No. 25-1569

In the United States Court of Appeals for the Fourth Circuit

JOHN DOE,

Plaintiff-Appellee,

v.

CATHOLIC RELIEF SERVICES,

Defendant-Appellant,

AND

STATE OF MARYLAND; UNITED STATES OF AMERICA,

Intervenors.

On Appeal from the United States District Court
for the District of Maryland at Baltimore
No. 1:20-cv-01815-JRR; Hon. Julie R. Rubin

BRIEF OF THE UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 25-1569 Caption: John Doe v. Catholic Relief Services

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5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Gene C. Schaerr Date: 09/11/2025

Counsel for: Amicus Curiae

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INTRODUCTION, INTEREST, AND SOURCE OF AUTHORITY OF *AMICUS CURIAE*[1]

For religious organizations, hiring, employing, and rewarding employees who live consistently with the organization's faith is crucial to those entities maintaining their religious nature and accomplishing their religious missions. The district court's ruling threatens all of that.

That is why this case deeply concerns *Amicus* United States Conference of Catholic Bishops (USCCB). As "an assembly of the hierarchy of bishops who jointly exercise pastoral functions on behalf of the Christian faithful of the United States,"[2] USCCB's mission includes acting "on vital issues confronting the Church and society."[3] And USCCB founded and maintains a close relationship with the Defendant here. From USCCB's perspective, a law that requires a Catholic entity to endorse same-sex marriage, which the Church does not recognize or

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[1] No counsel for a party authored any part of this brief. No party, party's counsel, or person other than *amicus*, its members, or its counsel made a monetary contribution to fund the brief's preparation or submission. This brief is filed with the consent of all parties.

[2] *About USCCB*, U.S. Conf. Cath. Bishops, https://www.usccb.org/about (last visited Sept. 8, 2025).

[3] *Our Mission*, *id.*

accept, is a serious threat to religious liberty. This Court should recognize this case as such and rule in Catholic Relief Services' (CRS) favor.

STATEMENT

CRS is a humanitarian agency, founded by USCCB, that embod[ies] Catholic social and moral teaching,"[4] including that "marriage is between a man and a woman." CRS Br. 5-6 (quoting JA3380). Thus, CRS administers its employee benefits consistently with those religious beliefs. And it believes that it is "never morally permissible to extend spousal benefits to an employee who has entered into a legally recognized same-sex union," as doing so would amount to "formal cooperation with the application of gravely unjust laws" and would "further[] practices that the Church has declared to be injurious to the social order." JA390-391; JA332.

Unfortunately, when John Doe joined CRS as an employee, he was falsely told by a recruiter that his same-sex spouse would be covered by CRS's benefits plan, and his spouse was subsequently erroneously enrolled. CRS Br. 10 (citing JA3389). CRS later discovered the error and

[4] *Mission Statement*, Cath. Relief Servs. (Sept. 11, 2008), https://www.crs.org/about-us/mission-statement.

increased Doe's salary to cover the cost of his putting his spouse on private insurance. *Id.* at 11 (citing JA3460; JA3468). Doe then sought and received a right-to-sue letter from the EEOC. *Id.* (citing JA3506). He then sued in federal court, raising (among others) claims under Title VII and the Equal Pay Act, as well as the Maryland Fair Employment Pay Act (MFEPA). JA19-31. Ultimately the district court ruled in Doe's favor, JA947, JA952-953, JA1122, JA1136, awarding him $60,000, JA1137.

SUMMARY OF ARGUMENT

The district court's determination that Plaintiff's Title VII, Equal Pay Act, and MFEPA claims were successful cannot stand. The first two claims are barred by RFRA, which, according to the statute's plain language, is a defense to federal claims in a federal suit between private parties. The Title VII claim also fails because it's barred by Title VII's religious organization exemption.

The MFEPA claim, moreover, cannot survive Free Exercise Clause analysis: The statute requires government discretion in determining whether to apply the MFEPA's religious exemption, triggering strict scrutiny. And application of the statute to CRS cannot survive that scrutiny because there is no compelling government interest when the

statute exempts more than 80% of Maryland employers from its anti-discrimination prohibitions.

ARGUMENT

I. As Multiple Circuits Have Recognized, RFRA Is a Defense in Federal Suits Between Private Parties, and It Bars Plaintiff's Federal Claims.

