No. 24-3259

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

World Vision, Inc.,

Defendant-Appellant,

v.

Aubry McMahon,

Plaintiff-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:21-cv-00920
Hon. James L. Robart

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON IN SUPPORT OF PLAINTIFF–APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, *Amici Curiae* state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Washington ("ACLU of WA") is one of the ACLU's statewide affiliates with over 120,000 members and supporters. As organizations that advocate for religious freedom and free speech, as well as equal rights for people of different faiths, genders, sexual orientation, and races, among others, the ACLU and the ACLU of WA have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws.

The ACLU and ACLU of WA have appeared as direct counsel or *amicus* in many cases nationwide involving religious liberties and

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[1] Under Fed. R. App. P. 29(a)(2), the ACLU and ACLU of WA submit this brief without an accompanying motion for leave to file because all parties have consented to its filing. Under Fed. R. App. P. 29(a)(4)(E), *Amici* state that: (i) neither party's counsel authored the brief in whole or in part; (ii) neither party, nor their counsel, contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than *Amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

equality. *See*, *e.g.*, *State v. Arlene's Flowers, Inc.*, 193 Wash. 2d 469 (2019) (en banc), *petition for cert. denied*, 141 S. Ct. 2884 (2021) (counsel); *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (counsel); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018) (counsel); *Olympus Spa v. Armstrong*, No. 23-4031 (9th. Cir. appeal docketed Dec. 8, 2023) (amicus); *Mahmoud v. McKnight*, 102 F.4th 191 (4th Cir. 2024), *petition for cert. filed*, (U.S. Sep. 16, 2024) (No. 24-297) (amicus); *Fitzgerald v. Roncalli High Sch., Inc.*, 73 F.4th 529 (7th Cir. 2023) (amicus).

INTRODUCTION

This case is about whether a religiously affiliated nonprofit organization can refuse to hire a gay woman for a non-ministerial position because of a policy that facially discriminates against LGBTQ people. It cannot.

In November 2020, Plaintiff-Appellee Aubry McMahon (hereinafter "McMahon") applied for a Donor Customer Service Representative position at Defendant-Appellant World Vision, Inc., ("World Vision"), a religiously affiliated nonprofit organization that provides humanitarian aid to combat hunger and poverty. The Donor Customer Service Representative position requires individuals to "acquire and maintain donor relationships through basic inbound and outbound calls." 1-ER-12. Donor Customer Service Representatives are not required to have any formal religious educational training. 1-ER-14.

In January 2021, World Vision extended McMahon a written offer for the Donor Customer Service Representative position. She accepted. A few days later, McMahon emailed a World Vision representative to inquire about World Vision's parental leave policy as she and her spouse were expecting a baby in March. Upon learning that McMahon

is a woman married to a person of the same sex, World Vision rescinded her job offer, citing its Standard of Conduct, a facially discriminatory policy that prohibits World Vision employees from engaging in "sexual conduct outside the Biblical covenant of marriage between a man and a woman." 1-ER-11.

In July 2021, McMahon filed the instant action alleging that World Vision unlawfully discriminated against her on the basis of sex, sexual orientation, and/or marital status in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), Pub. L. No. 88-352, 78 Stat. 255, (codified as amended 42 U.S.C. §§ 2000e–e17), and the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.10–530 (West 2020).

In June 2023, the district court granted World Vision's motion for summary judgment and denied McMahon's motion for partial summary judgment on the grounds that the "church autonomy" doctrine bars McMahon's employment discrimination claims. 1-ER-97–98. McMahon moved for reconsideration, arguing that the court erred by holding that the "church autonomy" doctrine bars the claims of a non-ministerial employee who was terminated pursuant to a facially discriminatory

employment policy. The court granted McMahon's motion. 1-ER-70. On reconsideration, the court agreed with McMahon's argument that World Vision's actions constituted *per se* intentional discrimination and held that the "church autonomy" doctrine does not preclude review of her employment discrimination claims. 1-ER-68–70. In July 2023, the parties filed renewed cross-motions for summary judgment.

On November 28, 2023, the district court granted McMahon's motion for partial summary judgment and denied World Vision's motion for summary judgment. The court held that World Vision discriminated on the basis of sex, sexual orientation, and marital status when it rescinded McMahon's job offer because she is married to a person of the same sex. The court rejected World Vision's affirmative defenses—including Title VII's religious employer exemption, the First Amendment's ministerial exception, and the freedom of association—and held that World Vision is liable for sex and sexual orientation discrimination under Title VII and the WLAD, as well as marital status discrimination under the WLAD. 1-ER-51–52.

