(a)(1); *see Bostock v. Clayton County*, 590 U.S. 644 (2020); Pl. Br. 6-7. Defendant's claimed constitutional justifications for its action lack merit. With respect to associational rights, the Supreme Court has repeatedly stated that "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it

[3] EEOC, *American Experiences vs. American Expectations* (2015), https://www.eeoc.gov/special-report/american-experiences-versus-american-expectations.

has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973); *see also, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (quoting *Norwood*). The district court thus correctly concluded that the right of expressive association does not apply to Defendant's action. The district court also correctly held that the ministerial exception and so-called "church autonomy doctrine" do not apply given the undisputed facts of this case. *Amici* States urge this Court to affirm.

I. The First Amendment right of expressive association does not apply to the employer-employee relationship at issue in this case.

Defendant's theory of expressive association is astonishing in its breadth and, if accepted, would dramatically constrict the States' ability to enforce employment discrimination laws. In Defendant's view, if it determines that having any particular employee on its payroll would impair its expression, that is sufficient to invoke its First Amendment right "not to associate." Def. Br. 50.

This radical view of expressive associational rights finds no support in the case law of the Supreme Court or this Court—and would wreak havoc on States' ability to ensure that employment opportunities remain open to all. This Court should reject Defendant's effort to weaponize the First Amendment against fair employment practices designed to further the critical goal of equal employment opportunity.

A. Precedent does not support the expansion of expressive association claims to the context of employment.

Defendant's expressive association claim depends on its misapplication of *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to the facts of this case. *See* Def. Br. 50. *Dale*, like every expressive association case preceding it, is about *group membership*, not *employment*—with one exception, *Hishon v. King & Spalding*, in which the Supreme Court unanimously rejected an employer's expressive association claim. 467 U.S. 69, 78 (1984) (dismissing claim that holding law firm liable for sex discrimination in partnership admission "would infringe constitutional rights of expression or association"); *see also Christian Legal Soc. v. Martinez*, 561 U.S. 661, 682 (2010) ("The expressive-association precedents … involved regulations that compelled a *group* to include unwanted *members*, with no choice to opt out." (citing *Dale*, 530 U.S. at 648) (emphasis added)). Review of the relevant cases confirms that *Dale* does not apply here.

The case that coined the phrase "freedom not to associate," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), concerned "members of a private organization," and held that a law "requiring the [organization] to admit women as full voting members" did not infringe that freedom. *Id*. at 612, 626-27. Three years later, *Board of Directors of Rotary International v. Rotary Club of Duarte* again asked whether a state law could require the admission of women to

membership in a private organization; again, it answered yes. 481 U.S. 537, 548 (1987).

The next year, the Court considered "freedom not to associate" in *New York State Club Association v. City of New York*, 487 U.S. 1 (1988) ("*NYSCA*"), in which private clubs challenged New York City's law requiring that membership in most private clubs be open to all. Like *Roberts* and *Rotary International*, *NYSCA* did not concern employment, and also like those cases, it rejected the First Amendment challenge. *Id.* at 11-14. In the course of doing so, the Court recognized that "[i]t may well be that a considerable amount of private or intimate association occurs" in clubs covered by the law, "but that fact alone does not afford the entity as a whole *any constitutional immunity* to practice discrimination *when the government has barred it from doing so*." *Id.* at 12 (emphasis added) (citing *Hishon*, 467 U.S. at 78). Similarly, the Court rejected the notion that "in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *Id.* at 13 (citing *Hishon*, 467 U.S. at 78; *Norwood*, 413 U.S. at 470; *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945)). The citation to *Norwood* reaffirmed that case's declaration that "[i]nvidious private discrimination … has never been accorded affirmative constitutional protections." *Norwood*, 413 U.S. at 470.

NYSCA also declared it "conceivable, of course, that an association might be able to show that … it will not be able to advocate its desired viewpoints nearly as effectively if it cannot *confine its membership* to those who share the same sex, for example, or the same religion." 487 U.S. at 13 (emphasis added). The Court's linkage of an association's expressive purposes with its ability to "confine its membership" emphasized once again that *NYSCA* (like *Roberts* and *Rotary International*) was about the relationship between members, not between employer and employee.