The district court correctly noted that this Circuit has yet to determine whether RFRA can apply to a suit between private parties. JA932-933. But in canvassing the circuit split, the lower court erroneously determined that only one circuit had held that RFRA applies as a defense against federal law in a federal court. JA933. In fact, three circuits have so held. *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006); *In re Young*, 82 F.3d 1407, 1416-17 (8th Cir. 1996); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996). And two circuits have held the opposite. *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010); *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015).[5] But RFRA's plain text shows why the Second, Eighth, and D.C. Circuits are correct.

[5] *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-43 (9th Cir. 1999), is sometimes included in this list, but it dealt with a different issue: whether one could bring a RFRA claim against a private party.

A. RFRA's text shows why it can be a defense to federal claims in a federal case between private parties.

RFRA's text reveals that it applies to suits between private parties in federal court when raised as a defense against federal claims.

1. First, RFRA "applies to all Federal law, … whether adopted before or after" its enactment. 42 U.S.C. §2000bb-3(a). The only exception is when a later-enacted "law explicitly excludes such application by reference to [RFRA]." *Id*. §2000bb-3(b). And "[a] person whose religious practices are burdened in violation of RFRA 'may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. §2000bb-1(c)). Thus, if not satisfied, RFRA becomes a "complete defense" to the application of any federal law. *Hankins*, 441 F.3d at 102.

With that understanding, RFRA applies to the federal laws here. Congress enacted Title VII and the Equal Pay Act decades before RFRA. Civil Rights Act of 1964, Pub.L.No.88-352, tit. VII, 78 Stat. 241, 253-66; Equal Pay Act of 1963, Pub.L.No.88-38, 77 Stat. 56, 56-57. And those statutes have never been amended to be expressly exempt from RFRA's application. Furthermore, a private right of action cannot be brought

under Title VII without a right-to-sue letter from the EEOC (i.e., without federal involvement). And there is no private right of action under the Equal Pay Act without that federal law establishing it.

Thus, RFRA applies to Title VII and the Equal Pay Act.

2. Moreover, RFRA prohibits the federal government from burdening one's free exercise of religion, and defines "government" broadly to encompass any "branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States[.]" 42 U.S.C. §2000bb-2(1). A federal court obviously falls under this definition.

Furthermore, RFRA not only "applies to all Federal law," but also to "the implementation of that law, whether statutory or otherwise." 42 U.S.C. §2000bb-3(a). When a federal court applies federal law to a party, it is implementing that law. And, by applying Title VII or the Equal Pay Act to CRS, the court would fall under RFRA's ambit. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that judicial officers enforcing

discriminatory contracts between private actors constituted state action under the Fourteenth Amendment).[6]

Therefore, RFRA may be invoked as a defense by CRS against any federal claims brought against it in federal court.

B. Three circuits have correctly found RFRA applies as a defense to federal claims in federal suits between private parties under the statute's plain language.

Multiple circuits have reached this same conclusion.

1. For example, *In re Young* involved an appeal from an order requiring a church to turn over to a trustee certain funds that debtors had given to the church as tithing in the year before the debtors filed their bankruptcy petition. 82 F.3d at 1410. As the court straightforwardly reasoned, RFRA applies to all federal law and defines "government" broadly to include any branch of the United States. *Id*. at 1416. Further, "bankruptcy code is federal law, the federal courts are a branch of the United States, and our decision in the present case would involve the implementation of federal bankruptcy law." *Id*. at 1417. Thus, RFRA could be raised as a defense in the case. *Id*.

[6] Of course, one cannot sue a federal court because of judicial immunity, *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

So too here. Title VII and the Equal Pay Act are "federal law, the federal courts are a branch of the United States, and [this Court's] decision in the present case would involve the implementation of federal [civil rights] law." *Id.* RFRA thus can be raised here as a defense.

2. Similarly, the D.C. Circuit recognized that RFRA applied to a Title VII suit between a nun and a Catholic university after the school denied her tenure, with the court ultimately finding her claim was barred by RFRA. *Cath. Univ.*, 83 F.3d at 469, 470. While the EEOC was also a party to the suit, that fact played no role in the court's determination that RFRA applied. *Id.* at 470 (finding "that the EEOC's *and* Sister McDonough's claims are barred by … RFRA" (emphasis added)).

After all, if the court's reasoning had been that RFRA barred federal claims brought by a federal agency, then the court would not have also found the private party's (Sister McDonough) Title VII claim barred as well.

