No. 21-2524

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LYNN STARKEY,

Plaintiff-Appellant,

v.

ROMAN CATHOLIC ARCHDIOCESE OF INDIANAPOLIS, INC. and RONCALLI HIGH SCHOOL, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division
Case No. 1:19-cv-3153 – Judge Richard L. Young

BRIEF OF CHRISTIAN LEGAL SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Christian Legal Society ("CLS") is a nondenominational association of Christian attorneys, law students, and law professors. CLS's legal advocacy division, the Center for Law & Religious Freedom, works to protect all Americans' right to the free exercise of their religious beliefs. This brief particularly concerns one key protection for religious exercise: the Religious Freedom Restoration Act ("RFRA"). CLS was instrumental in RFRA's passage and has a longstanding interest in ensuring that courts interpret the statute, as Congress intended, to give it "sweeping" scope and to "reaffirm[ ] our national commitment to the 'free exercise of religion as an unalienable right.'" *Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013) (quoting 42 U.S.C. §2000bb(a)(1)). CLS has filed *amicus* briefs in this Court in, e.g., *Demkovich v. St. Andrew Apostle Parish*, 3 F.4th 968 (7th Cir. 2021) and *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019); and the Court's opinion in *Gaylor* cited CLS's brief approvingly. See 919 F.3d at 424 n.3.

OVERVIEW AND SUMMARY OF ARGUMENT

Lynn Starkey was co-director of guidance counseling at Roncalli High School, a Catholic school operated for religious and educational purposes by the Archdiocese of Indianapolis. The Archdiocese declined to renew her employment because she had entered a same-sex civil marriage in violation of her employment contract and

[1] Pursuant to FRAP 29(a)(4)(E), neither a party nor party's counsel authored this brief, in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person (other than the *amicus curiae,* its members, or its counsel) contributed money that was intended to fund preparing or submitting the brief.

official Catholic teaching. In granting summary judgment dismissing Starkey's employment discrimination suit, the district court listed in detail the undisputed facts showing that Starkey "performed vital religious duties." A18.[2] Roncalli entrusted her with the tasks of "guiding students as they mature and grow into adulthood," "communicating the Catholic faith to students," and "help[ing] shape the religious and spiritual environment at the school." A18-A19; see A4-A8, A12-A17 (detailing the facts).

A religious school must have freedom to ensure that such an employee's counseling of adolescents, and her example of personal conduct, support its religiously grounded moral standards. But Starkey's lawsuit seeks to impose substantial liability on the Archdiocese for determining that she could no longer perform these functions. Accordingly, the district court correctly granted summary judgment finding Starkey a "minister" and dismissing her suit under the First Amendment's ministerial exception. *Id.* at A12-A20. *Amicus* CLS fully supports that conclusion.

Amicus writes to emphasize that this Court can also affirm on an alternative ground. The Archdiocese is also protected by the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* ("RFRA"), which prohibits the federal government from imposing a "substantial burden" on religious exercise unless the application of that burden furthers "a compelling governmental interest" and does so by the "least restrictive means." *Id.* §2000bb-1; see Appellees' Response Br. 38-40. The party

[2] "A" cites denote pages in Starkey's in-brief appendix.

whose religious exercise is burdened can raise RFRA "as a claim or defense in a judicial proceeding." *Id.* Whether or not Starkey is a "minister," the undisputed facts show the religious importance of her job functions. Those facts show that penalizing the Archdiocese for dismissing her would substantially burdens its religious exercise and cannot satisfy strict scrutiny.

I. In the district court, Starkey argued that RFRA is inapplicable to a discrimination suit by a private party, citing *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731 (7th Cir. 2015). That argument is erroneous, for three reasons.

A. At the very least, *Listecki* should not be extended to render RFRA inapplicable in discrimination suits by private parties. *Listecki* held RFRA inapplicable in a bankruptcy-related suit between private creditors and the archbishop of the debtor archdiocese. In that situation, only private parties can bring suit; but in Title VII and other discrimination cases, either the government (the EEOC) or a private party can sue. Holding RFRA applicable only in government suits, therefore, would (as two circuits have noted) make its application in Title VII cases depend on the arbitrary fact of who happened to sue.

B. *Listecki* has been undermined by *Bostock v. Clayton County* 140 S. Ct. 1731 (2020)—the very decision on which Starkey's Title VII claim rests. When an intervening Supreme Court decision conflicts with or unsettles circuit precedent, the Supreme Court decision must control. *Bostock* expressed "deep[ ] concern[ ]" with protecting religious liberty in clashes with nondiscrimination laws and said

that RFRA may "supersede Title VII's commands." *Id.* at 1754. These assurances would be negated if a RFRA defense were inapplicable to private-party suits, since those constitute the vast majority of Title VII suits. At the least, *Bostock* undermines *Listecki*'s application in Title VII cases. More broadly, it calls into question *Listecki*'s exclusion of RFRA from private-party suits overall.