World Vision filed a Notice of Appeal.

SUMMARY OF ARGUMENT

Amici agree with McMahon and the district court's decision that World Vision violated Title VII and the WLAD when it rescinded McMahon's employment offer because of her sex, sexual orientation, and/or marital status. 1-ER-51–52. *Amici* write separately to emphasize five points.

First, the district court correctly rejected World Vision's argument that Section 702 of Title VII immunizes religious employers from *all* claims of discrimination—including sex discrimination. On its face, Section 702 only exempts religious employers "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." 42 U.S.C. § 2000e-1(a). It does not provide for a similar exemption with respect to employment of individuals of a particular race, color, sex, or national origin; nor does it bar plaintiffs from bringing claims for "discriminat[ion] . . . with respect to . . . employment, because of such individual's race, color, . . . sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

Second, the district court properly held that the WLAD's religious organization exemption does not shield World Vision from liability here. 1-ER-29. The WLAD is a neutral and generally applicable antidiscrimination law that prohibits employers from refusing to hire or to discharge any person because of "age, sex, marital status, [or] sexual orientation. . . ." Wash. Rev. Code § 49.60.180. The WLAD's religious organization exemption bars review only where the employee was a minister—which McMahon was not.

Third, *Amici* urge this court to reject World Vision's "church autonomy" argument, which if accepted, would allow religious employers to discriminate against their employees for any reason, completely bypassing Title VII liability.

Fourth, the district court properly held that World Vision does not have an expressive association right to discriminate against non-ministerial employees based on sex. The Supreme Court has never recognized such a right and neither should this Court.

Fifth, should this Court accept World Vision's affirmative defenses, it would have radical, destabilizing consequences for employment protections. Not only would this affect the roughly 1.5

million people working at religious institutions, but it would pave the way for religious employers to discriminate based on all protected classes.

For these reasons, *Amici* urge this Court to affirm the district court's decision.

ARGUMENT

I. Title VII's Exemptions Do Not Provide A Defense For Policies Or Practices That Discriminate Based On Race, Color, Sex, Or National Origin.

A. Section 702 of Title VII exempts religious employers from religious discrimination claims only.

The district court correctly found that Section 702 only immunizes religious employers from *religious discrimination* claims. 1-ER-27. Title VII prohibits discrimination "against any individual with respect to . . . employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1). Section 702(a) of Title VII carves out a limited exception for religious organizations "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities." 42 U.S.C. § 2000e-1(a). The plain language of Section 702 "exempts religious organizations from Title VII's prohibition against

discrimination in employment on the basis of religion." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (1987). It does not provide a similar exemption for religious organizations with respect to employment of individuals based on the individual's race, color, sex, or national origin.

Every circuit, including this circuit, agrees: The religious employer exemption "merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with *religious discrimination*. Title VII still applies, however, to a religious institution charged with sex discrimination." *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (emphasis added); *accord Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993); *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) ("*Pacific Press*"), *abrogated on other grounds as recognized by Alcazar v. Corp. of Cath. Archbishop of Seattle*, 598 F.3d 668 (9th Cir. 2010); *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

These settled principles are consistent with Title VII's legislative history and purpose. Congress repeatedly rejected proposals to expand the religious organization exemption beyond claims for religious discrimination. The original 1964 bill passed by the House of Representatives would have provided a complete exemption for religious organizations, but the Senate replaced it with a narrower exemption limited to the employment of individuals of a particular religion. *See* EEOC, Legislative History of Titles VII and IX of Civil Rights Act of 1964 at 1004, 3004, 3017 (1968). In 1972, Congress expanded Section 702 to cover all of a religious organization's activities (not merely its religious ones) but rejected an amendment that would have covered all types of discrimination (not merely discrimination based on religion). *See EEOC v. Pac. Press Publ'g Ass'n*, 482 F. Supp. 1291, 1304 (N.D. Cal. 1979) (collecting legislative history), *aff'd,* 676 F.2d 1272 (9th Cir. 1982).

II. World Vision's Broad Misreading Of Section 702 Contradicts Its Text, Interpretation, And Prior Precedent.

Not only does World Vision misinterpret the text of Title VII, but it wholly misapprehends prior precedent. Title VII's text and

interpretation confirm that the statute does not authorize organizations to use religious beliefs to discriminate against their entire secular workforce based on race, color, sex, or national origin.

