22-951(L)

22-1076(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

COMPASSCARE, A NEW YORK NONPROFIT CORPORATION, NATIONAL INSTITUTE OF REPRODUCTIVE AND LIFE ADVOCATES, DBA NIFLA, A VIRGINIA CORPORATION, FIRST BIBLE BAPTIST CHURCH, A NEW YORK NONPROFIT CORPORATION,

Plaintiffs-Appellants-Cross-Appellees,

– against –

KATHY HOCHUL, IN HER OFFICIAL CAPACITY AS THE GOVERNOR OF THE STATE OF NEW YORK, ROBERTA REARDON, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE LABOR DEPARTMENT OF THE STATE OF NEW YORK, LETITIA JAMES, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* NEW YORK CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANTS-APPELLEES-CROSS-APELLANTS AND IN SUPPORT OF AFFIRMANCE OF THE APPEAL

For continuation of Amici Appearance See Inside Cover

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* American Civil Liberties Union and New York Civil Liberties Union hereby certify that they have no parent corporations and that no publicly held corporations own 10% of more of their stock.

AUTHORITY TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* state that all parties have consented to the filing of this brief.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and their members contributed money toward the preparation or filing of this brief.

INTRODUCTION

This appeal raises a critical issue: whether and to what extent employers can invoke freedom of association to immunize themselves from employment antidiscrimination laws. This Court's decision in *Slattery v. Hochul*, 61 F.4th 278 (2d Cir. 2023), allowed an anti-abortion pregnancy counseling center to proceed beyond the pleading stage on its claim that New York Labor Law Section 203-e (the "Boss Bill" or "Bill") 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, including their decisions to have abortions.

No other decision from any United States Court of Appeals or the United States Supreme Court has expanded expressive association rights to the commercial context of employment, and indeed courts have regularly rejected such arguments. *Amici* agree with the State that *Slattery* erred by applying the standard governing an expressive association's relationship with its *membership* and *volunteer leaders* to the different context of an expressive association's relationship with its *paid employees*. To the extent the Court determines it is bound by

Slattery's expressive association holding, *amici* urge this Court not to extend it beyond the particular context in which it arose: a pregnancy counseling center formed to oppose abortion that seeks to violate a law prohibiting discrimination in employment against people who have had an abortion.

Slattery goes no further. And even under its reasoning, Appellants First Bible Baptist Church ("First Bible") and its subsidiaries Grace and Truth Athletics and Sports Park ("G&T Athletics")—"which offers recreational sports programs for children and adults," Compl. ¶ 137—and Northstar Christian Academy ("Northstar")—"a traditional curriculum school," Compl. ¶ 133—cannot establish violations of their rights to expressive association. They are not associations formed to advocate opposition to the reproductive health decisions protected by the Bill, even if they sincerely oppose those decisions: They are, respectively, a house of worship, an athletic club, and a school. They, unlike Appellants CompassCare and NIFLA, thus cannot claim a presumption under *Slattery* that the Bill severely burdens their expression, and they have not otherwise shown such a burden exists. Even if they had, the Bill—a generally applicable law proscribing

employment discrimination on the basis of reproductive health decisions—survives strict scrutiny as applied to First Bible, G&T Athletics, and Northstar. The State has a compelling interest in enforcing the Bill against these plaintiffs, and the Bill goes no further than necessary to achieve that interest. *Slattery*'s finding that the Bill did not satisfy heightened First Amendment scrutiny at the pleading stage as applied to an anti-abortion pregnancy counseling center goes no further than its particular context.

The sweeping theory of expressive association proffered by Appellants would rewrite First Amendment doctrine and employment antidiscrimination law, dismantling the careful balance that has been struck between protecting expressive rights on the one hand and guarding against invidious discrimination in the workplace on the other.

For these reasons, *amici* urge this Court to at a minimum affirm the dismissal of First Bible, G&T Athletics, and Northstar's expressive association claims.[2]

[2] *Amici* write specifically to address the expressive association claims presented in this case, and to emphasize why *Slattery* should not be extended any further, should the Court determine that *Slattery*

STATEMENT OF INTEREST

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members dedicated to defending the principles of liberty and equality embodied in the Constitution. The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the ACLU, with over 85,000 members across the state. As organizations that advocate for freedom of expression as well as equal rights in the workplace, the ACLU, the NYCLU, and their members have a strong interest in the application of proper standards when evaluating constitutional challenges to civil rights laws. *Amici* have long fought to protect and expand the civil liberties guaranteed under state and federal law, including the rights of women and pregnant people to due process, equality, and reproductive freedom under the law. *Amici* have participated in numerous cases concerning employment discrimination,

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controls. *Amici* agree with the State that the handbook notice requirements are constitutional but do not address those arguments in this brief.