C. *Listecki* erred: RFRA, properly interpreted, provides a defense in private-party suits. The government burdens religious exercise under RFRA's text when it creates a burdensome law that is applied by courts—a branch of the government—even when the lawsuit is brought by a private party.

The RFRA phrases on which *Listecki* relied do not support excluding it in private-party suits. RFRA's statement that parties can raise it as a claim or defense "and obtain appropriate relief against a government" does not narrow the statute to cases where government is a party. Rather, that phrase expanded protection by providing the explicit statement required to abrogate state sovereign immunity. Nor is RFRA inapplicable to private-party suits just because it says that "government" must demonstrate a compelling interest to justify burdening religion. The government still imposes the burden; the private plaintiff may shoulder the government's obligation to demonstrate a compelling interest.

Finally, excluding RFRA defenses in private-party suits would undercut RFRA's purposes. The text specifies that RFRA applies to "all federal law"; the Supreme Court and this Court have emphasized that RFRA sweeps across all

federal law and gives very broad protection to religious liberty. RFRA will provide neither sweeping nor broad protection if it is irrelevant in private-party cases.

II. RFRA prohibits the application of Title VII in this case.

A. The application of Title VII substantially burdens the Archdiocese's religious exercise. Title VII liability would impose substantial pressure on the Archdiocese to modify its religious judgment concerning whether its employee can properly counsel students. The burden here is especially severe because of the importance and sensitivity of Starkey's religious functions as director of guidance.

B. The substantial burden on religion here cannot satisfy strict scrutiny. RFRA's text requires showing a compelling interest in burdening this specific claimant, not a compelling interest underlying the law in general. The generalized interest in prohibiting sex discrimination in employment cannot justify penalizing a religious organization for its decisions concerning employees in religiously important and sensitive positions. As to such positions, the interest in nondiscrimination is outweighed by the religious organization's right to determine whether employees can carry out its mission. Moreover, Title VII provides multiple other exceptions from liability, thereby undermining the claim that the nondiscrimination rule can brook no exceptions.

Whether or not one agrees with official Catholic teachings on sexuality, the Archdiocese has the right to ensure that school employees counsel adolescent students consistent with those religious teachings. The Archdiocese can determine

that an employee who counsels students must model personal behavior consistent with, rather than conflicting with, those teachings.

ARGUMENT

I. RFRA PROVIDES RELIGIOUS EMPLOYERS A DEFENSE IN EMPLOYMENT DISCRIMINATION SUITS BROUGHT BY PRIVATE PARTIES.

RFRA provides a defense to religious employers in discrimination suits brought by private parties. A panel of this Court has ruled that "RFRA is not applicable in cases where the government is not a party." *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015). But this Court should not follow that ruling in this case, for several reasons.

A. *Listecki* Should Not Extend to Title VII Cases, Because as Other Circuits Have Found, RFRA's Application Should Not Turn on Whether the EEOC or a Private Party Happened to Sue.

Listecki involved an action in a bankruptcy proceeding between a group of creditors, who were victims of sexual abuse, and the archbishop of the debtor diocese, who claimed that using certain funds to satisfy victims' claims would violate RFRA. There was no government agency that could bring that suit. See 780 F.3d at 737-41 (holding that the creditors' committee was a private party).[3] By contrast, Title VII and other employment discrimination suits can be brought by the government—the Equal Employment Opportunity Commission (EEOC)—as well as

[3] Bankruptcy trustees may be able to bring suits to recover assets for the estate, but such a trustee is not a government official. *In re Archdiocese of Milwaukee*, 485 B.R. 385, 391 (Bkrtcy. E.D. Wis. 2013), rev'd, 496 B.R. 905 (E.D. Wis. 2013), rev'd *sub nom. Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015) (collecting cases in which "courts have declined to deem the [bankruptcy] trustee a governmental actor in various contexts").

by private parties. Other circuits have emphasized the arbitrariness of applying RFRA to employment-discrimination cases when the government sues but not when a private party sues. As the Second Circuit put it, antidiscrimination prohibitions "cannot change depending on whether it is enforced by the EEOC or an aggrieved private party." *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006). And the Sixth Circuit, although it refused to apply RFRA in a trademark infringement suit between private parties where no government entity could sue, expressly distinguished discrimination cases, where it noted that courts might apply RFRA "to avoid disparate application of the statute based on who brings discrimination charges." *General Conf. Corp. v. McGill*, 617 F.3d 402, 411 (6th Cir. 2010). Indeed, this Court in *Listecki* noted the distinction too. 780 F.3d at 737 (saying that discrimination cases involve "a limited situation where the government *could* have been a party") (emphasis in original).