A. Title VII's text supports McMahon's claims.

In a gross misreading of Title VII, World Vision claims that Section 702 exempts religious organizations from the entire "subchapter" of Title VII—including race, color, sex, and national origin discrimination. Opening Br. 44 (quoting 42 U.S.C. §§ 2000e-1(a)). World Vision argues that religious employers may discriminate based on an employee's race, color, sex, or national origin so long as the decision is grounded in "religion," which includes "all aspects of religious observance and practice, as well as belief. . . ." 42 U.S.C. § 2000e(j); Opening Br. 44.

World Vision's textual argument fails for two reasons. First, contrary to World Vision's claims,[2] Title VII prohibits discrimination

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[2] World Vision also cites *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir. 2019), to support its novel theory that Section 702 applies to all discrimination claims. However, World Vision's reliance is mistaken. In *Garcia*, this Court only considered the narrow issue of whether Section 702 applies to retaliation and hostile work environment claims. *Id.* It did not consider whether Section 702 applies to all claims of Title VII discrimination.

"because of [an] *individual's* race, color, religion, sex, or national origin"—not because of the employer's motivations. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Section 702 tracks that phrasing by carving out an exception "with respect to the employment of individuals of a particular religion to perform work connected with . . . its activities." 42 U.S.C. § 2000e-1(a). Both provisions focus on the attributes of the "individual," not the employer.

Thus, the definition of "religion" in 42 U.S.C. § 2000e(j) upon which World Vision relies simply indicates that protections from religious discrimination include the right to reasonable accommodations for an individual employee's religious practice. It does not provide religious organizations with new rights to use their own religious beliefs to discriminate based on an employee's race, color, sex, or national origin. After all, the relevant religion referred to in Section 702 is the religion of the "individual," not the religion of the employer.

Second, World Vision fails to identify any text in Section 702 referring to the *employer's* religious motivations. In other antidiscrimination statutes, Congress has provided religious organizations exemptions based on the organization's "religious tenets."

See e.g., Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(3); Americans with Disabilities Act of 1990 § 103, 42 U.S.C. § 12113(d)(2). But Congress did not include the same language in Title VII. "[W]here Congress knows how to say something but chooses not to, its silence is controlling." *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 862 (11th Cir. 2007) (citation omitted).

Put simply, the text of Section 702 supports McMahon—not World Vision. Regardless of World Vision's religious motivations, Section 702 does not shield it from liability.

B. Title VII's interpretation supports McMahon's claims.

Contrary to World Vision's claims, no circuit court has ever held that Section 702 allows employers to engage in religiously motivated discrimination based on race, color, sex, or national origin. Opening Br. 45–46; *see Boyd*, 88 F.3d at 413; *Kennedy*, 657 F.3d at 192; *DeMarco*, 4 F.3d at 173; *Pac. Press Publ'g Ass'n*, 676 F.2d at 1276. World Vision relies on two Ninth Circuit cases—*Pacific Press* and *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986)—and a non-controlling Third Circuit case, *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130 (3d Cir. 2006), to support its novel theory that Section 702 applies to all claims of religiously motivated discrimination.

In *Pacific Press*, this Court held that a publishing house affiliated with the Seventh-day Adventist Church could not fire an employee for filing a charge of sex discrimination with the EEOC, even though the employee had violated church doctrine that prohibits lawsuits by members against the church. 676 F.2d at 1276–77, 1280. In reaching its decision, this Court recognized that "although Congress permitted religious organizations to discriminate in favor of members of their faith, religious employers are not immune from liability for discrimination based on race, sex, [or] national origin. . . ." *Id.* at 1276.

Likewise, in *Fremont Christian School*, this Court held that a religious school could not enforce the religious belief that men should be the head of the household by paying health benefits to married men but not to married women. 781 F.2d at 1365–67. Again, this Court acknowledged that "the language and legislative history of Title VII . . . indicate that the statute exempts religious institutions only to a narrow extent." *Id.* at 1366. It does not, as World Vision contends, shield religious employers from sex discrimination claims.

Further, in *Curay-Cramer*, the Third Circuit considered whether a school violated Title VII when it fired a teacher for including her name

on a political advertisement supporting *Roe v. Wade*. *See* 450 F.3d at 132. Although firing teachers for engaging in abortion rights advocacy is not sex discrimination in and of itself, the employee alleged that the school engaged in sex discrimination by punishing women more harshly for publicly supporting abortion than it would have punished men who opposed religious teachings on different issues (such as the Iraq War). *See id*. at 139. The Third Circuit rejected that argument because the plaintiff's theory required the court to balance the relative importance of different religious doctrines, which would force the court to answer an ecclesiastical question in violation of constitutional principles of church autonomy. *Id*. at 141.

