ESTREICHER, HARPER & FASMAN, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW (6TH ed.) ("EDEL")

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Introduction for Instructors

Dear Colleagues,

Thank you for adopting our book. We hope you will continue to share your thoughts and feedback with us, which we have found helpful in the past. Please send your thoughts and questions to Professor Zachary Fasman (zfasman@umich.edu) and to Professor Samuel Estreicher (Samuel.estricher@nyu.edu).

This Supplement includes several additional cases, including the Supreme Court's Title VII decision on religious discrimination, *Groff v DeJoy*, the Court's rulings on affirmative action in college admissions, and the Court's construction of the Court's construction of the FLSA salary basis test in *Helix Energy Systems v Hewitt*. Several new federal statutes are highlighted including the Speak Out Act making non-disclosure/non-disparagement agreements unenforceable in sexual harassment cases, the Pregnancy Workers Fairness Act requiring accommodation of pregnant workers, the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) Act, requiring accommodation of nursing mothers in the workplace, as well as additional state and federal developments involving claims of sexual harassment and sexual assault. Numerous other cases and statutes are included as additional resources should you wish to round out your coverage of the material, particularly for teaching more concentrated courses using a shorter version of the textbook.

The Supplement includes:

(1) The Supreme Court ruling in *Helix Energy Solutions v Hewitt* addressing the salary test under the FLSA.
(2) The Department of Labor proposed rule on independent contractors.
(3) The Supreme Court ruling in *Groff v DeJoy* addressing religious accommodations in the workplace.
(4) The Supreme Court rulings in the two new affirmative action cases in higher education.
(5) A note on the new federal Speak Out Act, which regulates secrecy in the settlement of discrimination claims, including harassment.
(6) A note and the text of the federal Pregnant Workers Fairness Act (PWFA), which requires the accommodation of pregnant workers.
(7) A note and the text of the federal Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) Act, requiring the accommodation of nursing mothers in the workplace.
(8) A note on state adoption of hair style statutes, called Crown Acts, which forbid discrimination on hair styles common to minority group members.
(9) A note on the suspension/extension of state statutes of limitations in sexual assault cases, which has allowed a number of high-profile civil lawsuits including E. Jean Caroll's suit against former President Trump.

(10) A note on the continuing controversy over standing in the wake of *Transunion v Ramirez*.
(11) Several important appellate rulings on religious discrimination issues and controversies.

Page references below are to the complete volume, Employment Discrimination and Employment Law. We hope these materials enhance your teaching using the 6th Edition.

Best wishes,
Samuel Estreicher, Michael Harper and Zachary Fasman

Add to the end of Note 5 on pp. 21 and 22 of the text:

On March 14, 2022, a District Court in East Texas vacated the Department of Labor's rescission of the Trump administration's rule, holding that the Department did not provide sufficient opportunity for comment or adequately consider alternatives to what was effectively a rescission of the rule. See Coalition for Workforce Innovation v. Walsh, 2022 WL 1073346 (E.D. Tex. 2022). On October 13, 2022, the Department issued another notice proposing a new rule to replace the Trump administration rule. 87 F.R. 62218.

The Department's proposed rule would return a "totality-of-the circumstance" framework to the economic reality test. It rejects a focus on core factors and lists six non-exhaustive factors for equal consideration:

1. The worker's opportunity for profit or loss based on his or her use of managerial skill;
2. Whether the worker makes capital or entrepreneurial investments related to the performance of work, and if so, whether such investment relative to the employer's investment indicates the worker is an independent business;
3. Degree of permanence in the work relationship;
4. Nature and degree of control exercised over the performance of work;
5. Extent to which the work performed is an integral part of the employer's business; and
6. Skill and initiative, including whether a worker uses specialized skills to perform the work.

The Department has extended the period for comments on this proposed rule several times, however, keeping the Trump administration rule in effect until at least October 2023.

Add new footnote 5 after Page85:

5. Notice Requirements for Modification of At-Will Contracts? Professor Arnow-Richman argues that courts should enforce mid-term modification of at-will contracts only if the employer provides sufficient advance notice to all to allow time to consider the employee's alternatives. What would be the legal basis for such a requirement? How long would the notice period have to be? See Rachel Arnow-Richman, Modifying At-Will Employment Contracts, 57 B.C.L. Rev. 427 (2016).

On Page 203, after note 6 add the following notes:

6.a. *Hair style protection statutes are now found in many states and cities.* Called CROWN Act laws (for Creating a Respectful and Open World for Natural Hair), these laws target discrimination based upon a person's hair texture or hairstyle—if that hair texture or hairstyle is commonly associated with a particular race or national origin, including hairstyles historically associated with Black people such as locs, cornrows, braids, twists, Bantu knots, and Afros." See, e.g., H.R. 5309. 116th Cong. 2d Sess. (introduced Sept. 22, 2020). As of this writing, 20 states and more than 40 local governments have enacted such laws.