Several years later, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the Court held that a state public accommodations law could not mandate a particular contingent's inclusion in a parade because the parade was "inherent[ly] expressive[]," as was the contingent seeking inclusion. 515 U.S. 557, 568, 570 (1995). Thus, state-mandated inclusion would have "requir[ed]" the sponsors "to alter the expressive content of their parade." *Id.* at 572-73. *Hurley* contrasted the situation before it with *NYSCA*, explaining that there, even though the clubs might have been "engaged in expressive activity[,] compelled access … did not trespass on the organization's message itself," but that "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81. Thus, *Hurley* (like *NYSCA*) allowed

for the possibility that *membership* decisions could implicate expressive associational rights, but never suggested that *employment* decisions could.

That brings us to *Boy Scouts of America v. Dale*—which, like *Roberts*, *Rotary International*, *NYSCA*, and *Hurley* before it, had nothing to do with employment, but rather concerned a private organization's membership and leadership decisions. In *Dale*, the Boy Scouts had "revoked" Dale's "adult membership" together with his "volunteer" position of "assistant scoutmaster," upon learning that he was "an avowed homosexual and gay rights activist." 530 U.S. at 644, 651; *see also id.* at 645 (noting that Dale had received a letter stating "that the Boy Scouts 'specifically forbid *membership* to homosexuals'" (quoting the record appendix) (emphasis added)). The question in the case was whether applying a state antidiscrimination law to the Boy Scouts' membership decision violated their "freedom not to associate"; the Court held that it did. *Id.* at 644. In support of its holding, the Court stated that governmental enforcement of a "'regulation that forces the group to *accept members* it does not desire'" may unconstitutionally burden expressive associational rights. *Id.* at 648 (quoting *Roberts*, 468 U.S. at 623) (emphasis added).

The record in *Dale* was especially clear that the issue was *membership* and *leadership* within the organization, as opposed to employment. For example, the Court looked to a "position statement" declaring that "'[t]he Boy Scouts of

America is a private, membership organization and leadership therein is a privilege and not a right.'" *Id.* at 651-52. A later "position statement" declared that the organization "'do[es] not allow for the registration of avowed homosexuals as *members* or as *leaders*.'" *Id.* (emphasis added). And the record was similarly clear that the Boy Scouts regarded persons in the (volunteer) position of assistant scoutmaster as "leaders" responsible for transmitting the organization's "values." *See, e.g.*, *id.* at 649-50 ("During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values—both expressly and by example.").

In contrast, the Boy Scouts had acknowledged that "'it would be necessary for the Boy Scouts of America to obey'" any law that "'prohibits discrimination against individual's employment upon the basis of homosexuality.'" *Id.* at 672 (Stevens, J., dissenting) (quoting Boy Scouts' position statement in the record appendix). Thus, while the Boy Scouts argued strenuously that the First Amendment guaranteed the organization the right to make any membership and leadership decisions it liked, the Boy Scouts also acknowledged that the organization could lawfully be subjected to state or federal employment discrimination laws—despite its stated view that "homosexual[s]" should be terminated from employment "in the absence of any law to the contrary." *Id.*

In short, *Dale*—like its predecessor cases about group membership—has little to say about the interplay between expressive associational rights and employment discrimination laws. At most, *Dale* suggests that *if* an employment position is *also* a "leadership" position within the organization, then expressive associational rights could be implicated. *See, e.g.*, *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003) (noting that "under any reading of *Dale*" the Boy Scouts' exclusion of "gay activists from leadership positions" would be "constitutionally protected"); *Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Hum. Relations*, 748 N.E.2d 759, 768-69 (Ill. App. 2001) (discussing "nonexpressive positions within [the Boy Scouts] where the presence of a homosexual would not 'derogate from [their] expressive message'" (quoting *Dale*, 530 U.S. at 661)). And even in such a case, the significant differences between employment and group membership would require careful examination in order to determine whether and how expressive associational rights applied.[4]

[4] Commentators from across the ideological spectrum have recognized that employment differs meaningfully from group membership, and that principles applicable in one context do not necessarily carry over to the other. *See, e.g.*, Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225, 260-61 (2013) ("[A] commercial enterprise's hiring and retention of an employee—at least where the employee is not hired specifically to express a message—seems a far cry from an expressive association's decision to admit an individual to membership."); Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 675-76,