In the event that this Court decides a remand is appropriate, it should nevertheless affirm the denial of Appellants' request for a preliminary injunction, as there is no basis to conclude that they are likely to succeed on the merits of their claims.

sex discrimination, and reproductive rights, including First Amendment challenges to antidiscrimination laws. *See* Brief of Amicus Curiae New York Civil Liberties Union in Support of Defendants-Appellees and in Support of Affirmance, *Slattery v. Cuomo*, No. 21-911, ECF No. 62 (Aug. 25, 2021). *Amici* bring expertise in the relevant law and have a strong interest in ensuring the correct analysis and resolution of questions directly implicating gender equality and reproductive autonomy.

ARGUMENT

I. *Slattery* Should Not Be Extended Beyond the Context of Associations Formed to Oppose Conduct Protected by the Bill.

In *Slattery v. Hochul*, 61 F.4th 278, 286-91 (2d Cir. 2023), this Court ruled that a nonprofit anti-abortion pregnancy counseling center formed to oppose abortion plausibly alleged that the Boss Bill—a New York statute that prohibits discrimination in employment on the basis of an individual's or their dependent's reproductive health decisions, N.Y. Lab. Law § 203-e —violated the center's right to expressive association under the First Amendment. *Amici* believe that *Slattery* was wrongly decided in implicitly extending expressive association to employment relationships, but even under *Slattery* this Court can and

should affirm the dismissal of similar claims raised by the differently situated plaintiffs here.

A. *Slattery* Stands Alone in Extending Expressive Association to Employment.

Without explanation or analysis, *Slattery* applied freedom of expressive association cases involving organizations' selection of their *members* and *volunteer leaders* to the dramatically different context of an organization's hiring practices with respect to *paid employees*. *Amici* agree with the State that *Slattery* reached the wrong conclusion insofar as it implicitly extended the right of expressive association to the commercial context of employment.

The Supreme Court has never found an expressive association right to engage in employment discrimination. To the contrary, it has flatly rejected such a claim. *See Hishon v. King & Spalding*, 467 U.S. 69, 74 (1984) (finding that expressive association did not immunize a law firm from Title VII's mandate that it not exclude women from partnership). Lower courts have also routinely rejected such claims. *See, e.g.*, *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1209 (S.D. Ind. 2020) ("*Dale* did not arise from the employment context. The plaintiff sought membership in a private

organization. The freedom of association cases relied upon in *Dale* reveal the doctrine's applicability to parade groups, political parties, and other non-employment contexts."); *Billard v. Charlotte Catholic High Sch.*, No. 3:17-cv-00011, 2021 WL 4037431, at *23 (W.D.N.C. Sept. 3, 2021) ("[H]iring paid employees is commercial activity, not expressive association. Freedom of association does not apply in the employment context."), *appeal pending*, No. 22-144 (4th Cir.). To the extent that employment regulations incidentally burden an expressive association's ability to communicate its message, those regulations (like other regulations of commercial activity that do not target expression) trigger, at most, intermediate scrutiny. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

Slattery arose in a particular factual context: a law prohibiting "discrimination based on one's choice to engage in certain, legally authorized conduct" as applied to an organization "dedicated to outlawing or otherwise opposing that specific conduct." *Slattery*, 61 F.4th at 289. To the extent this Court views *Slattery*'s holding applying strict scrutiny to an expressive association claim in the employment context as controlling in this case, it is critically important not to extend

its reasoning. *Slattery* did not address the situation presented here: application of the Bill to a range of employers different from an anti-abortion pregnancy counseling center. Extending its holding beyond that context would severely undermine protections guaranteeing equal opportunity in the workplace.

B. Extending Expressive Association to Employment Beyond the Context of *Slattery* Would Radically Destabilize Protections Against Discrimination in Employment.

Many businesses engage in some expression some of the time. Accepting Appellants' argument that engaging in some expressive activity entitles employers to claim a constitutional right to violate antidiscrimination laws and categorically exclude groups of people from employment—based on the allegation that the mere existence of an employment relationship with such individuals "alters [the employer's] message," Br. 20, or a claim that opposition to certain classes of people is central to its mission—would have radical consequences. As another court has noted, if this were the law, "then businesses engaged in . . . expressive association would be granted an exception from all statutes governing the relationship between a business and the people they interact with. This preposterous result cannot be the case." *Billard*,

2021 WL 4037431, at *22.[3] Appellants' theory of *Slattery*, if accepted, would upend *Hishon*, 467 U.S. at 74, and expressive association doctrine more broadly, and threatens to clear the path for unchecked discrimination in employment.