Curay-Cramer did not, however, adopt the expansive reading of Section 702 that World Vision advocates here, which would provide a blanket exemption whenever employment discrimination is motivated by religious belief regardless of whether the claim could be addressed without answering ecclesiastical questions. To the contrary, *Curay-Cramer* emphasized, "under most circumstances, Title VII's substantive provisions, *with the exception of the prohibition against religious discrimination*, apply to religious employers." *Id*. at 140 (emphasis

added). As the court noted, this reading accords with the statute's legislative history. *Id.* Moreover, a claim of sex discrimination need not be dismissed merely because the plaintiff seeks to show that an employer's proffered religious reason for its action was pretextual. *Id.* at 142. Rather, the court dismissed the case only because it would require courts to "compare the relative severity of violations of religious doctrine." *Id.* The court therefore "caution[ed] religious employers against over-reading the impact of [its] holding," *id.*, which is exactly what World Vision does here.

In short, World Vision cannot convert a claim of sex discrimination under Title VII to a case of religious discrimination by suggesting there was a religious reason behind the employment decision.

III. The District Court Properly Ruled That The WLAD Survives Constitutional Scrutiny And That Its Religious Organization Exemption Does Not Apply Here.

The Washington Law Against Discrimination ("WLAD") prohibits employers from discriminating against a person because of "age, sex, marital status, [or] sexual orientation. . . ." Wash. Rev. Code § 49.60.180. By its plain text, the WLAD seeks to "eliminat[e] and

prevent[] . . . discrimination" and to offer individuals a process to seek recourse for discriminatory treatment. *See id.* § 49.60.010.

A. The WLAD is neutral and generally applicable.

Consistent with prior precedent, the district court properly found that the WLAD is a neutral and generally applicable law that survives constitutional scrutiny. 1-ER-40; *see also State v. Arlene's Flowers*, 193 Wash. 2d 469, 523 (2019) (en banc).

First, the WLAD is neutral. To determine whether a law is neutral, courts look to the plain meaning of the text and the state's actions to determine whether the law targets religious activity or whether there is "governmental hostility which is masked . . . [or] overt." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). In enacting the WLAD, the Washington State Legislature sought to balance the rights of employees to be free from discrimination in the workplace with the right of religious employers to choose their ministers. *Woods v. Seattle's Union Gospel Mission*, 197 Wash. 2d 231, 236 (2021). Not only is this purpose unrelated to the targeting of religious activity or belief, but it protects religious beliefs through its religious employer exemption. *See* Wash. Rev. Code § 49.60.040(11). Further, neither the text nor the Legislature's actions

demonstrate hostility towards religion. *Cf., Lukumi*, 508 U.S. at 532–42 (holding that the law at issue was not neutral because the legislative history showed clear intent to target practitioners of the Santeria faith).

Second, the WLAD is generally applicable. General applicability requires that the state treat secular and religious activities equally. A law is not generally applicable if it: (1) includes a formal mechanism for granting individualized, discretionary exemptions; or (2) prohibits religious conduct while permitting comparable secular conduct. *Fulton v. City of Philadelphia,* 593 U.S. at 522, 533–36 (2021) (citing *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 636–39 (citations omitted)). A law may contain exemptions without triggering strict scrutiny, so long as the exemptions are not individualized and discretionary. *Fulton*, 593 U.S. at 533. While the WLAD exempts religious organizations, it does not contain individualized, discretionary exemptions like those in *Fulton.* The exemptions outlined in the WLAD are categorical. "Their application does not depend on individualized discretion; they contain no mechanism to import such discretion," and, most importantly, the exemptions "do not invite 'the government to

decide which reasons for not complying with the [law] are worthy of solicitude.'" 1-ER-43 (quoting *Fulton*, 593 U.S. at 537).

Third, as prior courts have already determined, the WLAD easily satisfies rational basis review. *See, e.g.*, *Arlene's Flowers*, 193 Wash. 2d at 523; 1-ER-45. The WLAD advances the government's legitimate interest in prohibiting employment discrimination in Washington. As this Court has recognized, the government has a "compelling interest in assuring equal employment opportunities. . . ." *Pacific Press*, 676 F.2d at 1280.

B. The WLAD's religious organization exemption does not bar McMahon's claims.

As the district court correctly explained, the WLAD's religious organization exemption only applies "to discrimination claims brought by employees who fall under the First Amendment's ministerial exception." 1-ER-29 (citing *Woods*, 481 P.3d at 1067–70). In assessing whether the ministerial exception applies to a particular employee, courts examine whether an employee engages in substantial religious duties and whether the employee's responsibilities are primarily religious in nature. *See e.g.*, *Our Lady of Guadalupe Sch. v. Morrissey-*

Berru, 591 U.S. 732, 758–60 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 194 (2012).