Thus, no circuit has declined to apply RFRA as a defense to a private-party employment discrimination suit; and multiple circuits have applied it in such cases or suggested it should apply. See *Hankins*, 441 F.3d at 101 (explicit application); *In re Young*, 82 F.3d 1407, 1416-17 (8th Cir. 1996), vacated, 521 U.S. 1114 (1997), reinstated, 141 F.3d 854 (8th Cir. 1998), cert. denied, 525 U.S. 811 (1998) (applying RFRA in private-party suits generally); *EEOC v. Catholic Univ.*, 83 F.3d 455, 468-69 (D.C. Cir. 1996) (applying RFRA in Title VII suit); *McGill*, 617 F.3d at 411 (suggesting RFRA might apply in discrimination cases). If this Court holds that

Listecki does not extend to discrimination cases, and therefore that RFRA applies in such cases, it will harmonize with the other circuits that have addressed the issue.

B. The U.S. Supreme Court Has Undermined *Listecki* by Emphasizing that RFRA Protects Against Substantial Burdens Imposed Through Title VII.

Moreover, *Listecki* has also been undermined by the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)—the very case on which Starkey's complaint rests. "When an intervening Supreme Court decision unsettles our precedent, it is the ruling of the Court that sits on 1 First Street that must carry the day." *United States v. Wahi*, 850 F.3d 296, 302 (7th Cir. 2017) (rejecting circuit precedent based on intervening Supreme Court decision); accord *De Leon Castellanos v. Holder*, 652 F.3d 762, 765 (7th Cir. 2011) (revisiting circuit precedent because "if [the intervening Supreme Court decision] controls, we are obviously bound to follow it"). Considered dicta by the Supreme Court likewise controls. *Reich v. Continental Casualty Co.*, 33 F.3d 754, 757 (7th Cir. 1994) (such dicta still "provides the best, though not infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it").

Bostock undermines, and at the very least "unsettles," the *Listecki* panel decision. *Bostock* held that discrimination against an employee for being homosexual or transgender is illegal sex discrimination under Title VII. 140 S. Ct. at 1737. At the end of its opinion, the Supreme Court spent two full paragraphs discussing the danger "that complying with Title VII's requirements in cases like ours may require some employers to violate their religious convictions." *Id.* at 1753.

It emphasized it was "deeply concerned with preserving the promise of the free exercise of religion; that guarantee lies at the heart of our pluralistic society." *Id.* at 1754. The Court described and quoted RFRA, among other religious-liberty provisions, noting that by enacting RFRA Congress had gone "a step further" than the Constitution in protecting religious liberty. *Id.* The Court said that RFRA "might supersede Title VII's commands in appropriate cases" since it "operates as a kind of super statute, displacing the normal operation of other federal laws." *Id.* Although none of the employers in the case had presented the Supreme Court with a RFRA defense, the Court stated that "other employers in other cases may raise free exercise arguments that merit careful consideration." *Id.*

If *Listecki* excluded a RFRA defense in private-party Title VII suits, it would make *Bostock*'s statements meaningless. Private suits, as opposed to EEOC suits, "constitute the vast majority of Title VII enforcement litigation." Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 Yale L. & Pol'y Rev. 119, 130 & n.58 (2014); see *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976) ("The primary burden of enforcing Title VII rests with private plaintiffs."). The "vast majority" of discrimination charges filed with the EEOC end with the agency issuing a "right to sue" letter that authorizes the complaining individual to sue in federal court. Bornstein, *supra*, at 130. For example, in fiscal years 2000-2013, "the agency filed lawsuits to enforce between 0.2% and 0.6% of the charges it received each year. In contrast, during the same

time period plaintiffs filed … on average *55 times as many lawsuits as filed by the EEOC each year*." *Id.* (emphasis added).

If RFRA applied only in government suits, it would likely provide protection in less than one-fiftieth of the lawsuits where Title VII burdened religious exercise. (There is no reason to think the 55:1 ratio described above changes significantly in suits burdening religious exercise.) When the Supreme Court said that RFRA "may supersede Title VII" when "employers raise free exercise claims," it gave no indication that this should happen only in government suits, less than 2 percent of the cases. Such meager, sporadic protection would negate *Bostock*'s goal of "preserving the promise of the free exercise of religion." 140 S. Ct. at 1754.