6.b. *Caste Discrimination Laws*. Seattle became the first city to ban caste discrimination, defined as a "system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion." The law, and similar proposals in other jurisdictions, aims at discriminatory practices involving south Asian immigrants who are by custom or ethnic group or nationality deemed of a lower caste. Others have argued that Title VII already bans discrimination based on lineage and national origin.

On Page 294, add instead of the Note on *Grutter v. Michigan*:

STUDENTS FOR FAIR ADMISSIONS, INC.,
v.
PRESIDENT AND FELLOWS OF HARVARD COLLEGE

___U.S.___ (June 29, 2023)

Chief Justice Roberts delivered the opinion of the Court, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

I

A

Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. See 980 F. 3d 157, 166–169 (CA1 2020). It can also depend on your race.

The admissions process at Harvard works as follows. Every application is initially screened by a "first reader," who assigns scores in six categories: academic, extracurricular, athletic, school support, personal, and overall. *Ibid.* A rating of "1" is the best; a rating of "6" the worst. *Ibid.* In the academic category, for example, a "1" signifies "near-perfect standardized test scores and grades"; in the extracurricular category, it indicates "truly unusual achievement"; and in the personal category, it denotes "outstanding" attributes like maturity, integrity, leadership, kindness, and courage. *Id.*, at 167–168. A score of "1" on the overall rating—a composite of the five other ratings— "signifies an exceptional candidate with >90% chance of admission." *Id.*, at 169 (internal quotation marks omitted). In assigning the overall rating, the first readers "can and do take an applicant's race into account." *Ibid.*

Once the first read process is complete, Harvard convenes admissions subcommittees. *Ibid.* Each subcommittee meets for three to five days and evaluates all applicants from a particular geographic area. *Ibid.* The subcommittees are responsible for making recommendations to the full admissions

committee. *Id.*, at 169–170. The subcommittees can and do take an applicant's race into account when making their recommendations. *Id.*, at 170.

The next step of the Harvard process is the full committee meeting. The committee has 40 members, and its discussion centers around the applicants who have been recommended by the regional subcommittees. *Ibid.* At the beginning of the meeting, the committee discusses the relative breakdown of applicants by race. The "goal," according to Harvard's director of admissions, "is to make sure that [Harvard does] not hav[e] a dramatic drop-off" in minority admissions from the prior class. Each applicant considered by the full committee is discussed one by one, and every member of the committee must vote on admission. 980 F. 3d, at 170. Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission. *Ibid.* At the end of the full committee meeting, the racial composition of the pool of tentatively admitted students is disclosed to the committee. *Ibid.*; 2 App. in No. 20–1199, at 861.

The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. 980 F. 3d, at 170. The full committee decides as a group which students to lop. 397 F. Supp. 3d 126, 144 (Mass. 2019). In doing so, the committee can and does take race into account. *Ibid.* Once the lop process is complete, Harvard's admitted class is set. *Ibid.* In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants." *Id.*, at 178.

B

Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the "nation's first public university." 567 F. Supp. 3d 580, 588 (MDNC 2021). Like Harvard, UNC's "admissions process is highly selective": In a typical year, the school "receives approximately 43,500 applications for its freshman class of 4,200." *Id.*, at 595.

Every application the University receives is initially reviewed by one of approximately 40 admissions office readers, each of whom reviews roughly five applications per hour. *Id.*, at 596, 598. Readers are required to consider "[r]ace and ethnicity ... as one factor" in their review. *Id.*, at 597 (internal quotation marks omitted). Other factors include academic performance and rigor, standardized testing results, extracurricular involvement, essay quality, personal factors, and student background. *Id.*, at 600. Readers are responsible for providing numerical ratings for the academic, extracurricular, personal, and essay categories. *Ibid.* During the years at issue in this litigation, underrepresented minority students were "more likely to score [highly] on their personal ratings than their white and Asian American peers," but were more likely to be "rated lower by UNC readers on their academic program, academic performance, ... extracurricular activities," and essays. *Id.*, at 616–617.

After assessing an applicant's materials along these lines, the reader "formulates an opinion about whether the student should be offered admission" and then "writes a comment defending his or her recommended decision." *Id.*, at 598 (internal quotation marks omitted). In making that decision, readers may offer students a "plus" based on their race, which "may be significant in an individual case." *Id.*, at 601 (internal quotation marks omitted). The admissions decisions made by the first readers are, in most cases, "provisionally final." *Students for Fair Admissions, Inc.* v. *University of N. C. at Chapel Hill*, No. 1:14–cv–954 (MDNC, Nov. 9, 2020), ECF Doc. 225, p. 7, ¶52.