(footnote continued)

Defendant's effort to extend the *Roberts-Dale* line of cases mechanically to all employees misreads those cases and should be rejected. *See, e.g.*, *Starkey v. Roman Cath. Archdiocese of Indianapolis, Inc.*, 496 F.Supp.3d 1195, 1209 (S.D. Ind. 2020) ("*Dale* did not arise from the employment context. The plaintiff sought membership in a private organization. The freedom of association cases relied upon in *Dale* reveal the doctrine's applicability to parade groups, political parties, and other non-employment contexts."), *app. dism'd*, No. 20-3265, 2021 WL 9181051 (7th Cir. Jul. 22, 2021).

Defendant's heavy reliance on the lone federal court of appeals case to have applied expressive association to the employment context—*Slattery v. Hochul*, 61 F.4th 278 (2d Cir. 2023), *see* Def. Br. 51-54—does not advance its cause. That case, even if correctly decided on its own peculiar facts,[5] has little relevance here,

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693 (1996) (arguing that "where the alleged exclusion or discrimination in *membership* is the consequence of a sincere religious belief, the exclusion must (outside of a commercial context) be permitted as part of the group's First Amendment free speech right of expressive disassociation," but also that "[f]ew these days would take seriously an *employer's* argument that racially discriminatory employment practices are protected as 'free speech'" (emphasis added)).

[5] *Amici* States do not agree that *Slattery* was correctly decided (among other things, the opinion assumes without analysis that the Supreme Court's expressive association precedents apply to employment, thereby ignoring the significant differences between group membership and employment, *see* Elizabeth Sepper, *The Return of* Boy Scouts of America v. Dale, 68 St. Louis U. L.J. 803, 818-21 (2024)), but need not address its merits in detail here.

where the factual scenario is easily distinguished. The question in *Slattery* was whether New York could prohibit a so-called "crisis pregnancy center," which "discourage[d] abortion and provide[d] pregnant women with ultrasounds, counseling, and information on adoption," and whose operator was "opposed to abortion," from taking adverse employment actions against "employees who, among other things, seek abortions." 61 F.4th at 283-84. The court held that the plaintiff had stated an expressive association claim because "[t]he statute forces [the center] to employ individuals who act or have acted against the very mission of its organization." *Id.* at 288.[6]

Slattery's holding thus distinguishes it from this case. Even if a crisis pregnancy center whose *raison d'etre* is opposition to abortion cannot constitutionally be required to employ counselors who seek or have had abortions, that says nothing about whether a multimillion-dollar global charity whose self-

[6] To similar effect is *Our Lady's Inn v. City of St. Louis*, 349 F.Supp.3d 805 (E.D. Mo. 2018), which, like *Slattery*, involved an expressive association claim brought by a crisis pregnancy center against a ban on discrimination based on an individual's reproductive decisions. For the same reasons discussed in the text as to *Slattery*, *Our Lady's Inn* is distinguishable even assuming *arguendo* that it was correctly decided on its own facts. Also distinguishable is *Darren Peterson Christian Academy v. Roy*, 699 F.Supp.3d 1163 (D. Colo. 2023), which preliminarily concluded—apparently over no opposition by the defendant, *see id.* at 1183—that a school stated an expressive association claim with respect to hiring teachers. Most of the court's analysis on the merits focused on the ministerial exception, *see id.* at 1184; the analysis of *Dale* was unnecessary given the court's conclusion on the ministerial exception and was little more than a cursory afterthought, *id.* at 1184-85.

proclaimed mission is to "partner with children, families, and their communities to reach their full potential by tackling the causes of poverty and injustice," specifically by "[s]erving every child we can – of any faith or none," *see* https://www.worldvision.org/about-us,[7] may lawfully refuse to hire a person who has entered into a same-sex marriage. It hardly needs saying that persons of any sexual orientation may be equally committed to the cause of ending child poverty. Relatedly, Defendant's claim that McMahon's "self-stated goal *in this lawsuit* was to advocate against World Vision's religious standards and render its religious expression illegal," Def. Br. at 53 (emphasis added; quotation marks and alterations omitted), is irrelevant. If McMahon had stated a similar goal during her job application process—i.e., that she intended to advance those goals *as an employee*—that might present a different question.[8] But the mere fact that McMahon seeks redress *in this lawsuit* for the *rescission* of her job offer says nothing about whether, if Defendant had simply followed through on its promise of a job, McMahon as an employee would have affected its expression.