This threat is neither abstract nor distant. While the ministerial exception recognized in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 193 (2012), already ensures that religious organizations can hire and fire anyone in a ministerial role,

[3] Commentators of all political stripes have treated employment relationships as outside the ambit of expressive association. *See, e.g.*, Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 Geo. L.J. 1, 64 (2000) ("The ordinary workplace, organized around economic rather than political, social, cultural, or spiritual objectives, cannot claim the freedom of expressive association as a shield against antidiscrimination law."); Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 Mich. L. Rev. 225, 260-61 (2013) ("[A] commercial enterprise's hiring and retention of an employee—at least where the employee is not hired specifically to express a message—seems a far cry from an expressive association's decision to admit an individual to membership."); David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 Mo. L. Rev. 83, 132 (2001) ("Most likely, courts will hold that wage payments are not 'expression' or 'speech' for purposes of the First Amendment."); Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. Det. Mercy L. Rev. 189, 348 (1999) ("[A]ssociation rights have not provided a defense against anti-discrimination laws in employment or housing contexts.").

religiously affiliated for-profit organizations are already arguing for a far broader right to refuse to hire lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people or people who have had abortions, and religiously affiliated schools claim an associational right to fire people who marry someone of the same sex or who are unmarried and pregnant. *See Bear Creek Bible Church v. E.E.O.C.*, 571 F. Supp. 3d 571, 615-16 (N.D. Tex. 2021), *vacated in relevant part sub nom. Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914 (5th Cir. 2023); *Billard*, 2021 WL 4037431, at *22-23; *Our Lady's Inn v. City of St. Louis*, 349 F. Supp. 3d 805, 820-22 (E.D. Mo. 2018). Hobby Lobby could argue for a right not to employ people who use contraception. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 700-04 (2014). Religiously affiliated hospitals that disapprove of LGBTQ people, unmarried pregnant people, or divorcees could argue that hiring such people would impair the hospitals' message merely because they do not abide by all the religious tenets the hospitals operate under.[4]

[4] These hospitals notably account for as many as one in six hospital beds in the country. Julia Kaye, Brigitte Amiri, Louise Melling & Jennifer Dalven, ACLU, Health Care Denied: Patients and Physicians Speak Out About Catholic Hospitals and the Threat to Women's Health

And, critically, free association claims are in no way limited to employers with religious values. *Hosanna-Tabor*, 565 U.S. at 189 ("The right to freedom of association is a right enjoyed by religious and secular groups alike."). Should the claim pressed by Appellants become more broadly available, more cases surely will emerge. A private school could fire a teacher for marrying someone of a different race because the school's values statement includes opposition to interracial relationships. A law firm could refuse to hire women based on a core belief that women belong in the home and should not work. A gym that opposes medical interventions could screen out job applicants with disabilities who require certain medications or treatments. A retail store that sells anti-war paraphernalia could exclude veterans from employment.

The argument marshalled against Title VII in 1964 is the same argument Appellants raise here: that employment antidiscrimination law "deprives employers of the right to exercise their own judgment

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and Lives 6 (2016), https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied.

with respect to hiring and other employment decisions."[5] This argument was rejected in the civil rights era and ought to be rejected once again. "Discriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed" in Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). Accepting Appellants' sweeping theory of expressive association would undermine the longstanding goals of employment antidiscrimination laws.

II. Even Under *Slattery*, First Bible, G&T Athletics, and Northstar Have Not Demonstrated a Violation of Expressive Association.

At every step of its analysis, *Slattery* relied on unique facts before the panel in that case. While the plaintiffs representing anti-abortion pregnancy counseling centers in this case—namely, CompassCare and NIFLA—may be covered by *Slattery*, the other plaintiffs—namely, First Bible, G&T Athletics, and Northstar Christian Academy—are not. First Bible—a church, Compl. ¶ 44, G&T Athletics—"which offers recreational sports programs for children and adults," Compl. ¶ 137,

[5] Paul M. Downing, Cong. Rsch. Serv., The Civil Rights Act of 1964: Legislative History; Pro and Con Arguments; Text 39 (1965), https://www.senate.gov/artandhistory/history/resources/pdf/CivilRights_CRSReport1965.pdf.

and Northstar—"a traditional curriculum school," Compl. ¶ 133, do not state a claim that the Boss Bill violates their right to freedom of expressive association.

A. Even Under *Slattery*, First Bible, G&T Athletics, and Northstar Have Not Demonstrated That the Boss Bill Imposes a Severe Burden on Their Expression.

Even under *Slattery*'s reasoning, the Boss Bill does not severely burden First Bible, G&T Athletics, or Northstar's expression. *Slattery* 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." *Slattery*, 61 F.4th at 288 (emphasis added). Even if a severe burden could be found with respect to an anti-abortion pregnancy counseling center at the pleading stage, as *Slattery* held, such a finding should be limited to that unusual context and not extended to other entities like First Bible, G&T Athletics, or Northstar.