3. Joining these two circuits, the Second Circuit a decade later reached a similar conclusion. *Hankins*, 441 F.3d at 103. There, a clergy member who was forced to retire at age 70 brought a claim against his church under the federal Age Discrimination in Employment Act

(ADEA). *Id.* at 99. The church raised RFRA as a defense and the court held that RFRA applied to the ADEA and remanded the case to determine whether the application of the ADEA violated RFRA. *Id.*

In so holding, the court analyzed the statute's text, finding that "RFRA's language surely seems broad enough to encompass" its application "to an action by a private party seeking relief under a federal statute against another private party who claims that the federal statute substantially burdens his or her exercise of religion." *Id.* at 103. Specifically, the court noted that RFRA "'applies to all federal law, and the implementation of that law,' and that a defendant arguing that such a law substantially burdens the exercise of religion 'may assert [a violation of the RFRA] as a … defense in a judicial proceeding.'" *Id.* (quoting 42 U.S.C. §§2000bb-3(a), 2000bb-1(c)). Thus, to the court, "[t]his language easily covers the present action"—a former employee of a religious organization raising a federal civil rights claim against his former employer. *Id.* A similar situation to this case.

The Second Circuit did note the "conceivably narrowing language" in RFRA of the phrase: "obtain appropriate relief against a government." *Id.* (quoting 42 U.S.C. §2000bb-1(c)). But to the court, "this language

would seem most reasonably read as broadening, rather than narrowing, the rights of a party asserting the RFRA." *Id.* That is because "[t]he narrowing interpretation—permitting the assertion of the RFRA as a defense only when relief is also sought against a governmental party—involves a convoluted drawing of a hardly inevitable negative implication." *Id.* And "[i]f such a limitation was intended, Congress chose a most awkward way of inserting it." *Id.*

Further buttressing the court's holding was the fact that, because RFRA essentially amends the ADEA (and all federal law) and "[t]he ADEA is enforceable by the EEOC as well as private plaintiffs, ... the substance of the ADEA's prohibitions cannot change depending on whether it is enforced by the EEOC or an aggrieved private party." *Id.* After all, "[a]n action brought by an agency such as the EEOC is clearly one in which the RFRA may be asserted as a defense, and no policy of either the RFRA or the ADEA should tempt a court to render a different decision on the merits in a case such as the present one" where a private party is suing another private party under a federal statute that a federal agency could also choose to sue the private defendant under. *Id.*

The same is true here. The EEOC can enforce Title VII's anti-discrimination provisions and the Equal Pay Act in a suit against a private party. 42 U.S.C. §2000e-5(f)(1); Reorganization Plan No. 1 of 1978, §1, 97 Stat. 3781. (And one needs EEOC action to be able to sue under Title VII in the form of a right-to-sue letter.) Thus, under the Second Circuit's logic, it is of no moment that Plaintiff here is a private party rather than the EEOC as to whether RFRA applies in this case.

4. Granted, two circuits have gone the other way, but more so because of a strained reading of RFRA, cherry-picked legislative history, or policy concerns more properly the province of Congress.

For example, in a trademark dispute between churches, the Sixth Circuit held that RFRA could not be invoked as a defense for a few reasons. *McGill*, 617 F.3d at 410. First, "[t]wo … implicit[] limit[ations]—that one can "obtain appropriate relief against a government" and that the statute requires the "government" to "demonstrate" that it has satisfied strict scrutiny—"strongly suggests that Congress did not intend RFRA to apply in suits between private parties." *Id*. (internal quotation marks and emphases omitted) (quoting *Hankins*, 441 F.3d at 114-15 (Sotomayor, J., dissenting)). So for the court, RFRA's language that it

applies "to all Federal law" only meant that it applies when the government is a party. *Id.* at 411 (quoting *Hankins*, 441 F.3d at 115 (Sotomayor, J., dissenting)).

Additionally, the Sixth Circuit "note[d] further that Congress repeatedly referred to government action in the findings and purposes sections of RFRA." *Id.* And the court also looked to the statute's legislative history to support their reading. *Id.* Moreover, it dismissed the *Hankins* majority's reading because (1) it read the *Hankins* holding to only apply "to the application of RFRA vis-à-vis federal laws that can be enforced by private parties *and* the government[,]" which didn't apply in a copyright suit; and (2) a later Second Circuit decision had called *Hankins* into question. *Id.* But, as previously noted, these reasons fall apart: RFRA's plain text trumps legislative history and implicit meanings; *Hankins* only partially relied on the possibility of government enforcement, which is also the exact situation here; and that later decision was dicta, relying on the same flawed reading as the Sixth Circuit as well as policy reasons, which cannot supersede plain statutory language, *Rweyemamu v. Cote*, 520 F.3d 198, 201 n.2, 203-204 (2d Cir. 2008) (relying on the ministerial exception rather than RFRA).