[7] *See also* Def. Br. 5 (describing World Vision's mission as "humanitarian outreach to children and families around the world who are poor and underserved," and noting that "[i]t helps those of any faith or no faith").

[8] Of course, she did no such thing. Pl. Br. 5-6.

B. Courts do not blindly defer to an organization's assessment of when its expressive associational rights are impaired.

Defendant misinterprets *Dale* in arguing that this Court cannot question Defendant's view that employing McMahon would impair its ability to express its opinions regarding homosexuality and same-sex marriage. Def. Br. 57-58. Even in the membership context, *Dale* itself squarely rejected the notion that "an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." 530 U.S. at 653. While *Dale* does indicate that courts "give deference to an association's view of what would impair its expression," *id.*, "deference does not imply … abdication," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). *Dale* accepted the Boy Scouts' view only after independently concluding that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message" that it did not wish to send. 530 U.S. at 653. And *Dale* did not address whether similar "deference" applies at all in the employment context.[9]

[9] Relatedly, in the employment-related context of the ministerial exception, only two Justices have adopted the view that "civil courts" must unquestioningly defer to a religious organization's "good faith" view of who constitutes a minister. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 732, 763 (2020) (Thomas, J., joined by Gorsuch, J., concurring).

The Court further clarified this point in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), in which a group of law schools claimed that a law requiring them to allow military recruiters on their campuses violated their expressive associational rights. The Court rejected the claim, emphasizing the "critical" distinction between *Dale* and situations not involving a law that "force[s]" an organization "'to *accept members* it does not desire.'" *Id.* at 69 (quoting *Dale*, 530 U.S. at 648) (emphasis added). Under *Rumsfeld*, unless outsiders are "trying … to become *members* of the [organization]'s expressive association," *id.* at 69 (emphasis added), associational rights are not implicated—even if the association itself believes otherwise. Thus, the Court explained, "[t]he law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'" *Id.* (quoting *Dale*, 530 U.S. at 653) (emphasis in original; citation omitted). Similarly, here, Defendant *says* that employing McMahon would impair its expression, but under *Rumsfeld*, that is not sufficient where no law is forcing Defendant to accept

McMahon as a "member" or to place her in a leadership position with responsibility for inculcating organizational values.[10]

C. Defendant's theory of expressive association would badly undermine employment discrimination laws.

Amici States are deeply concerned that Defendant's theory of expressive association, if accepted, would hamstring their ability to ensure equal employment opportunity within their jurisdictions. "The right to freedom of association is a right enjoyed by religious and secular groups alike." *Hosanna-Tabor Evan. Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171, 189 (2012). If *any* employer could invoke an "expressive purpose" not to employ certain types of people, and thereby claim exemption from antidiscrimination laws under the "freedom not to associate," the results could be catastrophic and widespread.

This concern is not hypothetical. One federal court recently certified a nationwide class of ordinary businesses—"for-profit entities producing a secular product"—whose leaders do not wish to employ LGBTQ+ individuals, and concluded that all such employers have the expressive associational right to discriminate against LGBTQ+ persons in employment notwithstanding Title VII. *Bear Creek Bible Church v. E.E.O.C.*, 571 F.Supp.3d 571, 600, 615-16 (N.D. Tex. 2021), *vacated in relevant part sub nom. Braidwood Mgmt., Inc. v. E.E.O.C.*, 70

[10] The record in this case shows that McMahon would have had no such responsibility. *See infra* Part II-A.

F.4th 914, 940 (5th Cir. 2023). Although the Fifth Circuit reversed the class certification and resolved the plaintiffs' individual claims on statutory grounds, it is difficult to overstate the threat that the expansive theory of expressive associational rights adopted in *Bear Creek* and similar cases poses to the States' ability to enforce employment discrimination laws.[11] Again, both religious and non-religious groups enjoy expressive associational rights. The reasoning in such cases is therefore not limited to business owners who wish not to employ LGBTQ+ persons for religious reasons; *any* sincerely-held expressive purpose of not wishing to "associate" with *any* type of people would seem to suffice.[12] Under this view, there is nothing to stop a business owner who sincerely believes in white supremacy from invoking his "freedom not to associate" in refusing to hire Black employees. Defendant's theory of expressive association thus threatens to make a mockery of employment discrimination laws by rendering them unenforceable in precisely the situations where they are most needed.