When the Supreme Court "goes out of the way" to discuss a point, the court of appeals should ordinarily follow that guidance. *Reich*, 33 F.3d at 757. *Bostock* went "out of the way" to emphasize RFRA's relevance in Title VII cases, pursuant to the Court's "deep[ ] concern[ ]" with protecting free exercise. 140 S. Ct. at 1754. At the very least, *Bostock*'s statements undermine *Listecki*'s application in Title VII cases. More broadly, they "unsettle" *Listecki*'s overall conclusion excluding RFRA in private-party suits, and require reconsidering it. *Wahi*, 850 F.3d at 302.

C. RFRA, Properly Interpreted, Provides a Defense in Suits Brought by Private Parties.

It is no surprise that *Bostock* unsettled *Listecki*, because *Listecki* erred. RFRA, properly interpreted, applies in suits between private parties. RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person" furthers "a

compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. §2000bb-1(a), (b). A party whose religious exercise is burdened "may assert [RFRA] as a claim or defense and obtain appropriate relief against a government." *Id.* §2000bb-1(c). The statute's text, purposes, and background show that it provides a defense in private-party suits.

1. RFRA's text protects against judicial application of laws that substantially burden religious exercise.

Most fundamentally, RFRA's basic text easily covers suits brought by private parties. As the Second Circuit has reasoned, RFRA by its text applies to "'all federal law, and the implementation of that law,'" and it allows a party to assert the statute "'as a … defense in a judicial proceeding.'" *Hankins*, 441 F.3d at 103 (ellipsis in original) (quoting 42 U.S.C. §§2000bb-3(a), 2000bb-1(c)). When a court applies a federal law in a way that burdens religion, it is the government that is burdening religion. The statute defines "government" to include "a branch, department, agency, instrumentality, and official." 42 U.S.C. §2000bb-2(1). Federal courts are a branch of the federal government. On this explicit ground, the Eighth Circuit applied RFRA as a defense against a suit brought by a bankruptcy trustee to recover contributions the debtors had made to their church. The court explained: "The bankruptcy code is federal law, the federal courts are a branch of the United States, and [the court's] decision in the present case would involve the implementation of federal bankruptcy law." *In re Young*, 82 F.3d at 1417. Thus, even though the suit was between private parties, the burden was ultimately imposed by the government. *Id.*

The proposition that government can burden First Amendment rights in suits by private parties is well accepted in constitutional cases. In the landmark decision of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). the Supreme Court held that the application of state libel law in a suit brought by an individual violated the First Amendment. "Although this is a civil lawsuit between private parties," the Court said, the state courts "have applied a state rule of law which petitioners claim to impose invalid restrictions on … freedoms of speech and press…. The test is not the form in which state power has been applied but, whatever the form, whether such power has, in fact, been exercised." *Id.* at 265.

The ministerial-exception decisions apply the same principle to free exercise rights in nondiscrimination suits. The nondiscrimination plaintiffs were private parties in the Supreme Court's most recent decision, *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), as well as in prominent lower-court decisions. See, e.g., *Rayburn v. General Conf. of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). Lawsuits by private parties, no less than suits by government agencies, violate free exercise; the court's imposition of liability creates "[s]tate interference in th[e] sphere" of a religious organization's control over matters of "faith and doctrine." *Our Lady*, 140 S. Ct. at 2060. Other civil actions by private plaintiffs against religious organizations likewise create state action that burdens religion. To take just one example: in *Paul v. Watchtower Bible and Tract Soc.*, 819 F.2d 875 (9th Cir. 1987), a private individual sued a church for defamation, invasion of privacy, fraud, and

outrageous conduct after she was shunned by members for leaving the church. The court barred the action because imposing tort damages on a church for its religiously motivated practice "constitute[s] state action" and "would constitute a direct burden on religion." *Id.* at 880 (citing *Sullivan*, 376 U.S. at 265); see *id.* at 880 ("application of tort law to activity of a church or its adherents in their furtherance of their religious belief is an exercise of state power"). All these cases illustrate that the government burdens a constitutional right when it creates the law burdening the right and the judiciary applies that law.

The principle from constitutional cases governs under RFRA. After all, the statute is designed to protect the "free exercise of religion … secure[d] … in the First Amendment." 42 U.S.C. §2000bb(a)(1). RFRA gives that right more protection than the Supreme Court recognizes under the Constitution, by applying strict scrutiny to burdens from laws that are "'neutral' toward religion" as well as those that discriminate against religion. See *id.* at §2000bb(a)(2)). But the statute still aims to protect the constitutional interest in free exercise against substantial burdens. *Id.* at §2000bb(a). Holding RFRA irrelevant when government imposes burdens in private-party lawsuits significantly frustrates that purpose.