The Sixth Circuit's least weak textual argument, that RFRA's requirement that the government "demonstrate" that it has satisfied strict scrutiny implies that the government must be a party, is easily rebutted. First, a judicial opinion is a way for the federal government, via a federal judge, to demonstrate that strict scrutiny's requirements have been met, without the government needing to be a party to the case. Second, when parties raise constitutional defenses against statutes under which other private parties bring claims, it is no obstacle to courts to consider these constitutional arguments, including Free Exercise Clause arguments identical to RFRA, without the government being a party.[7]

Additionally, the Seventh Circuit has also held that RFRA does not apply in a suit between private parties. *Listecki*, 780 F.3d at 736. Similar to the Sixth Circuit, the court relied on the same implicit limitation. *Id.*

[7] Alternatively, when this rare context occurs, the government can be deemed a necessary party and joined to brief the strict scrutiny issue. Fed. R. Civ. P. 19. With this option, "[t]hose who adopted [RFRA] might not have anticipated their work would lead to this particular result." *Bostock v. Clayton County*, 590 U.S. 644, 653 (2020). "Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years[.]" *Id.* "But the limits of the drafters' imagination supply no reason to ignore the law's demands." *Id.*

And the court relied on similar legislative history. *Id.* at 737. Finally, the Seventh Circuit observed that two of the three circuits to analyze the matter had held that RFRA does not apply in this context. *Id.*

But this is weak sauce. RFRA's plain text prohibits the federal government, which includes judges, from substantially burdening religion unless strict scrutiny is satisfied, and RFRA applies to all federal law, including its implementation. RFRA thus applies to a federal judge applying Title VII or the Equal Pay Act to CRS. *Cf. Bostock v. Clayton County*, 590 U.S. 644, 682 (2020) ("Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases.")

C. RFRA's strict scrutiny test cannot be satisfied here.

If allowed to invoke RFRA here—as it should be—CRS can easily show that RFRA bars the federal claims. Specifically, CRS can readily establish a substantial burden on its religious practice, and the lack of a compelling government interest in enforcing the claims.

1. CRS can easily show a substantial burden on its religious free exercise.

For RFRA to foreclose the claims asserted here, the Church's free exercise of religion must be "substantially burden[ed]." 42 U.S.C.

§2000bb-1(a). Because RFRA "restore[s]" the "test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)," those cases are instructive. *Id.* §2000bb(b). The burdens in those cases were the violation of one's faith, or, respectively, a loss of unemployment benefits and a $5 fine. *Sherbert,* 374 U.S. at 404; *Yoder*, 406 U.S. at 208.

Here the burdens are greater: a Catholic organization either must violate its faith by endorsing or being complicit in what it does not recognize or accept—a same-sex marriage—through funding benefits for the same-sex spouse, or CRS must pay tens of thousands of dollars. This easily satisfies RFRA's substantial burden requirement. *See also Fulton v. City of Philadelphia*, 593 U.S. 522, 532 (2021) (determining that a city had "burdened [a Catholic entity's] religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.").

2. There is no compelling government interest in applying these federal statutes to CRS here.

With CRS's sincere religious exercise substantially burdened, strict scrutiny must be satisfied: there must be a "compelling governmental interest" in applying the statute to CRS, and the imposition of liability,

and thus damages, must be the "least restrictive means" of achieving that interest. 42 U.S.C. §2000bb-1(b).

As to the first of these requirements, the Supreme Court has observed that compelling interests are "interests of the highest order," *Fulton*, 593 U.S. at 541 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

Furthermore, to satisfy RFRA's compelling interest requirement, a general interest in enforcing the law at issue will not suffice. Rather, "RFRA requires the … demonstrat[ion] 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*, 546 U.S. at 430-31 (quoting 42 U.S.C. §2000bb-1(b)). So courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431.

Thus, when a religious sect challenged federal prohibition of the use of a hallucinogenic drug, "[u]nder the more focused inquiry required by RFRA," it was insufficient to satisfy the compelling governmental

interest requirement to "mere[ly] invo[ke] … the general characteristics of Schedule I substances," which the Court conceded "are exceptionally dangerous." *Gonzales*, 546 U.S. at 432. Rather, the Court found "no indication that Congress, in classifying [the drug], considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of [the drug] by the [religious sect]." *Id*. Thus, "Congress' determination that [the drug] should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA." *Id*.