First Bible and the programs it operates, including G&T Athletics and Northstar, certainly may engage in expression that draws the protection of the First Amendment, but that does not mean they can claim that generally applicable employment antidiscrimination laws

impose a severe burden on their expressive association rights. The Supreme Court case on which *Slattery* primarily relied and on which Appellants rely, *Boy Scouts of America v. Dale*, 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. 640, 653 (2000). Employment decisions are not "inherent[ly] expressive[]," *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 568 (1995), a point which *Slattery* acknowledged. 61 F.4th at 291 (rejecting the proposition "that the acts of hiring, terminating, or continuing to employ persons are themselves expressive conduct that communicates its views"). 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 v. U.S. Jaycees*, 468 U.S. 609, 626 (1984); *see also Dale*, 530 U.S. at 653.

Appellants have not shown that the Boss Bill imposes a severe burden on the expression of First Bible, G&T Athletics, or Northstar. They assert that First Bible "believes that abortion. . . violates the

Bible's command" and "seeks to recognize and preserve the sanctity of human life from conception to natural death." Compl. ¶¶ 121, 123. They assert that G&T Athletics "offers recreational sports programs for children and adults alike that teach good sportsmanship, teamwork, fundamental skill development, and positive Christian values," and that Northstar Christian Academy is "a traditional curriculum school educating approximately 350 students from preschool/daycare through 12th grade." Compl. ¶¶ 133, 137. And they assert that both G&T Athletics and Northstar "follow[] First Bible's statement of faith in all respects." Compl. ¶¶ 136, 139. They also claim to "only hire and employ individuals who share their beliefs and values and personally adhere to such beliefs and values in every aspect of their lives." Compl. ¶ 249. Appellants suggest that the Boss Bill therefore severely burdens the expression of First Bible, G&T Athletics, and Northstar by preventing them from excluding individuals from employment based on reproductive health decisions they disapprove of. But this does not follow from *Slattery*.

Slattery held that a severe burden was plausibly alleged because it found that "[t]he statute forces [the plaintiff] to employ individuals who

act or have acted against the very mission of its organization." 61 F.4th at 288. First Bible is a church, G&T Athletics is an athletics and sports program, and Northstar is a school; none of these is an anti-abortion pregnancy counseling center formed for the purpose of opposing abortion. They cannot claim that they are organizations formed specifically to oppose certain reproductive health decisions, even though they and their members and employees may well sincerely hold and seek to share views opposing those decisions. This is a critical distinction; no one disputes that First Bible, G&T Athletics, or Northstar sincerely oppose abortion, nor that they may engage in anti-abortion expression. But that is not enough. As discussed *infra*, these plaintiffs retain ample discretion to make employment decisions on the basis of any particular individual's ability to effectively convey the plaintiffs' message to the extent required as part of their job performance. *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 Bill. *See* 61 F.4th at 288. First Bible, G&T Athletics,

and Northstar therefore must do more to demonstrate a severe burden under *Slattery*. They have not.[6]

The Boss Bill does not prevent First Bible, G&T Athletics, or Northstar from protecting their ability to express their values and beliefs through their employment practices. Employers have broad discretion in governing their relationships with employees. As a general matter, they can make employment decisions for almost any reason—or no reason at all—provided these decisions are not based on certain discrete protected characteristics as provided by federal, state, and local antidiscrimination laws. *See Nix v. WLCY Radio/Rahall Comms.*, 738 F.2d 1181, 1186 (11th Cir. 1984) ("[An] employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."); *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C.A §

[6] Appellants' reliance on *New Hope Family Services, Inc. v. Poole* is misplaced—that decision found that the employer had plausibly alleged a severe burden because they claimed enforcement of the law in question "may require New Hope to 'correct[ ] or disciplin[e]' employees who, sharing New Hope's religious beliefs, act on, or even express, those beliefs in interacting with birthparents or prospective adoptive parents." 966 F.3d 145, 179 (2d Cir. 2020). They thus alleged actual "expressive limitations," *id.*, of the sort that are wholly absent with respect to Appellants here.

2000e *et seq*. (proscribing discrimination on the basis of "race, color, religion, sex, or national origin," not employment decisions based on any other "legitimate, nondiscriminatory reason," *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973)).