2. The statutory phrases on which *Listecki* relied do not support excluding RFRA defenses in private-party suits.

Listecki relied on two statutory phrases to exclude RFRA defenses in private-party suits, but neither phrase supports that conclusion.

a. First, the panel pointed to the phrase saying that a party may assert RFRA "'as a claim or defense in a judicial proceeding *and obtain appropriate relief*

against a government.'" 780 F.3d at 737 (emphasis added by the Court) (quoting 42 U.S.C. §2000bb-1). The panel read the italicized language as narrowing relief under RFRA "to that from the 'government,'" meaning that "if the government is not a party, no one can provide the appropriate relief." *Id.* But by far the better reading is that the phrase expands relief, by making an explicit abrogation of the sovereign immunity of state governments. As written, the statute includes two different verbs allowing a person to do two different things: (1) "assert a violation of RFRA as a claim or defense in a judicial proceeding" and (2) "obtain appropriate relief against a government." 42 U.S.C. §2000bb-1(c). The latter phrase, as the Second Circuit has recognized, is "most reasonably read as broadening, rather than narrowing" relief. *Hankins*, 441 F.3d at 103. That is so for three reasons.

First, the narrowing interpretation adopted in *Listecki* makes the phrase "against the government" into a misplaced modifier. It takes that phrase, which accompanies a reference to "relief," and changes it into a reference (a limiting reference) to a party's ability to invoke the statute in the first place. *Listecki* rewrites the statute to say that a party may assert RFRA as a claim or defense … against a government and obtain appropriate relief ~~against a government~~." That is not what the statute says as written.

Second, *Listecki*'s interpretation assumes that "obtain[ing] appropriate relief against a government" is all that can happen when RFRA is asserted "as a claim or defense." See 780 F.3d at 737 (reasoning that "if the government is not a party, no one can provide the appropriate relief"). But that makes no sense for cases where

RFRA is asserted as a defense rather than as a claim. A litigant who raises a defense does not obtain any "relief" at all: not an injunction, or damages, or a declaratory judgment. A defense merely defeats liability. *Sikorsky Aircraft Corp. v. U.S.,* 102 Fed. Cl. 38, 48 n.14 (Fed. Cl. 2011) ("Affirmative defenses are not claims for additional relief."); *Resolution Tr. Corp. v. Love*, 36 F.3d 972, 977 (10th Cir. 1994) ("affirmative defenses are not 'claims' or 'actions,' but rather are responses to claims or actions"). Because "relief" is not applicable when a "defense" is raised, it makes no sense to read the phrase "obtain appropriate relief against a government" to modify the phrase "assert a claim *or defense* in a judicial proceeding."

Rather, RFRA's context shows that the phrase "obtain appropriate relief against a government" serves a different purpose: namely, to provide relief against a government by abrogating sovereign immunity. When RFRA was enacted in 1993, it applied to burdens imposed by state and local governments (those applications were later struck down in *City of Boerne v. Flores*, 521 U.S. 507 (1997)). At the time of enactment, Supreme Court precedent allowed Congress to abrogate state sovereign immunity only if Congress made its intention to abrogate "unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Thus, if Congress wanted religious adherents to be able to rely on RFRA in suits against states or state agencies, it was not enough to say that RFRA could be asserted "as a claim or defense in a judicial proceeding." It also had to say that RFRA could provide "appropriate relief against a government." Merely allowing the assertion "of a claim or defense" might suffice to authorize appropriate

relief in suits brought by private parties. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S. Ct. 2244, 2262-63 (2021). But it would not suffice to authorize relief against state entities; that required separate, explicit phrasing, which Congress provided.

A *Virginia Law Review* note examines this background in detail, showing that abrogating "state sovereign immunity provides the animating purpose behind Congress's inclusion of the 'obtain relief' parenthetical." Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides A Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343, 351-52 (2013). The note further details how any ambiguity on whether "obtain appropriate relief against a government" narrows or expands RFRA's protections "arose as an incidental result of grammatical restructuring." *Id.* at 353. The grammatical changes "required drafters to … append the clear statement abrogating state sovereign immunity to the end of the judicial relief section. These textual changes were not intended to limit the judicial relief available under RFRA." *Id.*

b. In excluding RFRA from private-party suits, *Listecki* also relied on the statutory language stating that "the government" must "demonstrate" the existence of a compelling interest to justify substantially burdening religious exercise. See 42 U.S.C. §2000bb-1(b). *Listecki* reasoned that "this is a burden shifting test in which the government must make a showing after the plaintiff demonstrates a substantial burden…. It is self-evident that the government cannot meet its burden if it is not a party to the suit." 780 F.3d at 736.