Likewise, here there is "no indication that Congress, in [prohibiting sex discrimination] considered the harms posed by the particular … issue here", *id*.—forcing a Catholic organization to be complicit in a same-sex marriage by recognizing it through same-sex spousal benefits. Thus, a "determination that [sex discrimination] should be [prohibited] simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA." *Id*.

Accordingly, it cannot satisfy the compelling governmental interest requirement to merely point to these statutes and argue that outlawing sex discrimination is sufficiently compelling. Instead, it must be a

compelling governmental interest to apply federal anti-discrimination law to CRS based on the facts of *this* case—that is, there must be a compelling interest in denying CRS a religious *exemption* to Title VII and the Equal Pay Act here. *Gonzales,* 546 U.S. at 432 (requiring the government show why it was a compelling "interest 'of the highest order,'" not to enforce federal drug laws generally, but to enforce them against that specific religious entity in that particular situation and so deny it an exemption (citation omitted)).

Thus, for instance, in *Fulton*, which applied the same principle under the Free Exercise Clause, the Court grappled with a non-discrimination policy. In analyzing whether a compelling governmental interest existed, the Court observed that "[t]he question, then, is not whether the [government] has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to [the religious organization in that case]." *Fulton*, 593 U.S. at 541. And the Court concluded that "[o]nce properly narrowed, the [government's] asserted interests are insufficient" because the government "fail[ed] to show that granting [the religious organization] an exception will put those goals at risk." *Id*. at 541-42.

That a compelling interest does not exist here is made clear by the fact that the discrimination statutes at issue are riddled with exemptions. *Lukumi*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." (cleaned up)).

For instance, Title VII exempts small business—15 or fewer employees—from its requirements. 42 U.S.C. §2000e(b). According to the Census Bureau's Annual Business Survey in 2021, 79% of all businesses in this country have fewer than 10 employees.[8] That means that small businesses employ nearly 46% of American workers—about 59 million people.[9] A hole that size in a statute makes it hard to swallow an argument that it serves a compelling government interest to not exempt an employer in this situation given the marginal interest in enforcement here. And this exemption excludes similar numbers of Americans from Title VII's protections that Justice Alito found sufficient to torpedo a

[8] Rebecca Leppert, *A look at small businesses in the U.S.*, Pew Rsch. Ctr. (Apr. 22, 2024), https://tinyurl.com/33jur2jw.

[9] Off. of Advocacy, U.S. Small Bus. Admin., *Frequently Asked Questions About Small Business, 2024*, at 1 (July 23, 2024), https://tinyurl.com/mr335ku9.

compelling interest. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 591 U.S. 657, 697-98 (2020) (Alito, J., concurring).

Besides the small-business exemption, exemptions exist for "bona fide occupational qualification[s]"; nonprofit private membership clubs; businesses operating on or near a reservation (may give preferences to Native Americans); workplace seniority and merit systems; and communists (may refuse to hire them). 42 U.S.C. §2000e-2(e)-(f), (h)-(i); §2000e(b).

Or consider the Equal Pay Act. It exempts from its sex-discrimination prohibitions professional baseball players, border patrol agents, employees of particular recreational camps or amusement establishments, fishing and aquaculture industries, small newspapers, and switchboard operators at independently owned public telephone companies with 750 or fewer stations. 29 U.S.C. §§213(a)(3), (5), (8), (10), (18), (19).

It is difficult to see that sex discrimination is any less of a concern for these tens of millions of Americans not covered by Title VII or the Equal Pay Act. These massive exemptions thus doom any claim to a compelling interest. *Gonzales*, 546 U.S. at 432-34 (finding that exempting

one hallucinogenic drug but not another from a ban under the Controlled Substances Act when the two posed the same potential danger demonstrated no compelling interest in banning the second substance). And lacking a compelling interest in enforcing Title VII and the Equal Pay Act against CRS here means that a federal court cannot enforce those statutes against CRS due to the substantial burden on its religious free exercise.

II. As Jurists and Scholars Have Made Clear, Title VII's Religious Organizations' Exemption Applies to Alleged Sex (and Sexual Orientation) Discrimination.

Besides RFRA's barring of claims under Title VII (and the Equal Pay Act), Title VII also bars Plaintiff's sex-discrimination claim under that statute. That is because Title VII provides exemptions for certain religious employers. Relevant here, "[t]his subchapter shall not apply … to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." 42 U.S.C. §2000e-1(a). Additionally, "'religion' includes all aspects of religious observance and practice, as well as belief[.]" *Id.* §2000e(j). As various jurists and scholars have observed, this broad

language means that the covered religious organizations are exempt from sex-discrimination claims.