Here, the district court properly found that the WLAD's religious organization exemption does not shield World Vision from liability because McMahon was not a minister. Considering "all the circumstances of her employment," the district court correctly determined that McMahon does not qualify for the ministerial exception because she applied for a position that neither requires religious training nor entrusts employees of this position with "certain important" ministerial responsibility. *Our Lady*, 591 U.S. at 746, 751. Thus, the WLAD's religious organization exemption does not bar McMahon's claims.

IV. The "Church Autonomy" Doctrine Does Not Provide A Defense To Discrimination Against Non-Ministerial Employees.

As a preliminary matter, the district court properly ruled that McMahon does not qualify for the ministerial exception. *See supra* Part III.B. *Amici* write separately to address the argument that the "church autonomy" doctrine bars McMahon's employment discrimination claims. Precedents from this Court and others are clear that the "church

autonomy" doctrine applies to ministerial employees, in the form of the ministerial exemption and ecclesiastical questions only. When religious organizations employ non-ministerial employees, they must comply with Title VII and other generally applicable employment laws.

A. Hiring non-ministerial employees is not a matter of internal church government protected by "church autonomy."

The ministerial exception already provides religious institutions with significant autonomy by granting a complete defense for employment discrimination claims brought by ministers. *See e.g.*, *Our Lady*, 591 U.S. at 746; *Alcazar v. Corp. of the Cath. Archbishop of Seattle*, 627 F.3d 1288, 1290 (9th Cir. 2010). But the "church autonomy" doctrine cannot be extended to provide an absolute right to fire *any* employee based on an organization's religious beliefs in situations that do not involve ecclesiastical questions. This doctrine is designed to ensure "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 591 U.S. at 747. It does not extend to all employment decisions, but only "internal management decisions that are essential to the institution's central mission," such as the selection of its ministers. *Id.* at 746.

Under this Court's precedent, the employment of non-ministerial employees is not part of "church autonomy" and is subject to neutral and generally applicable regulations. For example, in *Puri v. Khalsa*, 844 F.3d 1152, 1158 (9th Cir. 2017), this Court framed the "church autonomy" doctrine as applicable "to any state law cause of action that would otherwise impinge on the church's prerogative to choose *its ministers* or to exercise its religious beliefs in the context of employing *its ministers*." (emphasis added) (quoting *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999)).

Other circuits agree. "[C]hurches are not—and should not be—above the law. Like any other person or organization . . . [t]heir employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985); *see also EEOC v. Roman Cath. Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000).

A non-ministerial employee's "local church [can] invoke[] disciplinary actions such as censure or expulsion from the church which undoubtedly would qualify as ecclesiastical decisions immune from

judicial review," but firing a non-ministerial employee based on sex "is an action that involves more than purely religious considerations; it also conflicts with rules of conduct established by Congress for legimate [sic] secular reasons." *Pacific Press*, 676 F.2d at 1281. And "notwithstanding [non-ministerial employees'] apparent general employment obligation to be a visible witness to the Catholic Church's philosophy and principles, a court [can] adjudicate [their] claims without the entanglement that would follow were employment of clergy or religious leaders involved." *Geary v. Visitation of Blessed Virgin Mary Par. Sch.*, 7 F.3d 324, 331 (3d Cir. 1993); *see also DeMarco,* 4 F.3d at 171–72 (distinguishing between ministerial and non-ministerial employees); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 n.3 (8th Cir. 1991) (same); *Ference v. Roman Cath. Diocese of Greensburg*, No. 22-797, 2023 WL 3876584, at *4 (W.D. Pa. Jan 18, 2023) (report and recommendation) ("The Court therefore declines the Diocese's invitation to immunize it against all claims by secular employees based solely on the Diocese's blanket assertion that

church doctrine requires what would otherwise be unlawful discrimination.”).[3]

In spite of this precedent, World Vision relies on three non-controlling cases to argue that the “church autonomy” doctrine bars employment claims even when the employee is not a minister. Opening Br. 36 (citing *Darren Patterson Christian Acad. v. Roy*, 699 F. Supp. 3d 1163 (D. Colo. 2023); *Garrick v. Moody Bible Inst.*, 412 F. Supp. 3d 859, 872 (N.D. Ill. 2019); *Aparicio v. Christian Union*, No. 18-cv-592, 2019 WL 1437618, at *9 (S.D.N.Y. Mar. 29, 2019)). However, World Vision’s reliance on these cases is mistaken.