But this argument is also mistaken. As already discussed, when a court in a private-party suit enforces a law that substantially burdens religious exercise, it is still "the government" imposing the burden. See *supra* pp. 10-12. The private plaintiff may then undertake the government's obligation to justify that burden.

Title VII's enforcement structure makes it especially clear that private plaintiffs in such cases are shouldering "the government's" obligation. As already noted, a private individual cannot simply bring a Title VII suit but must first file a charge with the EEOC. 42 U.S.C. §2000e-5(e)(1); see *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019) (describing process). In order to sue, the individual must receive a "notice of right to sue" from the EEOC, either because the agency has closed its investigation or because the individual requests the notice before the investigation's close. U.S. Equal Employment Opportunity Commission, *Filing a Lawsuit*, https://www.eeoc.gov/filing-lawsuit. Even if the EEOC finds "reasonable cause" to believe discrimination has occurred, and even if its conciliation efforts with the employer are unsuccessful, the agency still "has discretion which charges to litigate" and which to authorize for private litigation by a right-to-sue notice. *Id.*

In short, if the private plaintiff brings suit, it's because the EEOC—the "government"—has authorized it through a right-to-sue notice. The private plaintiff thus shoulders the litigation obligation that the government would have had, including the obligation to justify a substantial burden under RFRA. If the EEOC does sue, the private plaintiff's avenue to court is to intervene in the government's suit, which again reinforces that the person is undertaking the government's

obligation. See 42 U.S.C. §2000e-5(f)(1) (giving "the person or persons aggrieved … the right to intervene in a civil action brought by the Commission").[4] The statement that government must demonstrate a compelling interest provides no warrant to cripple RFRA by rendering it irrelevant in private-party suits.

3. Excluding RFRA as a defense in private-party suits undermines the statute's purposes.

Finally, excluding RFRA as a defense in private-party suits undermines the statute's purposes as reflected in its text. RFRA "specifies that it 'applies to all Federal law, and the implementation of that law.'" *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (quoting 42 U.S.C. §2000bb-3(a)). This language, the Supreme Court says, shows "beyond dispute" that Congress intended RFRA to have comprehensive reach. *Id.* Indeed, RFRA's explicit purpose is to "guarantee [strict scrutiny's] application *in all cases* where free exercise of religion is substantially burdened." 42 U.S.C. §2000bb(b)(1) (emphasis added). Excluding RFRA's application in the significant category of private-party suits negates that purpose.

This Court, too, recognizes RFRA as a "sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach." *Korte*, 735 F.3d at 673 (quoting Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code,* 56 Mont. L.

[4] Not only does the private plaintiff undertake the government's obligation to "demonstrate" a compelling interest. In addition, the *court*, the government actor enforcing the burdensome law, must demonstrate that the burden is justified. The court must make that demonstration by applying the compelling interest test.

Rev. 249, 253 (1995)). This comprehensive sweep likewise follows from "RFRA's statement of purpose[, which] explicitly reaffirms our national commitment to the 'free exercise of religion as an unalienable right,' existing prior to and above ordinary law." *Id.* (quoting 42 U.S.C. §2000bb(a)(1)). See also *Little Sisters*, 140 S. Ct. at 2383 (the free exercise right is "described by RFRA as 'unalienable'").

The Supreme Court has also said, and reemphasized since *Listecki*, that "RFRA 'provide[s] very broad protection for religious liberty.'" *Little Sisters*, 140 S. Ct. at 2383 (bracket in original) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). Excluding a RFRA defense in private-party suits undermines "broad" protection. It makes RFRA inapplicable in the "vast majority" of Title VII cases, negating *Bostock*'s assurance of "preserving the promise of free exercise of religion." 140 S. Ct. at 1754; see *supra* pp. 8-10. RFRA aims to mediate "the inevitable clashes between religious freedom and the realities of the modern welfare state." *Korte*, 735 F.3d at 673. But it can't fulfill that crucial purpose, in the sensitive set of clashes between religious freedom and antidiscrimination laws, if it barely ever applies in such cases.