[11] *See* Sepper, *supra* n.5, at 815-21 (summarizing recent cases).

[12] Indeed, most expressive association cases have involved claims based not on religion, but rather on a claimed secular "expressive purpose" that requires excluding certain kinds of people from group membership. *See, e.g.*, *Dale*, 530 U.S. at 654; *Roberts*, 468 U.S. at 628.

D. Employment discrimination laws satisfy strict scrutiny.

Even if the employment relationship at issue here implicates the right to expressive association, Title VII and similar laws forbidding employment discrimination on the basis of sex and other protected characteristics pass constitutional muster. Infringements upon the right to expressive association are justified where they "serve compelling state interests[] unrelated to the suppression of ideas" and where that interest cannot be vindicated "through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. That standard is easily met here.

1. Governments' interest in eliminating employment discrimination is compelling, and Title VII and similar statutes are narrowly tailored to that goal.

This Court has repeatedly recognized that federal and state governments have a compelling interest in prohibiting employment discrimination: "[b]y enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a 'highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions." *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (citations omitted), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957, 960 (9th Cir. 1991); *accord E.E.O.C. v. Fremont*

Christian School, 781 F.2d 1362, 1368-69 (9th Cir. 1986). So have numerous other circuits. *See, e.g.*, *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591 & n.12 (6th Cir. 2018) (noting EEOC's "compelling interest in combating discrimination in the workforce"; collecting cases), *aff'd*, *Bostock v. Clayton County,* 590 U.S. 644 (2020); *E.E.O.C. v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000) (noting "the profound state interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin" (citation and internal quotation marks omitted)); *E.E.O.C. v. Mississippi Coll.*, 626 F.2d 477, 488 (5th Cir. 1980) ("[T]he government has a compelling interest in eradicating discrimination in all forms.").

This universally recognized governmental interest in combating employment discrimination is grounded in the "grave harm" such discrimination creates for both individuals and the marketplace. *United States v. Burke*, 504 U.S. 229, 238 (1992). For individuals, employment discrimination "depriv[es an affected employee or applicant] of her livelihood and harm[s] her sense of self-worth." *Harris Funeral*, 884 F.3d at 592. Congress has noted that employment discrimination leads to "humiliation; loss of dignity; psychological (and sometimes physical) injury; resulting medical expenses; damage to the victim's professional reputation and career; loss of all forms of compensation and other consequential injuries." H. Rep. 102-40, 1991 U.S.C.C.A.N. 549, 603 (Apr. 24, 1991). But laws

prohibiting employment discrimination serve "societal as well as personal interests." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Left unchecked, racially discriminatory employment practices "foster[] racially stratified job environments to the disadvantage of minority citizens"; the same is true of sex discrimination. *Id.* at 800.

Unfortunately, in the States' experience, "workplace discrimination remains a pervasive problem."[13] Over 60% of American workers report that they have experienced or witnessed discrimination in the workplace based on race, age, gender, or LGBTQ+ status.[14] Research indicates that Black workers experience higher unemployment and underemployment rates than white workers across education levels.[15] Similarly, studies report a substantial wage gap between men

[13] Desta Fekedulegn *et al.*, *Prevalence of workplace discrimination and mistreatment in a national sample of older U.S. workers: The REGARDS cohort study*, SSM – Population Health vol. 8 (2019), at 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6612926/pdf/main.pdf.

[14] Amy Elisa Jackson, *New Study: 3 in 5 U.S. Employees Have Witnessed or Experienced Discrimination*, Glassdoor (Oct. 23, 2019), https://www.glassdoor.com/blog/new-study-discrimination/.