Under the Boss Bill and other antidiscrimination laws, First Bible, G&T Athletics, and Northstar maintain wide latitude to ask potential employees whether they would be willing and able to promote the values the employers seek to teach; to include terms in an employment contract requiring employees to support the employer's message in their job performance; and to assess whether an employee effectively communicates the employer's message. As the district court below noted: "Plaintiffs could fire an employee who advised a patient to have an abortion, use birth control, engage in sex outside of marriage to a person of the opposite sex, or declared that God did not exist and not face any consequences under Labor Law 203-e." *CompassCare v. Cuomo*, 465 F. Supp. 3d 122, 148 (N.D.N.Y. 2020). Employment decisions made on these grounds would not be made on the basis of an individual's reproductive health decisions, and thus are not affected by the Boss Bill. *See, e.g.*, *N.Y. State Club Ass'n v. City of New York*, 487

U.S. 1, 13 (1988) (noting that antidiscrimination laws do not bar exclusion of individuals who do not share certain views; rather, they "merely prevent[] an association from using . . . specific characteristics as shorthand measures in place of what the city considers to be more legitimate criteria").

The fact that First Bible is a religious institution, and that G&T Athletics and Northstar operate under the ambit of First Bible, has no bearing as a matter of law on these plaintiffs' expressive association claims. *See Hosanna-Tabor*, 565 U.S. at 189. Any "special solicitude to the rights of religious organizations" flows from the religion clauses of the First Amendment, not the Amendment's protection of free association, as the Supreme Court has made clear. *Id.* Of course, the Bill does not and cannot override the special protections religious institutions *do* enjoy under the First Amendment, including the ministerial exception. The ministerial exception "precludes application of [certain employment discrimination laws] to claims concerning the employment relationship between a religious institution and its ministers." *Id.* at 188. To the extent a particular employee or role qualifies under this doctrine as a "minister," the Boss Bill would

necessarily be subordinated to the demands of the First Amendment. *See CompassCare*, 465 F. Supp. 3d at 148; *see also Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 204 (2d Cir. 2017) ("[T]he ministerial exception bars employment-discrimination claims against a religious organization . . . [where] the employee qualifies as a 'minister' . . . ."); *Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) ("Some employees have only religious duties. Others may be lay employees of a religious organization.").[7]

The freedom of expressive association does not differentiate between religious and secular organizations, and the Bill does not purport to intrude upon the rights religious institutions—including

[7] Indeed, the expansive reading of expressive association asserted by Appellants, extended to the employment context, would render completely superfluous the ministerial exception. *See Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 496 F. Supp. 3d 1195, 1209 (S.D. Ind. 2020) ("[I]f a religious employer could simply assert a freedom of association defense and defeat a discrimination claim, it is again not clear why the Supreme Court reaffirmed the ministerial exception in *Morrissey-Berru*. If freedom of association applies in the religious employment context, the ministerial exception is unnecessary."). The Supreme Court's reasoning that the ministerial exception offers protection above and beyond what expressive association does, since the First Amendment "gives special solicitude to the rights of religious organizations," would be flipped on its head were Appellants' arguments accepted. *See Hosanna-Tabor*, 565 U.S. at 189.

First Bible—hold under the religion clauses of the First Amendment. *See Slattery*, 61 F.4th at 293 n.9 ("If Evergreen is ever subject to suit under § 203-e, it may raise the ministerial exception as a defense to a suit concerning a particular employee." (citing *Hosanna-Tabor*, 565 U.S. at 193)). For purposes of an expressive association claim, however, First Bible's status as a religious institution does not alter the severe burden analysis as to itself, G&T Athletics, or Northstar. And as discussed *supra*, these plaintiffs cannot show such a burden.

B. Even Under *Slattery*, the Boss Bill Satisfies Strict Scrutiny as Applied to First Bible, G&T Athletics, and Northstar.

"Strict scrutiny applies only when a challenged regulation imposes 'severe burdens' on associational rights." *Slattery*, 61 F.4th at 287 (quoting *Jacoby & Meyers, LLP v. Presiding Justices*, 852 F.3d 178, 191 (2d Cir. 2017)). First Bible, G&T Athletics, and Northstar cannot show any such burden, but in any event, the Boss Bill satisfies strict scrutiny as applied to these Appellants. *Slattery* acknowledged that "[t]he right to associate for expressive purposes is not . . . absolute. Infringements 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." *Slattery*, 61 F.4th at 289 (quoting *Jaycees*, 468 U.S. at 623). While *Slattery* went on to find that heightened scrutiny was not satisfied as to an anti-abortion pregnancy counseling center at the pleading stage, that decision goes no further than its precise context.

Here, the State has a compelling interest in enforcing the Boss Bill against First Bible, G&T Athletics, and Northstar, and the Bill goes no further than is necessary to achieve that compelling interest.

i. The State Has a Compelling Interest in Enforcing the Boss Bill.

