No. 24-1271

In the

United States Court of Appeals for the Fourth Circuit

KRISTEN M. BARNETT,

Plaintiff–Appellant,

v.

INOVA HEALTH CARE SERVICES,

Defendant–Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia,
Case No. 1:23-cv-01638-MSN-WEF

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF APPELLANT

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, *amicus curiae* Alliance Defending Freedom (ADF) respectfully moves this Court for leave to file the attached *amicus* brief in support of Plaintiff-Appellant and reversal of the district court's judgment. Counsel contacted the parties counsel prior to filing this motion—counsel for Plaintiff consented to the filing of this brief but counsel for Defendant did not take a position.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

ADF is a public-interest law firm that defends religious liberty and free speech in a wide variety of contexts. ADF regularly litigates cases throughout the country—including multiple cases before the Supreme Court of the United States—on behalf of parties whose religious and speech rights have been threatened. This includes both First Amendment and Title VII cases. ADF has represented individuals and organizations from a broad spectrum of denominations because religious freedom is for everyone.

Affirming the district court here would harm ADF's mission and clients and threaten the religious freedom rights of individuals everywhere. This can be seen by the fact that the district court's decision

was based on its own previous—and erroneous—decision in *Ellison v. Inova Health Care Services*, No. 1:23-cv-132, --- F.Supp.3d ---, 2023 WL 6038016 (E.D. Va. Sept. 14, 2023) (available at JA64–JA85). *Ellison*, in turn, has metastasized to other district courts and is just now beginning to be corrected. *See, e.g.*, *Lucky v. Landmark Med. of Mich., P.C.*, No. 23-2030, --- F.4th ---, 2024 WL 2947920 (6th Cir. June 12, 2024) (rejecting district court's adoption of *Ellison*'s application of *Africa v. Pennsylvania*, 662 F.2d 1025, 1027 (3d Cir. 1981), and reversing *Lucky v. Landmark Med. of Mich., P.C.*, No. 23-cv-11004, 2023 WL 7095085, at *6–7 (E.D. Mich. Oct. 26, 2023) (accepting *Ellison*'s treatment of prayer as "amount[ing] to the type of blanket privilege that undermines our system of ordered liberty")); *see also Ringhofer v. Mayo Clinic, Ambulance*, 102 F.4th 894 (8th Cir. 2024) (reversing district court's application of *Africa* in the Title VII context).

If left unchecked, the district court's decision here—as with *Ellison*—would be similarly used to undermine religious rights for employees across the country. ADF is committed to fighting against such intrusions on religious liberty and thus has a substantial interest in this case's outcome.

RELEVANCE AND DESRIEABILITY OF BRIEF BY *AMICUS CURIAE*

Courts are "usually delighted to hear additional judgments from able *amici* that will help the court toward right answers." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999). This is particularly true when an *amicus* provides "information on matters of law about which there [is] doubt, especially in matters of public interest." *United States v. Michigan*, 940 F.2d 143, 164 (6th Cir. 1991). The *amicus* brief here can aid the Court in considering the statutory context and where the district court's opinion fits in the larger spectrum of Title VII cases across the country. As a First Amendment and religious liberty litigation expert, ADF is well-positioned to offer information about these questions that are important to the public interest.

First, *amicus* explains why the district court's decision—and its related erroneous decision in *Ellison*—is out of step with precedent from the Supreme Court, this Court, and circuit courts around the Nation. Indeed, its exact logic has been rejected by the Sixth Circuit in just the past week. *Lucky*, 2024 WL 2947920.

Second, the brief explains the mismatch between the primary case on which the district court relied—*Africa v. Pennsylvania*, 662 F.2d 1025, 1027 (3d Cir. 1981)—and consideration of what qualifies as a religious belief under Title VII. The district court focused on the elements of the *Africa* test without considering whether it should apply at all. Unsurprisingly, that conclusion has been rejected by courts around the country and was expressly rebuffed by the EEOC's *amicus* brief and oral argument in *Ringhofer v. Mayo Clinic, Ambulance*, 102 F.4th 894 (8th Cir. 2024). *See* Br. of EEOC as Amicus Curiae in Supp. of Appellants Ringhofer and Kiel and in Favor of Reversal, *Ringhofer v. Mayo Clinic Ambulance*, Nos. 23-2994 & 23-2996 (8th Cir. Nov. 1, 2023); Oral Arg. at 11:30–12:15, *Ringhofer v. Mayo Clinic Ambulance*, No. 23-2994 (8th Cir. Mar. 13, 2024), (calling *Africa* "a really poor fit").[1]

Last, the *amicus* brief highlights the difference between policing what beliefs are "religious" in the First Amendment context versus the Title VII context. Because employers are not required to accommodate religious beliefs that impose an "undue hardship" on the business interests of the company—and do not face the hurdles of strict scrutiny

[1] Available at media-oa.ca8.uscourts.gov/OAaudio/2024/3/232994.MP3.

that a government actor would in the First Amendment context—there is a less of a need for courts or employers to be religious inquisitors in determining which beliefs are religious. This is important since such judgments about religious belief are not within the "judicial ken" anyway. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989).