[15] Valerie Wilson & William Darity Jr., *Understanding Black-White Disparities in Labor Market Outcomes Requires Models That Account for Persistent Discrimination and Unequal Bargaining Power*, Econ. Pol'y Inst. (Mar. 25, 2022), at 5, https://files.epi.org/uploads/215219.pdf.

and women,[16] especially for some women of color.[17] And nearly a quarter of LGBQ workers in a recent survey reported having suffered adverse treatment at work because of their sexual orientation or gender identity within the last five years—a figure that nearly doubles for transgender and nonbinary workers.[18]

As for tailoring, the Supreme Court has observed that prohibitions on "discrimination in hiring" are "precisely tailored to achieve" the government's interest in "providing an equal opportunity to participate in the workforce." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014); *see also Roberts*, 468 U.S. at 628-29. Just so here.

2. Defendant's arguments that strict scrutiny is not satisfied fail.

Defendant's claim that the government does not have a "compelling interest in forcing [it] to rely on vocal religious dissenters to serve as the 'voice, face, and heart' of its religious message," Def. Br. 54, flips the compelling interest test on its

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[16] U.S. Bureau of Labor Statistics, *Highlights of Women's Earnings in 2023*, at 1 (Aug. 2024), https://www.bls.gov/opub/reports/womens-earnings/2023/home.htm.

[17] Institute for Women's Policy Research, *The 2023 Weekly Gender Wage Gap by Race, Ethnicity, and Occupation*, at 7 (Mar. 2024), https://iwpr.org/wp-content/uploads/2024/03/Occupational-Wage-Gap-2024-Fact-Sheet-1.pdf.

[18] Brad Sears et al., *LGBTQ People's Experiences of Workplace Discrimination and Harassment*, Williams Institute, at 13-15 (Aug. 2024), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Aug-2024.pdf.

head. The question is not whether the government has "an interest in disturbing a company's workplace policies" or "in requiring … organizations to act in a way that conflicted with their religious practice," *Harris Funeral*, 884 F.3d at 591, but whether the government has a compelling interest that *justifies* a regulation affecting such policies and practices. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (rejecting argument that "take[s] the *effect* of the statute and posit[s] that effect as the State's interest" (emphasis original)). By conflating the effects of a statute with the interest giving rise to the statute in the first place, Defendant attempts to transform the compelling interest test into a tautology that can never be satisfied. The ample case law (*supra* Part I-D-1) recognizing and defining the compelling interest served by Title VII and its ilk—namely, fighting employment discrimination—refutes this sleight of hand.

Defendant also misconstrues both law and history in suggesting that Title VII's exemptions render the law so underinclusive that the interest it protects cannot be compelling. Def. Br. 54-56. On the law, Defendant again ignores the many cases (including from this Court) finding that Title VII *does* serve a compelling interest, even though the exemptions Defendant discusses have long been part of the statute, with many dating to the statute's inception. *See supra* Part I-D-1. And the history of Title VII underscores Congress's view that fighting

employment discrimination is a compelling interest. The fifteen-employee threshold, for instance—originally set at twenty-five employees, *see* Pub. L. 88-352, § 701(b), 78 Stat. 253—was intended to ensure that covered employers fell within Congress's authority to regulate interstate commerce. H. Rep. 88-914, 1964 U.S.C.C.A.N. 2391, 2475 (Nov. 20, 1963) (statement of Reps. Poff and Cramer); *see also* Burke Marshall Personal Papers, *Civil Rights Act of 1964: Legislative history and scope of H.R. 7152: Title VII*, at 28 ("It is hard to imagine many businesses employing 25 or more persons which cannot plausibly be said to affect commerce within the meaning of Title VII."), https://www.jfklibrary.org/asset-viewer/archives/BMPP/029/BMPP-029-010. So, unlike *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, where the limitations of the statute in question were "designed to persecute or oppress a religion or its practices," 508 U.S. 520, 547 (1993), Title VII's employer-size requirements represent Congress's effort to ensure that the statute was constitutionally sound. Congress's cognizance of its constitutional constraints—and its steps to ensure that a historic effort to combat widespread discrimination would be upheld—cannot undermine the compelling interests animating Title VII.