A. Jurists, including in this Court, correctly interpreted Title VII's plain language to mean that the religious organization exemption applies to any type of alleged discrimination.

For example, in *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 938 (7th Cir. 2022), the Sevent Circuit dismissed a Title VII suit brought by a guidance counselor after her former employer, a Catholic high school, decided not to renew her contact because she acknowledged being in "a same-sex union." The court ruled in the school's favor on ministerial exception grounds. *Id.* at 945.

But Judge Frank Easterbrook wrote a separate concurrence, arguing that the school was also entitled to a defense under Title VII's Section 702 religious organizations exemption. *Id.* at 945-46 (Easterbrook, J., concurring). He noted that "the Roman Catholic Church deems same-sex marriages improper on doctrinal grounds and … avoiding such marriages is a kind of religious observance." *Id.* at 946. And he thus reasoned that "[a] straightforward reading of §2000e-1(a) [Section 702], coupled with §2000e(j) [the statutory definition of

"religion"], shows that the Diocese was entitled to fire [the employee] without regard to any of the substantive rules in Title VII." *Id.*

Specifically, Judge Easterbrook articulated 6 key points:

1. The term "'[t]his subchapter' … comprises all of Title VII," meaning that an employer exempted under Section 702 may take employment action "without regard to any of the substantive rules in Title VII." *Id.* (quoting 42 U.S.C. §2000e-1(a)).

2. "A straightforward reading" of the exemption requires juxtaposing the exemption's language with the separate definition of "'religion,'" so that "'of a particular religion'" incorporates "'all aspects of religious observance and practice, as well as belief.'" *Id.* (quoting 42 U.S.C. §§2000e-1(a), 2000e(j)).

3. This means that "Section 702(a) permits a religious employer to require the staff to abide by religious rules." *Id.* Or, put another way, "when the [disputed employment] decision is founded on religious beliefs, then all of Title VII drops out." *Id.*

4. Section 702 "does not exempt all employment decisions by religious organizations. The decision must itself be religious, as that word is defined in Title VII." *Id.*

5. Reading Section 702's exemption in view of Title VII's definition of "religion" removes "[a]ny temptation to limit this exception to authorizing the employment of co-religionists, and not any other form of religious selectivity." *Id.* (discussing 42 U.S.C. §2000e(j)).

6. Just because a religious employer's religion discriminates on other grounds protected by Title VII does not mean the employer loses Section 702's exemption. Thus, "[f]iring people who have same-sex partners is sex discrimination …. But it is also religious discrimination. The Diocese is carrying out its theological views; that its adherence to Roman Catholic doctrine produces a form of sex discrimination does not make the action less religiously based." *Id.* at 947.

And Judge Easterbrook was not alone. Later, the Seventh Circuit's Judge Brennan read Title VII the same way. *Fitzgerald v. Roncalli High Sch., Inc.,* 73 F.4th 529, 536 (7th Cir. 2023) (Brennan, J., concurring). As did Judge King of this Court. *Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316, 335 (4th Cir. 2024) (King, J., dissenting in part and concurring in the judgment).

The similarities to this case are stark: CRS took a relatively mild adverse employment action (denying benefits to an employee's spouse)

for religious reasons: in order to avoid endorsement of or complicity in what it does not recognize or accept. In other words, CRS wants its employees to adhere to a particular religious observance or practice—specifically, abiding by the Church's teachings on marriage—and took action against an employee because he did not do so. Section 702 thus exempts CRS from any claim under the subchapter (Title VII), which includes sex-discrimination claims.

B. Recent scholarship shows that Title VII's text, purpose, and legislative history require that the religious-organization exemption applies to any alleged discrimination.

Reaching the same conclusion as these jurists are two soon-to-be published law review articles. R. Shawn Gunnarson, James C. Phillips & Christopher Bates, *Religious Employment and the Tensions between Liberty and Equality*, 2025 B.Y.U. L. Rev. (forthcoming 2025)[10] (hereinafter "*Religious Employment*"); Luke W. Goodrich, *Religious Hiring Beyond the Ministerial Exception*, 101 Notre Dame L. Rev. (forthcoming 2026)[11] (hereinafter "*Religious Hiring*").

[10] Available at SSRN, https://tinyurl.com/y3yh3hmu.

[11] Available at SSRN, https://tinyurl.com/44kuun3y.