CONCLUSION

For the foregoing reasons, *amicus curiae* ADF respectfully requests that the Court grant its unopposed motion for leave to file the attached *amicus* brief.

June 19, 2024

Respectfully submitted.

/s/ John C. Sullivan

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CERTIFICATE OF SERVICE

I certify that on June 19, 2024, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users.

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record certifies that *amicus curiae* Alliance Defending Freedom (ADF) has an interest in the outcome of this case because of the subject matter at issue. *Amicus curiae* is a nonprofit organization—501(c)(3)—and thus has no corporate disclosures. *Amicus* is unaware of any persons with an interest in the outcome of this litigation other than the signatories to this brief and their counsel and those identified in the party and *amicus* briefs. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

June 19, 2024

/s/ John C. Sullivan
John C. Sullivan

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Alliance Defending Freedom

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INTEREST OF *AMICUS CURIAE* [1]

ADF is a public-interest law firm that defends religious liberty and free speech in a wide variety of contexts. ADF regularly litigates cases throughout the country—including multiple cases before the Supreme Court of the United States—on behalf of parties whose religious and speech rights have been threatened. This includes both First Amendment and Title VII cases. ADF has represented individuals and organizations from a broad spectrum of denominations because religious freedom is for everyone.

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[1] Rule 29(a)(4) statement: This brief has been authored in whole by *amicus* and its counsel. No party or party's counsel contributed money toward preparing or submitting the brief and no person—other than *amicus*, its members, or its counsel—contributed money to fund preparing or submitting this brief.

to be corrected. *See, e.g.*, *Lucky v. Landmark Med. of Mich., P.C.*, No. 23-2030, --- F.4th ---, 2024 WL 2947920 (6th Cir. June 12, 2024) (rejecting district court's adoption of *Ellison*'s application of *Africa v. Pennsylvania*, 662 F.2d 1025, 1027 (3d Cir. 1981), and reversing *Lucky v. Landmark Med. of Mich., P.C.*, No. 23-cv-11004, 2023 WL 7095085, at *6–7 (E.D. Mich. Oct. 26, 2023) (accepting *Ellison*'s treatment of prayer as "amount[ing] to the type of blanket privilege that undermines our system of ordered liberty")); *see also Ringhofer v. Mayo Clinic, Ambulance*, 102 F.4th 894 (8th Cir. 2024) (reversing district court's application of *Africa* in the Title VII context).

If left unchecked, the district court's decision here—as with *Ellison*—would be similarly used to undermine religious rights for employees across the country. ADF is committed to fighting against such intrusions on religious liberty and thus has a substantial interest in this case's outcome.

SUMMARY OF ARGUMENT

It is astonishing that the district court concluded that Ms. Barnett could not have a valid religious objection to COVID-19 vaccination because she did not rely on a specific belief about fetal stem cell use. But

in the lower court's view, to allow more subjective beliefs—such as prayer and guidance by God—to count for Title VII purposes would be an intolerable "blanket privilege." Controlling precedent does not support this cramped view of religious rights. The Supreme Court has repeatedly counseled lower courts not to take such an approach, and circuit courts around the country uniformly condemn such exacting scrutiny of religious beliefs. *E.g.*, *Lucky*, 2024 WL 2947920, at *2.

In conflict with contrary authority, the district court determined that some beliefs—such as prayer/direction from God—are not as "religious" as beliefs the court could describe in more detail—such as the use of fetal stem cells being linked to abortion. The district court also assumed that allowing a subjective religious belief to satisfy Title VII would create an impermissible "blanket privilege." That assumption cannot be supported. *See, e.g.*, *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 141 (4th Cir. 2017); *see also Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) (holding that the "difficult and delicate" determination of whether religious beliefs are sincere may not "turn upon a judicial perception of the particular belief or practice in question").