In the first case, *Darren Patterson Christian Academy*, a religiously affiliated school challenged a government program that conditions funds on compliance with antidiscrimination protections. The

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[3] World Vision relies on *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002) for the proposition that when a church makes a personnel decision based on religious doctrine, the broader church autonomy doctrine applies. Opening Br. 35. But the holding in *Bryce* has no bearing on this case. *Bryce* was a case about a religious organization’s speech about its employment decisions, not about the legality of employment decisions themselves. The employee in *Bryce* did not challenge the church’s decision to terminate her employment, but instead attempted to challenge the church’s speech about the termination decision as a form of sexual harassment. *Bryce*, 289 F.3d at 657.

school argued that the antidiscrimination protections violate its right to hire and fire ministers under the "church autonomy" doctrine. In a narrow ruling, the court held that the provisions likely violate the school's First Amendment rights because the plaintiff's teachers "are likely to qualify *as religious ministers*" and are therefore, protected by the ministerial exception. 699 F. Supp. 3d at 1184 (emphasis added). And in *Garrick* and *Aparicio*, the courts held that the "church autonomy" doctrine bars a non-ministerial employee's claims where the employee's *advocacy* is contrary to the religious organization's doctrinal views. Here, World Vision rescinded McMahon's employment offer pursuant to a facially discriminatory policy—not because of any advocacy. Put differently, World Vision discriminated on the basis of an employee's sex, not because of the employee's actions.

In short, the "church autonomy" doctrine does not provide a defense to discrimination against non-ministerial employees. Should this Court accept World Vision's argument, it would dramatically expand the doctrine beyond ministerial employees and insulate *all* personnel decisions from legal regulation when an employer asserts its decisions are based in any way on religious doctrine.

B. Applying Title VII to this case does not require courts to answer ecclesiastical questions.

Finally, as this Court has recognized, the "church autonomy" doctrine provides only a "qualified limitation" restricting courts from resolving disputes where the underlying controversies involve "religious doctrine." *Puri*, 844 F.3d at 1164. It does not, however, preclude courts from deciding cases where it does not "call[] into question the reasonableness, validity, or truth of a religious doctrine or practice." 1-ER-64 (citation omitted). Here, there are no ecclesiastical questions that would implicate "religious doctrine or practice." *Id.*

In cases such as *Curay-Cramer*, the plaintiff's allegations required courts to evaluate whether a church's doctrinal beliefs about abortion were equivalent to its doctrinal beliefs about the Iraq War. 450 F.3d 130 (3d Cir. 2006). But these types of problems are wholly absent where an employment decision facially discriminates on the basis of race, color, sex, or national origin. "Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499

U.S. 187, 199 (1991). Because liability in this case depends on World Vision rescinding McMahon's job offer because she is married to a spouse of the same sex—not on World Vision's subjective motivations—this Court does not need to examine the sincerity of World Vision's religious beliefs.

By contrast, finding the "church autonomy" doctrine applicable here would create more constitutional difficulties by making liability turn on an organization's subjective religious motivations instead of an objective assessment of its conduct. In a country filled with religious diversity, "[t]he Constitution protects not just popular religious exercises." *Masterpiece*, 584 U.S. at 644 (2018) (Gorsuch, J., concurring). "It protects them all." *Id*.

Because McMahon was a non-ministerial employee and her claims do not require the court to resolve any ecclesiastical question, "church autonomy" does not insulate World Vision's discrimination from review.

V. World Vision Does Not Have An Expressive Association Right To Discriminate Against Non-Ministerial Employees Based On Sexual Orientation.

Beyond "church autonomy," World Vision raises an even more sweeping First Amendment argument based on the right to expressive

association. Opening Br. 50–59. In doing so, World Vision ignores Supreme Court precedent finding that an employment relationship is not an expressive association. But, even if an employment relationship were entitled to a First Amendment right to association, any burden on World Vision's expressive association satisfies strict scrutiny.

A. An employer-employee relationship is not an expressive association.

The Supreme Court has never recognized a First Amendment right to engage in employment discrimination under the banner of "expressive association." To the contrary, the Supreme Court has specifically found that Title VII does not infringe upon the First Amendment rights of employers. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) ("In *Hishon*, we rejected the argument that Title VII infringed employers' First Amendment rights."); *see also Hishon v. King & Spaulding*, 467 U.S. 69, 78 (1984); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part). Furthermore, the Supreme Court has acknowledged that "[o]nce a contractual relationship of employment is established, the provisions of Title VII attach and govern certain aspects of that relationship." *Hishon*, 467 U.S. at 74.