It is well established that eradicating discrimination—and specifically eradicating discrimination in employment—is a compelling governmental interest of the highest order. *See, e.g.*, *Hsu By and Through Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 859 (2d Cir. 1996) ("*Roberts* and *Rotary* make clear that a 'compelling' governmental interest (such as eliminating discrimination against women) will override the right to expressive association." (citing *Jaycees*, 468 U.S. at 623; *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987))); *Redhead v. Conf. of Seventh-Day*

Adventists, 440 F. Supp. 2d 211, 220 (E.D.N.Y. 2006) ("Title VII's purpose of eradicating employment discrimination is a 'compelling government interest.'" (citing, e.g., *Werft v. Desert Southwest Annual Conf. of United Methodist Church*, 377 F.3d 1099, 1102 (9th Cir. 2004))); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1281 (9th Cir. 1982) ("Title VII establishes a compelling governmental interest in eliminating employment discrimination.").

Employment antidiscrimination laws are enacted to ensure that people traditionally subject to discrimination have a chance to earn a livelihood and participate in public life—and the Boss Bill is no different.[8] Laws barring discrimination in employment operate to remove the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups. *See Jaycees*, 468 U.S. at 625. For example, Congress passed Title VII in response to the high rate of unemployment and resulting

[8] *E.g.*, 29 C.F.R. § 1608.1(b) ("Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.").

poverty experienced by Black workers.[9] Today, vast wealth and wage gaps continue to burden people of color, women, and LGBTQ people.[10] Laws preventing employment discrimination in particular attempt to address this inequity. In this respect, a job is not like a club, given the role it plays in addressing economic inequities reflecting longstanding discrimination.[11]

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[9] Downing, *supra* note 5, at 39 (explaining that Black workers experience twice the rate of unemployment as white workers).

[10] *See, e.g.*, Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020* (Nat'l Bureau of Econ. Rsch. Working Paper No. 30101 at 2-3, 2022), https://www.nber.org/system/files/working_papers/w30101/w30101.pdf ("From a starting point of nearly 60 to 1, the white-to-Black per capita wealth ratio fell to 10 to 1 by 1920, and to 7 to 1 by the 1950s. 70 years later the wealth gap remains at a similar magnitude of 6 to 1."); Carolina Aragão, *Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades*, Pew Rsch. Ctr. (Mar. 1, 2023), https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts ("The gender gap in pay has remained relatively stable in the United States over the past 20 years or so. In 2022, women earned an average of 82% of what men earned . . . ."); *The Wage Gap Among LGBTQ+ Workers in the United States*, HRC Foundation, https://www.hrc.org/resources/the-wage-gap-among-lgbtq-workers-in-the-united-states (last visited July 2, 2023) ("LGBTQ+ workers earn about 90 cents for every dollar that the typical worker earns.").

[11] Even in the case of the Jaycees (a club, not a place of employment), the Minnesota Supreme Court noted the various commercial programs and benefits offered to members, and stated that "[l]eadership skills are 'goods,' [and] business contacts and employment promotions are

Permitting employers to claim a constitutional right to discriminate against individuals whose identities allegedly impair their message would perpetuate existing inequalities in employment. Even with existing protections, women, LGBTQ people, and people of color experience discrimination in hiring and at work. Résumés with distinctively Black names are nine percent less likely to be contacted by employers.[12] On average, white applicants receive thirty-six percent more callbacks than Black applicants and twenty-four percent more callbacks than Latinx applicants.[13] Forty-seven percent of transgender people experienced a negative employment outcome because of their gender identity, which includes: thirty-four percent who were passed over for a job, twenty-three percent who were denied a promotion, and

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'privileges' and 'advantages' . . . ." *U.S. Jaycees v. McClure*, 305 N.W.2d 764, 772 (Minn. 1981).

[12] Patrick M. Kline, Evan K. Rose & Christopher R. Walters, *Systemic Discrimination Among Large U.S. Employers* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29053, 2022), https://www.nber.org/system/files/working_papers/w29053/w29053.pdf.

[13] Lincoln Quillian, Devah Pager, Ole Hexel & Arnfinn H. Midtbørn, *Meta-Analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring over Time*, 114 Proceedings of the Nat'l Acad. Sciences of the United States 10870, 10871 (2017).

twenty-six percent who were fired because they were transgender.[14] Ninety percent of transgender workers reported experiencing workplace harassment or mistreatment.[15] Allowing employers to use expressive association as an end-run around employment antidiscrimination law would worsen these outcomes and generally strip away the crucial framework that has been built up over the past several decades to protect equal opportunity in the workplace.

The Boss Bill addresses many forms of discrimination that have long hurt women in the workplace and continue to do so. *See* N.Y. Lab. Law § 203-e(2)(a) (prohibiting discrimination based on an "employee's or dependent's reproductive health decision making, including, but not limited to, the decision to use or access a particular drug, device or medical service"). The State has a compelling interest in eradicating the real harms addressed by the Bill.