The district court justified its straying from this well-established precedent by relying on the Third Circuit's decision in *Africa*. That decision is inapplicable here, though, since this case focuses on an individual's religious beliefs under Title VII and not whether a set of beliefs constitutes a religion in the First Amendment context. The EEOC confirmed this in a recent *amicus* brief and oral argument in *Ringhofer*, supporting reversal of a district court that adopted an analysis similar to the one here. *See* Br. of EEOC as Amicus Curiae in Supp. of Appellants Ringhofer and Kiel and in Favor of Reversal, *Ringhofer v. Mayo Clinic Ambulance*, Nos. 23-2994 & 23-2996 (8th Cir. Nov. 1, 2023) ("EEOC *Amicus*"); Oral Arg. at 11:30–12:15, *Ringhofer v. Mayo Clinic Ambulance*, No. 23-2994 (8th Cir. Mar. 13, 2024), (calling *Africa* "a really poor fit") ("EEOC Oral Argument").[2]

Finally, unlike pure First Amendment claims, Title VII has an intrinsic protection for the employer that government actors do not have. Even a religious employee need not be accommodated if it would cause the employer undue hardship—a standard not limited by the strict scrutiny that accompanies First Amendment claims. Courts thus have

[2] Available at media-oa.ca8.uscourts.gov/OAaudio/2024/3/232994.MP3.

even less reason to become religious inquisitors when evaluating religious beliefs under Title VII than they might under the First Amendment.

The district court should be reversed.

ARGUMENT

I. Controlling And Persuasive Authority Foreclose The District Court's Artificially Imposed Limitation On What Counts As A Religious Belief Under Title VII.

Religious beliefs need not be "acceptable, logical, consistent, or comprehensible to others" to be protected. *Thomas*, 450 U.S. at 714. Courts have long recognized that individuals "may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." *United States v. Ballard*, 322 U.S. 78, 86 (1944). And even though the "concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests," *Wisconsin v. Yoder*, 406 U.S. 205, 215–16 (1972), Title VII only requires an employee to show their employer "that [they] ha[ve] a bona fide religious belief that conflicts with an employment requirement." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 65 (1986). There is no heightened threshold for what makes a

religious belief good enough or objective enough to be accepted by a district court, and courts should not be in the business of drawing those distinctions.

The district court's flawed reasoning begins with the premise that a court may adjudicate which individual beliefs are "religious enough" to protect the concept of ordered liberty. But that is decidedly not how Title VII functions. *See, e.g.*, *Lucky*, 2024 WL 2947920, at *2 (explaining that "the Supreme Court has warned, '[r]epeatedly and in many different contexts,' that 'courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.'" (citing *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990))). As this Court held in *Consol Energy*, "[i]t is not [the employer's], nor ours as a court, to question the correctness or even the plausibility" of an employee's premises for their religious claim. 860 F.3d at 142.

Other circuits agree. *See, e.g.*, *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013) (requiring a "light touch" and "judicial shyness" when examining religious sincerity); *see also Ringhofer*, 102 F.4th at 900–03; *Keene v. City & Cnty. of S.F.*, No. 22-16567, 2023 WL 3451687, at *2 (9th Cir. May 15, 2023) (holding that "the sincerity of an employee's

stated religious belief [in conflict with a policy] . . . is generally presumed or easily established" and that courts "may not . . . question the legitimacy of [the plaintiffs'] religious beliefs regarding COVID-19 vaccinations") (cleaned up); *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 453 (7th Cir. 2013) (reversing summary judgment for employer, recognizing courts must "tread lightly" when assessing religious sincerity in conflict with employer policy); *EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados*, 279 F.3d 49, 56 (1st Cir. 2002); *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996).

Indeed, the Sixth Circuit's recent treatment of this exact issue in *Lucky* would create a circuit split if either this case or *Ellison* is upheld. 2024 WL 2947920, at *2. The plaintiff in *Lucky* pled that the vaccine would defile her body—a temple of God—and that she took all medical decisions to God in prayer. *Id.* "[A]s to the Covid vaccine in particular—'God spoke to [her] in her prayers and directed her that it would be wrong to receive the COVID-19 vaccine.'" *Id.* (alteration in original) (citing Complaint). The district court there—following *Ellison*—believed that a religious belief based on prayer "amount[ed] to the type of blanket

privilege that undermines our system of ordered liberty" and should not qualify for Title VII protection. *Lucky*, 2023 WL 7095085, at *6–7. The Sixth Circuit reversed, holding that those "allegations of particular facts—she prayed, she received an answer, she acted accordingly . . . were almost self-evidently enough to establish, at the pleadings stage, that her refusal to receive the vaccine was an 'aspect' of her religious observance or belief." *Lucky*, 2024 WL 2947920, at *2 (citing 42 U.S.C. § 2000e(j)).

Just so here. Ms. Barnett prayed, received an answer, and acted accordingly. The district court should not have presumed—contrary to repeated Supreme Court warnings—that it had the authority to "'determine the place of a particular belief in a religion or the plausibility of a religious claim.'" *Id.* (quoting *Employment Division*, 494 U.S. at 887). Such a determination was decidedly not within the "judicial ken." *Id.* (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)).

II. The EEOC Has Confirmed That *Africa*—Used In The First Amendment Context—Does Not Work Well For An Individual Determination Of Religious Belief Such As The One Here.