II. Neither the ministerial exception nor the "church autonomy doctrine" bars McMahon's claims.

Defendant's expansive interpretations of the ministerial exception and church autonomy are, for the reasons explained below, wrong. Moreover, they

would render large categories of employment decisions completely exempt from antidiscrimination laws—unlike infringements on the right of expressive association, which can be justified under strict scrutiny, *see supra* Part I-D. The near-total withdrawal of the crucial protection of employment discrimination laws from the thousands of people employed by religious organizations in both ministerial and non-ministerial capacities, as Defendant would have it, would effectively confer upon religious organizations the broad immunity that the Supreme Court specifically denied them. *Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. 723, 746 (2020) ("This does not mean that religious institutions enjoy a general immunity from secular laws…."). And it would inflict enormous harm on American workers, and on *Amici* States' efforts to ensure equal employment opportunity, as discussed *supra* Parts I-C and I-D.

A. The ministerial exception does not apply.

The ministerial exception does not protect Defendant's decision to rescind its offer to employ McMahon as a customer service representative. That exception exists to safeguard a religious institution's independence in selecting individuals to fill "certain key roles" from potential liability under Title VII and other employment discrimination laws. *Our Lady*, 591 U.S. at 746; *see also id.* (ministerial exception applies to "certain important positions"). This carve-out from liability serves to "protect [religious institutions'] autonomy with respect to

internal management decisions that are essential to the institution's central mission." *Id.* Determining whether a religious institution may invoke the exception is a highly context-dependent inquiry that, "at bottom," hinges on "what an employee does." *Id.* at 753.

Looking at what McMahon would have done had her job offer not been rescinded makes clear that the ministerial exception does not apply here. The bulk of the responsibilities listed in the job description for the customer service role McMahon was offered are secular, requiring no particular religious training, commissioning, or education. *See McMahon v. World Vision, Inc.*, 704 F.Supp.3d 1121, 1127 (W.D. Wash. 2023); *see also id.* at 1137 (deposition testimony from Defendant's representative that training for position is not a religious commissioning). And the few responsibilities of the position that *do* implicate religion are, by Defendant's own admission, shared by every one of its many employees.[19] *See id.* at 1138; Pl. Br. 7, 24-25; *see also* Our Work, *World Vision* (boasting 34,000 staff across 100 countries), http://www.worldvision.org/our-work.

[19] The sole exception is praying with donors. But it is undisputed that such prayer is optional (the job description tells applicants they can pray with donors "if comfortable"), and that failure to do so does not result in discipline or termination. *McMahon*, 704 F.Supp.3d at 1138-39. Because the ministerial exception focuses on whether an individual's "core responsibilities" further the religious employer's mission, *see Our Lady*, 591 U.S. at 757, the district court was right to hold that the optional donor prayer role performed by some customer service representatives at World Vision does not render the ministerial exception applicable.

The universality of these religious expectations defeats Defendant's invocation of the ministerial exception. The touchstone of the analysis is "whether *each particular position* implicate[s] the fundamental purpose of the ministerial exception," because the exception protects only "certain key roles" or "certain important positions." *Our Lady*, 591 U.S. at 746, 758 (emphasis added). "The ministerial exception remains just that—an exception—and each case must be judged on its own facts to determine whether a 'particular position' falls within the exception's scope." *Billard v. Charlotte Catholic H.S.*, 101 F.4th 316, 333 (4th Cir. 2024) (quoting *Our Lady*, 591 U.S. at 758); *see also DeWeese-Boyd v. Gordon College*, 163 N.E.3d 1000, 1017 (Mass. 2021) (rejecting Christian college's effort to exempt "all its employees" from state antidiscrimination law as a "significant expansion of the ministerial exception well beyond" existing doctrine); *cf. Schmidt v. Univ. of Northwestern-St. Paul*, No. 23-2199, 2024 WL 477166, at *4-5 (D. Minn. Feb. 7, 2024) (denying motion to dismiss based on ministerial exception where defendant college pointed to doctrinal affirmation required of all applicants, students, and employees, pending further factual development about plaintiff's specific role).

Defendant protests that if religious expectations across an entire institution are insufficient to invoke the ministerial exception, then religious communities like convents—where every devotee holds a religious role—would fall outside the

exception's scope. Def. Br. 31. But this ignores the Supreme Court's admonition to "take all relevant circumstances into account." *Our Lady*, 591 U.S. at 758. Context matters, and the religious responsibilities of nuns in a convent say nothing about whether the ministerial exception can apply to every position at a large company. As the district court correctly recognized, "[a]pplying the ministerial exception to the principally administrative customer service representative position would expand the exception beyond its intended scope, erasing any distinction between roles with mere religious components and those with 'key' ministerial responsibilities." 704 F.Supp.3d 1139-40 (quoting *Our Lady*, 591 U.S. at 746); *see also Schmidt*, 2024 WL 477166 at *4-5 (declining "to expand the definition of ministerial to what the Defendants are suggesting" based on requirement that all employees affirm "Doctrinal Statement and Declaration of Christian Community").