To advance its novel theory regarding freedom of association, World Vision relies heavily on two cases: *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Slattery v. Hochul*, 61 F.4th 278 (2d Cir. 2023). Opening Br. 50–58. In *Dale*, a Boy Scouts assistant scoutmaster brought an antidiscrimination claim against the Boy Scouts for revoking his membership after it learned he was gay. World Vision claims that because *Dale* ruled against compelling association with a gay scoutmaster, the same outcome is warranted here. *Id.* This argument fails because it disregards a critical aspect of the *Dale* decision that makes it inapplicable to this case: This case involves an employment relationship, whereas Dale was a volunteer bringing a claim under a public accommodation law. 530 U.S. at 644–45. In fact, the Boy Scouts of America expressly acknowledged that their organization would have been subject to any employment laws that prevented discrimination based on sexual orientation. *Dale*, 530 U.S. at 672 (Stevens, J., dissenting).

The commercial nature of the employment relationship distinguishes Title VII from public accommodation laws regulating a voluntary association's membership. *See, e.g.*, *Christian Legal Soc'y v.*

Walker, 453 F.3d 853, 857, 860 (7th Cir. 2006) (forced inclusion of members in student organization that had no employees); *cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 572 (1995) ("peculiar" application of public accommodations statute to private entity's speech without any connection to "the provision of publicly available goods, privileges, and services"). Applying public accommodation laws to an expressive association's membership policies "directly and immediately affects associational rights." *Dale*, 530 U.S. at 659.

By contrast, when the government prohibits discrimination in employment or other economic transactions, those "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). To the extent that regulations of those commercial transactions have an "incidental effect" on an organization's expressive message, *Dale*, 530 U.S. at 659, those regulations are evaluated by the more deferential standard of *United States v. O'Brien*, 391 U.S. 367 (1968). Thus, while "religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in

the economy and in society to deny protected persons equal access to goods and services. . . .” *Masterpiece*, 584 U.S. at 631.

Next, World Vision cites *Slattery*, a non-controlling case, to argue that employers have an expressive association right to discriminate. In *Slattery*, the Second Circuit allowed an anti-abortion pregnancy counseling center to proceed beyond the pleading stage on its claim that a New York law violated the center’s expressive association rights by prohibiting it from firing, not hiring, or taking any other adverse employment action against its employees based on the employees’ reproductive health decisions. The Second Circuit found that the plaintiffs in that case had alleged a severe burden because “[t]he statute forces [the anti-abortion pregnancy counseling center] to employ individuals who act or have acted against the very mission of its organization.” 61 F.4th at 288.

Slattery is the first—and only—circuit decision to hold that the freedom of expressive association might provide a viable defense to engage in employment discrimination. *Slattery* does so by mistakenly equating an expressive association’s *membership* with its *employees*. In *Dale*, the Supreme Court clarified that “an expressive association

[cannot] 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. Employment decisions are not "inherent[ly] expressive[]," *Hurley*, 515 U.S. at 568, a point which *Slattery* acknowledged. 61 F.4th at 291. Thus, when an association alleges that hiring an employee with a protected characteristic will burden its expression, courts must independently determine whether the burden actually exists, and whether it is severe. *See Roberts*, 468 U.S. at 626; *see also Dale*, 530 U.S. at 653.

Unlike the plaintiffs in *Slattery*, World Vision is a religiously affiliated employer that provides humanitarian aid to combat hunger and poverty—not an anti-abortion pregnancy counseling center formed for the purpose of opposing abortion. World Vision cannot claim that it formed specifically to oppose marriage for same-sex couples, even though its employees may well sincerely hold and seek to share views opposing same-sex marriage. This is a critical distinction; no one disputes that World Vision sincerely believes "marriage [is] between a man and a woman," 1-ER-11, nor that it may express those views. But that is not enough. *Slattery* held only that a severe burden could be

found with respect to an anti-abortion pregnancy counseling center without requiring any more specific showing of burden on expression because that employer was formed precisely to advocate against the conduct protected by the law. World Vision therefore must do more to demonstrate a severe burden under *Slattery*. It has not.