Both articles make similar textualist arguments to those of Judge Easterbrook. *See Religious Employment*, at 10-13; *Religious Hiring*, at 22-23. And besides an analysis of Title VII's text, the BYU article proffers supplemental evidence from legislative history of the Civil Right Act of 1964 and the 1972 amendments to the Act that support this textualist meaning. *Religious Employment,* at 16-21. Specifically, in the original Act, the exemption only applied to employees engaged in religious activities, but the 1972 amendments deleted the word "religious" to also include secular activities to "remove religious institutions in all respects from subjugation to the EEOC." *Id*. at 19 (quoting 118 Cong. Rec. 705, 948 (1972)). As a Senate co-sponsor observed, "the amendment … would exempt religious societies, corporations, and educational institutions from the provisions of the act insofar as their employment practices are controlled by religious considerations." *Id.* at 20. (quoting 118 Cong. Rec. at 4907).

Additionally, the article notes that, as the Supreme Court observed, in amending Title VII Congress acted with "the proper purpose of lifting a regulation that burden[ed] the exercise of religion." *Id*. at 21 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints*

v. Amos, 483 U.S. 327, 338 (1987)). And the article observes that Justice Brennan's concurrence in *Amos* explains how Section 702, as interpreted above, "protects religious minorities against legal and cultural pressure to abandon their religious doctrine." *Id.* at 21-23 (font altered). While one could quibble whether Catholicism is a religious minority, religious views opposed to same-sex marriage are certainly a minority view in this country.[12]

Thus, the scholarship shows that text, purpose, and legislative history all point in the same direction: Title VII categorically exempts religious employers from sex-discrimination claims, like the one here, when the employment action was undertaken for religious reasons.

III. The Free Exercise Clause Requires Strict Scrutiny Here and Bars the MFEPA Claim.

Besides CRS's federal statutory defenses, the First Amendment also protects CRS from Plaintiff's state law discrimination claim under MFEPA.

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[12] Megan Brenan, *Same-Sex Relations, Marriage Still Supported by Most in U.S.*, Gallup (June 24, 2024), https://tinyurl.com/ynmt4d3w (finding that more than a super-majority—69%—of Americans support same-sex marriage).

A. Under *Fulton*, strict scrutiny applies if there is substantial government discretion in whether to provide an exemption.

Under the Free Exercise Clause, a law must satisfy strict scrutiny if it lacks neutrality or general applicability. *Fulton*, 593 U.S. at 533. And "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Id.* (cleaned up).

Thus, in *Sherbert v. Verner*, the Court dealt with a state law under which a state actor could deny unemployment benefits if an applicant had "failed, without good cause … to accept available suitable work." 374 U.S. at 400-01. And the Supreme Court characterized that law as lacking general applicability "because the 'good cause' standard permitted the government to grant exemptions based on the circumstances underlying each application." *Fulton*, 593 U.S. at 534 (citing *Emp. Div. v. Smith*, 494 U.S. 872, 884 (1990)). Thus, strict scrutiny applied.

Likewise in *Fulton*, the state contract required a Catholic services provider arranging foster care or adoption to "not reject a child or family … based upon … their … sexual orientation … unless an exception is granted by the Commissioner[.]" *Id.* at 535 (internal citation omitted).

And the Court viewed the contract as similar to "the good cause provision in *Sherbert*, [because it] incorporates a system of individual exemptions[.]" *Id*. Thus, the regulation was not generally applicable and strict scrutiny applied. *Id*. at 540-41. The same is true here.

B. MFEPA's religious exemption is the very definition of substantial government discretion.

Just like the government discretion embedded in the state law in *Sherbert* and the government contract in *Fulton*, MFEPA embeds government discretion in whether to grant a religious exemption—hence failing general applicability and triggering strict scrutiny.

That is because the MFEPA's religious organization exemption (as interpreted by the Maryland Supreme Court) applies only to employees who "directly further the core mission(s)—religious or secular, or both—of the religious entity." JA994. To determine this "entails a fact-intensive inquiry that requires consideration of the totality of the pertinent circumstances." JA994. And so the statute as interpreted, requires "a trial court [to] consider, among other things," at least seven named factors, with the door open to unnamed others. JA994-995. Such a multi-factor, totality-of-the-circumstances test is the very definition of discretion. *See, e.g., Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,

