

LEGAL ISSUES

# Firing of gay Catholic school teacher could test latest Supreme Court ruling



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When Lonnie Billard announced on Facebook in October 2014 that he was engaged to his partner of 14 years, he knew not everyone in his social circles would celebrate the news. Same-sex marriage had only been legal in his home state of North Carolina for two weeks.

“If you don’t agree with this,” he wrote, “keep it to yourself.”

He received only congratulations in reply. But two months later, while the substitute teacher and his fiancé were celebrating Christmas with one of his colleagues at Charlotte Catholic High School, Billard mentioned that he hadn’t heard from the school about filling in during her post-holiday vacation.

That’s when Billard learned he was no longer being employed by the Catholic school because he was marrying a man. Billard sued the school for sex discrimination and won in 2021. That decision is being challenged by a nonprofit firm involved in multiple high-profile fights on behalf of religious conservatives, which says last month’s U.S. Supreme Court decision [in favor of a web designer](#) who did not want to work for gay couples bolsters its case.

The fight in the U.S. Court of Appeals for the 4th Circuit in Richmond is an early test of how that major Supreme Court decision pitting free speech against anti-discrimination laws will play out beyond the hypothetical situation in that case, which involved a plaintiff who had never actually made wedding websites or been asked to do so by a gay person.

“If the First Amendment protects a business’s decision about which services to offer the public, it ... protects a church’s decision about who is religiously qualified to fulfill the mission of a religious school,” the Becket Fund for Religious Liberty wrote in a letter to the U.S. Court of Appeals for the 4th Circuit on June 30, the day the Supreme Court decision was issued. The court had already delayed Billard’s case for that decision; oral argument is now being scheduled for September.

Luke Goodrich, who is litigating the case for the Becket Fund, says it was the first time the group cited the Supreme Court decision known as *303 Creative*.

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(Chloe Cushman for The Washington Post)

“There’s a long series of Supreme Court decisions protecting religious freedom and freedom of speech in various contexts,” he said. “‘303 Creative’ just feeds in to that.”

A week after the filing in Billard’s case, the Becket Fund argued to the U.S. Court of Appeals for the 7th Circuit in Chicago that *303 Creative* also bolsters its case against a guidance counselor fired by an Indianapolis Catholic school.

The Supreme Court has already ruled that discrimination laws don’t apply to employees of a religious institution who engage in ministerial work — even if they have other duties as well. The Becket Fund was also involved in that litigation. But Charlotte Catholic has not argued that Billard’s job was ministerial. He had been a drama teacher for a decade before becoming a substitute in retirement. While classes began with a prayer, the teacher did not have to lead it, according to the court record; secular teachers at the school do not have to be Catholic and were discouraged from engaging students on theology.

Instead of arguing for the “ministerial exception,” Becket is arguing that a religious school’s employment choices are “expressive association” protected by the First Amendment, just as Colorado web designer Lorie Smith successfully argued that she has the right to choose which marriages to celebrate with her work. In both the North Carolina and Indiana cases, Becket says *303 Creative* undermines the argument that the expressive association protections don’t apply to commercial transactions.

Liberals on the Supreme Court warned against the possibility of *303 Creative* being applied to employment. “The potential implications of the Court’s logic are deeply troubling,” Justice Sonia Sotomayor wrote, suggesting a law firm refuse female partners on the grounds of speech. Justice Neil M. Gorsuch, in his majority opinion, called those concerns “pure fiction.”

The American Civil Liberties Union, which is litigating Billard’s case, referenced that comment as showing that the decision has no applicability in Billard’s lawsuit. “The Court rejected the dissent’s assertion that its decision opened the door to discrimination in employment,” ACLU attorney Josh Block wrote in a reply to Becket’s letter.

But the examples raised in the Supreme Court did not include a religious organization or a gay employee, and Gorsuch repeatedly invoked a 2000 decision allowing the Boy Scouts to expel a gay volunteer on “expressive association” grounds. That line of reasoning had not been extended to paid employees by an appellate court until this year, when a panel of Trump appointees on the U.S. Court of Appeals for the 2nd Circuit ruled that an antiabortion nonprofit had a First Amendment right to fire employees who have abortions or engage in extramarital sex.

The ACLU called that decision “radical” and “destabilizing” and said *303 Creative* cuts in their favor. Based on stipulations in the case, the Supreme Court found that Smith’s web design work was “pure speech,” which has the most protection under the First Amendment. Here, the ACLU argues that an employer-employee relationship is not an expressive association and there is at most an incidental impact on the Church’s expression of its values. The district court judge who ruled in Billard’s favor said the church’s argument was “preposterous” in how it would upend employment law.

The Catholic school is also arguing that another exception to federal anti-discrimination law, which lets religious organizations hire exclusively “individuals of a particular religion,” allows for broader discrimination against anyone who doesn’t adhere to the group’s religious beliefs. A district court in Texas has agreed with that interpretation; the same court ruled that for-profit businesses run by religious people can similarly discriminate under the Religious Freedom Restoration Act of 1993 (RFRA), which prohibits “substantially burdening” someone’s exercise of religion unless it is the only way to advance a “compelling government interest.”

Goodrich argued the Supreme Court’s decision in 2020 that sex discrimination includes sexuality and gender identity — also written by Gorsuch — set up an untenable conflict that must be resolved by allowing exemptions for religious groups that do not accept same-sex marriage or gender nonconformity, whether under the First Amendment, exceptions to federal civil rights law or RFRA.

“We all said that thousands of religious organizations all across the country ask their employees to uphold their traditional view of marriage in word and deed, and if you interpret the statute that way, it’s going to unleash lots of lawsuits against them,” Goodrich said.

While the Supreme Court has specifically said preventing racial discrimination is a compelling government interest that justifies restricting First Amendment freedoms, he noted that the Supreme Court has rejected such a finding on discrimination against gay or transgender people. In his 2020 opinion, Gorsuch wrote that “how ... doctrines protecting religious liberty interact with” the decision “are questions for future cases.”

Ira Lupu, a professor at George Washington University Law School who studies First Amendment-related religious jurisprudence, is skeptical that the Supreme Court would take a position that would imperil thousands of secular employees at faith-based institutions.

“The very fact that he is in a same-sex marriage and that he’s identified that on Facebook, not on campus, not in his job — you cannot attribute that expression to the school,” he said.

It would be different, he said, if the employee was vocally opposing Catholic doctrine on same-sex marriage on the job, which might “compromise the mission” of the school, Lupu said. He says the Supreme Court is “interested in protecting” religious organizations that oust such employees. “But cleansing their ranks of everyone who is LGBT is way more than just protecting their mission.”

## **CLARIFICATION**

This story has been updated to clarify a description of the Becket Fund.