B. The "church autonomy doctrine" does not apply.

Defendant and its *amici* also err in positing that the so-called "church autonomy doctrine" affords a religious employer broader protection from antidiscrimination laws than does the ministerial exception. The ministerial exception is a "component" of religious institutions' "autonomy." *Our Lady*, 591 U.S. at 746. Other such components include the control of church property, *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); and internal matters of

church discipline and governance, *see Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

In the employer-employee context, however, the Supreme Court has never extended religious institutions' "autonomy" beyond the ministerial exception. Justice Alito has explained that "[r]eligious autonomy *means* that religious authorities must be free to determine who is qualified to serve in positions of *substantial* religious importance." *Hosanna-Tabor*, 565 U.S. at 200 (concurring opinion) (emphasis added); *see also Gordon College v. DeWeese-Boyd*, 142 S.Ct. 952, 954 (2022) (statement of Alito, J.) ("In *Our Lady of Guadalupe School*, we explained that the 'ministerial exception' protects the 'autonomy' of 'churches and other religious institutions' in the selection of the employees who 'play *certain key roles*.' (quoting *Our Lady*, 591 U.S. at 746) (emphasis added)); *cf. Hosanna-Tabor*, 565 U.S. at 204 (Alito, J., concurring) (noting that "a purely secular teacher would not qualify for the 'ministerial' exception" at a religious school). Defendant's contrary assertion that its autonomy "includes decisions about the religious qualifications for membership *or employment* in a religious community," Def. Br. 34 (emphasis added)—an assertion lacking citation to any authority—"would render the ministerial exception superfluous," *Starkey*, 496 F.Supp.3d at 1206 (rejecting position "that the overarching principle of religious autonomy bars

employment discrimination claims arising from a religious employer's application of religious doctrine regardless of whether the employee qualifies as a minister").

Indeed, "[i]f … religious autonomy protects employment decisions regardless of whether the position was religious or secular, it is not clear why the Supreme Court reaffirmed the ministerial exception's narrow application to only those employees who have responsibilities 'that lie at the very core of the mission of a [religious employer].'" *Id.* at 1207 (quoting *Our Lady*, 591 U.S. at 754). In *Hosanna-Tabor*, for example, the plaintiff had been discharged because "her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally." 565 U.S. at 180. That conduct fits squarely within Defendant's claimed authority to fire (or refuse to hire) anyone—ministerial or not—who does not abide by the organization's beliefs. Def. Br. 34. Yet, rather than simply upholding the plaintiff's discharge based on "autonomy," *Hosanna-Tabor* carefully examined "all the circumstances of [the plaintiff's] employment," 565 U.S. at 190-94, ultimately concluding that she "was a minister within the meaning of the exception," *id.* at 194.

Montana's heavy reliance on *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002), *see* Montana Br. 6, 10-12, is misplaced. There, an employee and a non-employee claimed sexual harassment by the church, so the case focused not on the church's prerogatives as an employer, but rather on

"the First Amendment rights of the church to discuss church doctrine and policy freely." 289 F.3d at 658.[20] *Bryce*'s holding that a church may not be held liable for sexual harassment based on statements—i.e., speech—made in the course of "an internal ecclesiastical dispute and dialogue" on homosexuality, *id.* at 659, has little relevance to the question whether this Defendant may escape liability for refusing to hire a non-ministerial employee for a discriminatory reason.

CONCLUSION

The judgment below should be affirmed.

[20] Moreover, *Bryce* predates *Hosanna-Tabor*, and therefore the *Bryce* court did not have the benefit of the Supreme Court's adoption of the ministerial exception (and in *Bryce*, the plaintiff-employee—the church's "Youth Minister"—seems clearly to fall within that exception, *see* 289 F.3d at 651).

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Dated: October 28, 2024

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