Despite the well-established precedent prohibiting the district court from delving into which religious beliefs should qualify for Title VII protection—including this Court's holding in *Consol Energy*—the court

thought it was appropriate to look to the Third Circuit's decision in *Africa* to venture into the adjudication of religious beliefs. That expedition fails even on its own terms.

As the EEOC recently explained in *Ringhofer*, the *Africa* test can assist—in the First Amendment context—with determining whether a particular belief fits within a religion. EEOC *Amicus* at 12. The problem with taking *Africa* further, however, is that an individual's beliefs need not line up with the beliefs of their particular religion—they are protected all the same. *Id.* at 13. This is especially true in the Title VII context, where the individualized inquiry of an employee need only show that the employment requirement conflicts with an "aspect[ ]" of the individual's religious observance or belief. 42 U.S.C. § 2000e(j).

Moreover, a belief need not be tied to any "formal and external signs" of religion since that is the *Africa* factor for determining whether a set of beliefs is a *religion*, not whether an individual's particular belief is *religious*. EEOC *Amicus* at 22. The EEOC's Compliance Manual cautions against using *Africa* this way, too. EEOC Compliance Manual § 12-I.A.1 n. 27 (noting that although religion is often marked by external manifestations, they are not required for the belief to be religious and

protected under Title VII). While the district court here appeared to be looking for external signs—such as the objective presence of a belief about fetal stem cell lines—the EEOC confirmed that such an inquiry is "a really poor fit" for determining whether a belief warrants Title VII protection. EEOC Oral Argument at 11:30.

III. Title VII's Statutory Framework Lessens The Need For Overzealous Judicial Policing Of What Constitutes An Acceptable "Religious" Belief.

The district court's error was predicated on a fear that each person might be able to claim a "blanket privilege . . . that if permitted to go forward would undermine our system of ordered liberty." JA61. As seen in *Africa*, 662 F.2d at 1030, this concern harkens back to *Wisconsin v. Yoder*, 406 U.S. at 215–16. *Yoder*, in turn, relied on cases such as *Reynolds v. United States*, 98 U.S. 145 (1878). *See* 406 U.S. at 230. Closer inspection of those cases reveals their limitations in the Title VII context.

To be sure, the Supreme Court has held that "one's religious convictions" do not make one "totally free from legislative restrictions." *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). But those holdings—in the context of Free Exercise Clause challenges to governmental

regulation (*i.e.*, "legislative restrictions")—involved instances in which "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Yoder*, 406 U.S. at 230. Said differently, "the very concept of ordered liberty" involves matters "in which *society as a whole* has important interests" that trigger the action of a legislature. *Id.* at 215–16 (emphasis added). That is not the case when dealing with a single, private employer's internal requirements for its workers.

Courts should thus be cautious in extending *Africa* to Title VII claims since employment regulations are hardly comparable to those instances in which "public safety, peace or order" is at issue and the actor is the government. To hold otherwise is to place a company's internal regulations on par with government pronouncements where ordered liberty may actually be at stake. As seen here, *Africa* should not be read to stretch the Supreme Court's holdings beyond their reasonable bounds.

Importantly, though, the statutory framework here sets employment law claims apart from the First Amendment claims in *Yoder* and its progeny. Unlike pure First Amendment claims, Title VII has its own guardrails for preventing the disruption of "ordered liberty"—

whatever that is supposed to mean in the context of private employers in the employment law arena. In the First Amendment context, the acknowledgment of a religious belief could trigger strict scrutiny, and the presumption favors the individual. But under Title VII, an employer may avoid accommodating an employee if the result would be an "undue hardship" on the company. 42 U.S.C. § 2000e(j). In those cases, the presumption shifts in favor of the employer on the second part of the inquiry.

Because the Title VII context is dramatically different than a pure First Amendment claim after the religious sincerity inquiry—from both a policy and practical-ramifications perspective—courts have even less reason to be overly zealous regarding whether the employee has such a belief in employment law cases. Even absent any sort of "least restrictive means" or "narrow tailoring" obligation on the company, the employment requirement may still be enforceable (if it is truly important and part of the business, not just an aspirational goal without business purposes). What should be beyond doubt is that district courts (much less employers) should not take the role of religious inquisitor, seeking to weed out claims that are not religious enough or are too subjective. *See*

Consol Energy, 860 F.3d at 142 (holding "[i]t is not [the employer's], nor ours as a court, to question the correctness or even the plausibility" of an employee's premises for their religious claim).

* * *

The Supreme Court has repeatedly stated that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez*, 490 U.S. at 699. There is no need to stray from that guidance here, in the context of Title VII.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

June 19, 2024

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a) and 29(b) because it contains 2513 words, excluding portions exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface in 14-point font.

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