572 U.S. 545, 554 (2014) ("District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances.").

That the statute invests discretion in a judge, as opposed to other government officials, regarding whether to provide the religious exemption does not matter. Judges should be treated no differently than any other official under the First Amendment. *Herbert v. Lando*, 568 F.2d 974, 987 & n.13 (2d Cir. 1977) (Oakes, J., concurring) ("[T]he First Amendment binds the courts just as it binds the other branches of government." (citing *Neb. Press Ass'n v. Stuart*, 427 U.S. 539 (1976))), *rev'd*, 441 U.S. 153 (1979); *Fitzgerald v. Roncalli High Sch., Inc.*, 634 F.Supp.3d 523, 529 (S.D. Ind. 2022) ("The [First Amendment's ministerial] exception binds courts 'to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions.'" (quoting *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 746 (2020))), *aff'd*, 73 F.4th 529 (7th Cir. 2023). After all, *Smith* and *Fulton* articulated the standard as "government" discretion, not discretion of a certain *type* of government actor. *Smith*, 494 U.S. at 884; *Fulton*, 593 U.S. at 534.

Nor does applying this standard to judicial discretion open Pandora's Box. *Sherbert* and *Fulton* clearly contain two limiting principles. First, discretion only violated general applicability in the context of written law: a state statute and a government contract. *Sherbert,* 374 U.S. at 400-01; *Fulton,* 593 U.S. at 534-40. That is the situation here. So the principle need not be extended to other forms of judicial discretion, like common-law decision making. Second, both cases dealt with substantial discretion: *Sherbert* dealt with a "standard [that] permitted the government to grant exemptions based on the circumstances underlying each application," *Fulton,* 593 U.S. at 534 (citing *Sherbert,* 374 U.S. at 401 n.4), and in *Fulton*, whether to grant an exemption was at the "sole discretion" of a government actor, *id.* at 535. The same is true with MFEPA and its fact-intensive, multi-factor, totality-of-the-pertinent-circumstances test.

Therefore, given the MFEPA's requirement of substantial judicial discretion in whether to apply a religious exemption, strict scrutiny applies.

C. Lacking a compelling interest, the State cannot satisfy strict scrutiny, and denying an exemption therefore violates the Free Exercise Clause.

With strict scrutiny triggered, a law can survive "only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Fulton*, 593 U.S. at 541 (cleaned up). And the State fails the first of these requirements: a compelling government interest.

That's because "the First Amendment demands a more precise analysis" than stating a government interest "at a high level of generality." *Id.* In other words, "[t]he question, then, is not whether the [State] has a compelling interest in enforcing its non-discrimination [law] generally, but whether it has such an interest in denying an exception to [CRS]." *Id.* Thus, a general interest in prohibiting sexual-orientation discrimination is insufficient.

And, to determine how compelling that interest is, the number and relevance of exceptions to the interest are crucial to the analysis. *Lukumi*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited." (cleaned up)). But here MFEPA provides a whole series of exemptions that undermine the asserted

interest in prohibiting sexual-orientation discrimination. First, the statute exempts small businesses (14 or fewer employees). Md. Code Ann., State Gov't §20-601(d)(1)(i). Second, the statute exempts non-profit membership clubs. *Id.* §20-601(d)(3). Third, MFEPA allows religious educational institutions to only hire or employ "employees of a particular religion," meaning that employer could discriminate based on sexual orientation for a religious reason. *Id.* §20-605(a)(3). Finally, the statute exempts employers that are "observing the terms of a bona fide seniority system or any bona fide employee benefit plan." *Id.* §20-605(a)(4).

These exemptions mean that over 80% of Maryland employers are free to discriminate based on sexual orientation.[13] This "leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (citation omitted). And it makes it hard to justify "the marginal interest in enforcing the [MFEPA] in th[is] case[]" against

[13] U.S. Census Bureau, 2021 SUSB Annual Data Tables by Establishment Industry: U.S. and States, NAICS, detailed employment (Dec. 21 2023), https://perma.cc/PQ57-M474.

CRS when so many other employers are off the hook. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726-27 (2014).[14]

Lacking a compelling interest, strict scrutiny cannot be satisfied and the Free Exercise Clause is violated by enforcing MFEPA here.

CONCLUSION

Given RFRA, Title VII, and the Free Exercise Clause, none of Plaintiff's claims survive. This Court should reverse the district court and remand for judgment for Catholic Relief Services.

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Respectfully submitted,

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[14] Excluding large swaths of the population from the statute's protections can also trigger strict scrutiny by showing the statute is not generally applicable. CRS Br. 49-53.

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limit of Fed. R. App. P. 29(b)(4), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,496 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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