Even worse, if RFRA is unavailable in private-party suits, an EEOC hostile to employers' religious liberty defenses could unilaterally make the statute unavailable in any or all employment-discrimination cases. Given Title VII's enforcement structure, the EEOC could strategically decline to bring suit itself, relying on private-party suits entirely or in cases where it disliked the employer's religious belief or practice. Protection that depends on government's whim is not the

"broad protection" that RFRA is meant to secure for an "unalienable right." *Little Sisters*, 140 S. Ct. at 2383; *Hobby Lobby*, 573 U.S. at 693; *Korte*, 735 F.3d at 673.

II. APPLICATION OF TITLE VII TO THE EMPLOYMENT DECISION CONCERNING THE RELIGIOUS SCHOOL'S DIRECTOR OF GUIDANCE COUNSELING VIOLATES RFRA.

Applying Title VII in this case violates RFRA. As just noted, RFRA provides "'very broad protection'" for religious liberty. *Little Sisters*, 140 S. Ct. at 2383 (quoting *Hobby Lobby*, 573 U.S. at 693). The application of Title VII here substantially burdens religious exercise. And the government's interests in preventing discrimination, however compelling in the abstract, are not compelling as applied to the employment decision concerning an employee with religious responsibilities, like the director of guidance counseling.

A. The Application of Title VII Substantially Burdens the Archdiocese's Religious Exercise.

There can be little doubt that the application of Title VII would substantially burden the Archdiocese's religious exercise. "[T]he substantial-burden inquiry evaluates the coercive effect of the governmental pressure on the adherent's religious practice." *Korte*, 735 F.3d at 683. Government imposes a substantial burden when it places "substantial pressure on" a claimant "to modify" its religiously motivated conduct, "undermin[ing its] ability to give witness to the moral teachings of [its] church." *Id.* at 682-83. That is precisely what happens when a court penalizes a religious high school for determining that an employee who counsels students can no longer effectively guide them in the faith. Title VII

pressures the Archdiocese by potentially subjecting it to substantial liability for making that determination.

That is enough to constitute a substantial burden under RFRA and trigger the compelling interest test. But the burden here is especially severe because of the importance and sensitivity of Starkey's religious functions as director of guidance. Starkey was entrusted with "'vital religious duties,'" including "discuss[ing] some of the most sensitive issues in a young person's life," "guiding students as they mature and grow into adulthood," "communicating the Catholic faith to students and fostering spiritual growth," and "help[ing to] shape the religious and spiritual environment at the school." A18-A19.

The district court held, correctly, that these functions made Starkey a "minister." A18 (quoting *Our Lady*, 140 S. Ct. 2066). But whether or not this Court applies the ministerial exception, the same undisputed facts show that Title VII liability would impose an especially severe burden on the Archdiocese under RFRA. Whether or not the director of guidance is a "minister," the position surely has sufficient religious importance that "pressur[ing]" the Archdiocese to retain an unwanted director would "undermine [its] ability to give witness to [Catholic] moral teachings." *Korte*, 735 F.3d at 682, 683. See also *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012) (emphasizing the intrusion when government "deprives the church of control over the selection of those who will personify its beliefs"); *Catholic Univ.*, 83 F.3d at 467 (finding that the same facts that showing a university canon-law teacher was a "minister" also

showed "that Title VII impermissibly burdens Catholic University's free exercise of religion" under RFRA).

B. Imposing the Burden in This Case Does Not Further a Compelling Governmental Interest by the Least Restrictive Means.

Nor can the substantial burden on religion here be justified on the ground that it "further[s] … a compelling governmental interest"—let alone that it furthers it by "the least restrictive means." 42 U.S.C. §2000bb-1(b). In the district court, Starkey argued that the government has a compelling interest in prohibiting discrimination. See Appellees' Response Br. 39. But as the Supreme Court has repeatedly emphasized, RFRA requires showing "that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (quoting 42 U.S.C. §2000bb–1(b)); accord *Hobby Lobby*, 573 U.S. at 726. Strict scrutiny, under RFRA or the First Amendment, means that "[r]ather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (quoting *O Centro*, 546 U.S. at 431)); accord *Korte*, 735 F.3d at 685 (RFRA requires "a compelling and specific justification for burdening *these* claimants") (emphasis in original). Thus in *Fulton*, the Court acknowledged that the nondiscrimination laws could serve "weighty" or "important" interests in general, but it held those interests "insufficient" as applied to the religious foster-care agency in question. 141 S. Ct. at 1881-82.

This distinction—requiring a showing of compelling interests in the specific case rather than in the abstract—is how RFRA mediates "the inevitable clashes between religious freedom and the realities of the modern welfare state." *Korte*, 735 F.3d at 673. The law in question can apply in the large majority of cases. But it cannot apply to impose a substantial burden on religious exercise unless the application of the burden in that case furthers a compelling interest.