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[14] Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment: Data Demonstrate Need for Federal Law,* Ctr. for Am. Progress (June 2, 2011), https://www.americanprogress.org/article/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment.

[15] *Id.*

Discrimination on the basis of reproductive health decisions has long been a problem, and necessitated laws expressly barring discrimination on the basis of pregnancy when antidiscrimination laws protecting against sex discrimination proved insufficient. *See, e.g.*, *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 139-40 (1976) (concluding that discrimination on the basis of pregnancy is not a form of discrimination on the basis of sex), *superseded by statute*, Pregnancy Discrimination Act of 1978 ("PDA"), *amending* 42 U.S.C.A § 2000e *et seq.* When discrimination persisted even after such laws were passed, several states—and recently the federal government—enacted further protections requiring reasonable workplace accommodations for employees who are pregnant or experiencing related medical conditions. *See, e.g.*, Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. § 103(1) (2022); N.Y. Exec. Law §§ 292(21-f), 296(3)(a). And the harms addressed by the Bill continue—as *amici* NYCLU explained in an amicus brief submitted in *Slattery*, "employers have often exerted their influence over employees' private health care decisions through coercive means such as punishment, threats, or termination. . . . [T]he New York State Legislature plainly noted this ongoing problem when they

considered and passed the statute." Brief of Amicus Curiae New York Civil Liberties Union in Support of Defendants-Appellees and in Support of Affirmance, *Slattery v. Cuomo*, No. 21-911, ECF No. 62 (Aug. 25, 2021).

Appellants' suggestion that the Bill's "legislative history shows no instance of discrimination based on an employee's reproductive choices," Br. 10, is incorrect. During the Legislature's debate over the Boss Bill, Assembly Member Ellen Jaffee explained that she had received many complaints from constituents about workplace discrimination based on reproductive health decision making.[16] While Assembly Member Jaffee had reasonably been "asked not to share" the details of her constituents' private medical histories, public reporting and detailed studies have elucidated the types of discrimination to which Assembly Member Jaffee referred.[17] Culled from those studies—as well as from additional

[16] *See* N.Y. Assembly Debate on Assembly Bill No. 8769-A (June 18, 2014), at 106-07 (discussing a prior version of the Bill).
[17] *See* Stephanie Bornstein, Ctr. for WorkLife Law, Poor, Pregnant, And Fired: Caregiver Discrimination Against Low-Wage Workers 11-13 (2011), https://worklifelaw.org/wp-content/uploads/publications/PoorPregnantAndFired.pdf; Joan C. Williams, Professor of Law, Univ. of Cal. Hastings, and Director, Ctr. for Worklife Law, Written Testimony at EEOC Meeting on Unlawful Discrimination Against Pregnant Workers and Workers with

reports, investigations, and complaints—the stories below illustrate the types of harm the New York State Legislature acted to address and the types of discrimination prohibited by the Boss Bill that have persisted in workplaces across the state and country in recent years.

For example, employees who became pregnant and decided to continue the pregnancy still risked being fired from their jobs, demoted, or relieved of key responsibilities, despite the PDA's protections. Kristina McGowan, a receptionist at a day spa on Long Island, told her supervisor she was pregnant one morning. By noon, the spa owner fired her, saying her pregnancy would make her "less agile" and more absent during busy summer months.[18] Leigh Castergine, a former top ticket sales executive for the New York Mets, was fired when the team's chief operating officer discovered that she had decided to continue a pregnancy outside of marriage. The COO stated that he was "as morally

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Caregiving Responsibilities (Feb. 15, 2012); Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. Rev. 2083 (2017).

[18] Complaint, *McGowan v. Ananas Day Spa et al.*, No. 2:09-cv-00040, 2009 WL 3290324 (E.D.N.Y. Jan. 6, 2009).

opposed to putting an ecigarette sign in my ballpark as I am to Leigh having this baby without being married."[19]

Other employers, especially in low wage workplaces, have explicitly forced employees to decide between having an abortion or losing their jobs. For example, after disclosing she was pregnant, Abigail Shomo, a waitress, was told to either have an abortion or face termination. When she refused, the restaurant owner fired her and said that customers preferred to be served by a slim waitress, not someone with a "belly."[20]

By contrast, some employers punished employees who chose to end a pregnancy. Elena DeJesus, a teller at a credit union, asked her supervisor for one day off to have an abortion. Her supervisor approved the request, and Elena proceeded with her abortion. Two weeks later, the credit union's branch manager notified Elena that she was being

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[19] Richard Sandomir, *Ex-Mets Executive Sues Jeff Wilpon, Citing Discrimination over Pregnancy*, N.Y. Times (Sept. 10, 2014),https://www.nytimes.com/2014/09/11/sports/baseball/former-executive-sues-mets-and-wilpon-for-discrimination.html.