Finally, World Vision's assertion that it has a right to engage in employment discrimination as a form of expressive association would, if accepted, have radical, destabilizing consequences for all organizations. Because "[t]he right to freedom of association is a right enjoyed by religious and secular groups alike," *Hosanna-Tabor*, 565 U.S. at 189, the "associational rights [of religious institutions] are no stronger than those of other private entities." *Richardson v. Nw. Christian Univ.*, 242 F. Supp. 3d 1132, 1153 (D. Or. 2017). Thus, if World Vision has a "freedom of association" right to engage in employment discrimination, non-religious expressive organizations would also have the same right to do so. And such a right would not be limited to issues of sex. It would provide a defense to any discrimination on the basis of identity—including actions that are explicitly racist, sexist or xenophobic—if the organization could articulate an expressive justification for the action,

because First Amendment rights do not depend on the courts' assessment of whether a particular viewpoint is worthy of protection. *Cf. Snyder v. Phelps*, 562 U.S. 443, 458 (2011). This result would nullify all employment discrimination protections.

B. Any burden on World Vision's expressive association satisfies strict scrutiny.

Even putting aside the lack of a cognizable burden on World Vision's freedom of association with respect to non-ministerial employees, "[t]he right to associate for expressive purposes is not . . . absolute," and "[i]nfringements on that right may be justified 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." *Roberts*, 468 U.S. at 623. Those requirements are easily satisfied here.

First, Title VII and other laws prohibiting sex discrimination in employment serve "an interest of the highest order" and may be "properly applied to the secular employment decisions of a religious institution." *Rayburn*, 772 F.2d at 1169. Prohibiting sex discrimination with respect to LGBTQ people is equally compelling. "[T]he laws and the Constitution can, and in some instances must, protect [same-sex

couples] in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Masterpiece*, 584 U.S. at 631.

Second, like the public accommodations law in *Roberts*, applying Title VII to prohibit discrimination in employment with respect to non-ministerial employees "responds precisely to the substantive problem which legitimately concerns the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." 468 U.S. at 628–29 (internal quotation marks omitted); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.").

VI. Adopting World Vision's Interpretations Of Section 702, The WLAD, The "Church Autonomy" Doctrine, And Expressive Association Would Gut Employment Protections.

Adopting World Vision's interpretations of Section 702, the WLAD, the "church autonomy" doctrine, and freedom of association would grant religious organizations a license to discriminate against

their employees. This could have enormous economic and social impacts.

Religious organizations employ roughly 1.5 million people in the United States[4] and include churches, schools, hospitals, financial services, broadcasting, and endowments, in addition to the "countless coaches, camp counselors, . . . social-service workers, in-house lawyers, media-relations personnel, and many others." *Our Lady*, 591 U.S. at 784 (Sotomayor, J., dissenting). Seventy-eight percent of private schools in the United States were religiously affiliated in 2014[5], and 14.5 percent of hospitals were religiously affiliated in 2016.[6] Most staff at these institutions work in non-religious roles. For example, the National Catholic Educational Association reports that 97.4 percent of professional staff at Catholic schools are laity and only 2.6 percent are

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[4] IBIS World, *Religious Organizations in the US – Employment Statistics 2004–2029*, https://www.ibisworld.com/industry-statistics/employment/religious-organizations-united-states// (last updated Dec. 28, 2023).
[5] Council for American Private Education, *Private School Statistics at a Glance*, Sep. 1 ,2017, https://perma.cc/M2BT-6MUX.
[6] Lois Uttley & Christine Khaikin, *Growth of Catholic Hospitals & Health Systems: 2016 Update of the Miscarriage of Medicine Report*, MergerWatch (2016), https://perma.cc/2EFQ-HBN4.

religious staff or clergy.[7]

World Vision's proposed interpretations would gut Title VII and local civil rights protections for these 1.5 million employees. To take two examples, a religious organization would be free to pay women less or refuse to hire people of color, so long as the employer alleges a religious motivation. These are precisely the types of employment decisions that our nation's antidiscrimination laws seek to prevent.

Further, if this court were to recognize an expressive association right to engage in employment discrimination, it would have destabilizing consequences. For example, if governmental restrictions on employment discrimination were subject to the same strict scrutiny that applies to government restrictions on a private group's membership and volunteer leaders, it is difficult to see what non-discrimination protections would ever survive an organization's assertion that a particular employee is "not desire[d]." *Slattery*, 61 F.4th at 287.

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[7] National Catholic Educational Association, *Enrollment and Staffing*, https://perma.cc/6DKJ-KLL8 (last visited Oct. 24, 2024).

Accepting World Vision's dangerous interpretations would improperly limit our civil rights protections far beyond anything the WLAD, Title VII or the Constitution or requires.

CONCLUSION

For the reasons stated above, the district court judgment should be affirmed.

Dated: October 28, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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