The generalized interest in prohibiting discrimination in society simply cannot justify applying nondiscrimination laws to penalize religious organizations for their handling of employees in religiously important and sensitive positions. The ministerial exception itself reflects the categorical judgment that as to religious leaders, "the state interest in eliminating employment discrimination is outweighed by a church's constitutional right of autonomy in its own domain." *Catholic Univ.*, 83 F.3d at 467. The co-director of guidance is a "minister." But even if it is not, the position is sufficiently religiously important and sensitive that the Archdiocese's right to freedom "in its own domain" outweighs the governmental interest in nondiscrimination. The severity of the burden requires an especially strong governmental interest, which is not present here.

The same conclusion follows from *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), where the Supreme Court held that a state prohibition on discrimination in public accommodations could not apply to forbid the Boy Scouts from dismissing an openly gay scoutmaster, because that prohibition would "serious[ly] burden" the Scouts' First Amendment expressive decision to affirm traditional moral values. 530

U.S. at 658. Applying the compelling interest test (*id.* at 657-58), the Court reaffirmed that antidiscrimination laws could apply to groups, like the Jaycees, when it would not "serious[ly]" burden members' rights to associate to express ideas. *Id.* at 658 (citing, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984)). But coercing the Scouts to retain an openly gay and activist scoutmaster would "force the organization to send a message" it did not wish to send—that it "accepts homosexual conduct" (*id.* at 653)—and the general interests underlying nondiscrimination laws could not "justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association." *Id.* at 659.

Dale applied strict scrutiny in a way that set "the associational interest in freedom of expression … on one side of the scale, and the State's interest on the other": that is, an especially serious burden on organizational rights demands an especially compelling justification. *Id.* at 658-59. The same logic applies here under RFRA's strict scrutiny test. Given the religious sensitivity and importance of guidance counseling, the government interests are not compelling enough to override the Archdiocese's religious freedom. See, e.g., Douglas Laycock and Thomas C. Berg, *Free Exercise Under* Smith *and After* Smith, 2020-2021 Cato Sup. Ct. Rev. 33, 54 (arguing that under the compelling interest test, "the government interest must 'compellingly outweigh the burden on religion'") (quotation omitted).

Indeed, the case for protecting the Archdiocese is far stronger than that in *Dale*. There the Court found a "severe intrusion" on the Boy Scouts' expressive association, *Dale*, 530 U.S. at 659, even though most of the organization's moral

statements were inexplicit about homosexuality and it "d[id] not trumpet its views about homosexuality from the rooftops." *Id.* at 650, 656; see *id.* at 677 (Stevens, J., dissenting) (arguing that the Scouts "fail[ed] to establish any clear, consistent, and unequivocal position on homosexuality" or that same-sex conduct "was contrary to the group's values"). By contrast, the Catholic Church could hardly be more "clear, consistent, and unequivocal" (*id.*) in its teaching that same-sex conduct is wrong; and Starkey's contract and the ministry description explicitly required that her "'personal conduct … convey and be supportive of [the Church's] teachings.'" A5 (quotation omitted). If the government could not satisfy strict scrutiny as to the Scouts' muted message about sexuality, then *a fortiori* it cannot satisfy strict scrutiny here.

Finally, the application of Title VII fails strict scrutiny here because that statute provides exceptions for several other interests. Providing such exceptions "undermines th[e] contention that [the government's] non-discrimination policies can brook no departures." *Fulton*, 141 S. Ct. at 1882 (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-47 (1993)). Title VII provides exceptions for employers who disfavor Communists, 42 U.S.C. §2000e-2(f); for enterprises, on or near Indian reservations, favoring Indians, *id.* at §2000e-2(i); and for employers with fewer than 15 employees, *id.* at §2000e(b). Together these exceptions "undercut" government officials' "argument that they had an interest in eradicating all forms of discrimination." *Bear Creek Bible Church v. EEOC*, 4:18-CV-00824-O, 2021 WL 5449038 at *25 (N.D. Tex. Nov. 22, 2021).

CONCLUSION

The judgment of the district court should be affirmed. The judgment based on the ministerial exception is correct, but as an alternative or additional ground, this Court can hold that application of Title VII in this case would violate RFRA.

Respectfully submitted.

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_____
Laura Nammo
Dated: January 18, 2022

CERTIFICATE OF SERVICE

I certify that on January 18, 2022, the foregoing brief was served on counsel for all parties by means of the Court's ECF system.

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