[20] *Shomo v. Junior Corp.*, No. 7:11-cv-508, 2012 WL 2401978, at *1 (W.D. Va. June 1, 2012).

terminated for her absence from work because the medical procedure "was not an appropriate excuse for her absence."[21]

Employers also subjected employees to adverse actions for pursuing pregnancy using assisted reproductive technologies like in vitro fertilization ("IVF") treatment. Cheryl Hall, a sales secretary, was fired in between her first and second round of IVF treatments. The employee relations manager listed "absenteeism—infertility treatments" as one of the factors relating to Cheryl's job performance. Cheryl's supervisor told her the termination "was in [her] best interest due to [her] health condition."[22]

The stories collected in the reports and studies cited above are only the tip of the iceberg. Many aspects of reproductive health care are stigmatized in the United States—from patients seeking abortions to people seeking treatment for infertility—and, as a result, instances of discrimination based on reproductive health decision making are likely severely underreported.

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[21] *DeJesus v. Fla. Cent. Credit Union*, No. 8:17-cv-2502-T-36TGW, 2018 WL 4931817, at *1 (M.D. Fla. Oct. 11, 2018).
[22] *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008).

Appellants contend that "[t]he question 'is not whether the [State] has a compelling interest in enforcing its non-discrimination [law] generally, but whether it has such an interest in' coercing" specific parties, Br. 22-23 (quoting *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021)), and that where the law burdens a party's expression, "it requires much higher justification." *Id.* Because *Slattery* found a burden at the pleading stage on those few employers formed directly to oppose the conduct the State seeks to protect, it found that this standard was not satisfied. 61 F.4th at 289-90. But there can be no question that governments have a compelling interest in eradicating discrimination in employment and enforcing these laws against all employers beside those few arguably covered by *Slattery*. Were it otherwise, employment antidiscrimination laws could never serve their purpose—they are fashioned to broadly proscribe discrimination, recognizing the critical importance of equal opportunity in employment. If governments could not assert a compelling governmental interest in preventing employment discrimination as applied to employers such as a recreational sports program and a school—where the direct conflict at issue in *Slattery* is not present—myriad types of employers could claim

to be exempt from these laws, tearing a hole in the fabric of employment antidiscrimination law in precisely those circumstances where it is most needed.

Combatting discrimination, including on the basis of sex and reproductive health decisions, is a quintessential compelling governmental interest—and the Bill is plainly designed to advance this interest.

ii. The Boss Bill Is Narrowly Tailored.

Slattery's tailoring analysis addressed only a limited category of employers and does not alter the usual rule that laws prohibiting sex discrimination, including discrimination on the basis of pregnancy and reproductive health decisions, are narrowly tailored to advance a compelling interest in ensuring full and equal participation in the commercial sphere regardless of gender.

As discussed *supra* Pt. II.A, First Bible, G&T Athletics, and Northstar retain wide latitude to make employment decisions on the basis of whether an individual could be effective at a particular job that involves communicating their values through the ministry, recreational programs, or schooling that they offer, respectively, including by

inquiring into that individual's actual ability to communicate the employer's message regardless of their personal medical decisions. Application of the Boss Bill to these plaintiffs "will [not] impede the organization's ability to engage in . . . protected activities or to disseminate its preferred views." *Jaycees*, 468 U.S. at 627; *see also Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) ("[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."). And again, the Bill does not purport to intrude on the protections offered by the ministerial exception grounded in the religion clauses of the First Amendment. The Boss Bill in no way undermines the protections religious employers enjoy—it is the least restrictive means of achieving its interest in combatting employment discrimination.

The Supreme Court has found that an antidiscrimination law is narrowly tailored where—as here—"even if enforcement of the Act causes some incidental abridgment of . . . protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes" because the Boss Bill "'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." *Jaycees*, 468 U.S. at 628-29. The contention that the Boss Bill is not narrowly tailored—even in contexts where it does not burden expression and only targets the very ill it aims to address—would undermine the basic framework of antidiscrimination laws generally, *see supra* Pt. I.B, and would endanger the critical steps toward workplace equality that Congress, states, and localities have fought to achieve.

CONCLUSION

Amici urge this Court not to extend *Slattery* beyond its narrow and unusual circumstances, to reject Appellants' proffered theory of expressive association as extended broadly to employment decisions, and to reaffirm the careful balance that has been struck to maintain robust protections for free expression while guarding against discrimination in the workplace.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2023, this brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Gabriella Larios
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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 29(a)(5) and Local Rule 29.1(c) because, excluding the portions exempted by Fed. R. App. P. 32(f), this brief contains 6,840 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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