Following the first read process, "applications then go to a process called 'school group review' ... where a committee composed of experienced staff members reviews every [initial] decision." 567 F. Supp. 3d, at 599. The review committee receives a report on each student which contains, among other things, their "class rank, GPA, and test scores; the ratings assigned to them by their initial readers; and their

status as residents, legacies, or special recruits." *Ibid.* (footnote omitted). The review committee either approves or rejects each admission recommendation made by the first reader, after which the admissions decisions are finalized. *Ibid.* In making those decisions, the review committee may also consider the applicant's race. *Id.*, at 607; 2 App. in No. 21–707, p. 407.

C

Petitioner, Students for Fair Admissions (SFFA), is a nonprofit organization founded in 2014 whose purpose is "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." 980 F.3d at 164 (internal quotation marks omitted). In November 2014, SFFA filed separate lawsuits against Harvard College and the University of North Carolina, arguing that their race-based admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment.[2] See 397 F.Supp.3d at 131–132; 567 F.Supp.3d at 585–586. The District Courts in both cases held bench trials to evaluate SFFA's claims. See 980 F.3d at 179; 567 F.Supp.3d at 588. Trial in the Harvard case lasted 15 days and included testimony from 30 witnesses, after which the Court concluded that Harvard's admissions program comported with our precedents on the use of race in college admissions. See 397 F.Supp.3d at 132, 183. The First Circuit affirmed that determination. See 980 F.3d at 204. Similarly, in the UNC case, the District Court concluded after an eight-day trial that UNC's admissions program was permissible under the Equal Protection Clause. 567 F.Supp.3d at 588, 666.

[2] Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003). Although Justice GORSUCH questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.

* * *

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person ... the equal protection of the laws." Amdt. 14, § 1. To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) (Cong. Globe). The Constitution, they were determined, "should not permit any distinctions of law based on race or color," Supp. Brief for United States on Reargument in *Brown* v. *Board of Education*, O. T. 1953, No. 1 etc., p. 41 (detailing the history of the adoption of the Equal Protection Clause), because any "law which operates upon one man [should] operate *equally* upon all," Cong. Globe 2459 (statement of Rep. Stevens). As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold "over every American citizen, without regard to color, the protecting shield of law." *Id.*, at 2462. And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give "to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." *Id.*, at 2766. For "[w]ithout this principle of equal

justice," Howard continued, "there is no republican government and none that is really worth maintaining." *Ibid.*

At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder* v. *West Virginia*, 100 U. S. 303, 307–309. "[T]he broad and benign provisions of the Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to ... race and nationality" "which in the eye of the law is not justified." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 368–369, 373–374 (1886); see also *id.*, at 368 (applying the Clause to "aliens and subjects of the Emperor of China"); *Truax* v. *Raich*, 239 U. S. 33, 36 (1915) ("a native of Austria"); semble *Strauder*, 100 U. S., at 308–309 ("Celtic Irishmen") (dictum).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America. 163 U. S. 537 (1896). The aspirations of the framers of the Equal Protection Clause, "[v]irtually strangled in [their] infancy," would remain for too long only that—aspirations. J. Tussman & J. tenBroek, The Equal Protection of the Laws, 37 Cal. L. Rev. 341, 381 (1949).

After *Plessy*, "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown* v. *Board of Education*, 347 U. S. 483, 491 (1954). Some cases in this period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. See, *e.g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 349–350 (1938) ("The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups ...."). But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U. S. 637, 640–642 (1950) ("It is said that the separations imposed by the State in this case are in form merely nominal.... But they signify that the State ... sets [petitioner] apart from the other students."). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. 347 U. S., at 494–495. *Brown* concerned the permissibility of racial segregation in public schools. The school district maintained that such segregation was lawful because the schools provided to black students and white students were of roughly the same quality. But we held such segregation impermissible "*even though* the physical facilities and other 'tangible' factors may be equal." *Id.*, at 493 (emphasis added). The mere act of separating "children ... because of their race," we explained, itself "generate[d] a feeling of inferiority." *Id.*, at 494.

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." *Id.*, at 493. As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." . . . The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown* v. *Board of Education*, 349 U. S. 294, 300–301 (1955).

The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional." *Id.*, at 298.

So too in other areas of life. Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. . . .

In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": " 'the Constitution ... forbids ... discrimination by the General Government, or by the States, against any citizen because of his race.' " *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954) (quoting *Gibson* v. *Mississippi*, 162 U. S. 565, 591 (1896) (Harlan, J., for the Court)). As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] ... all invidious racial discriminations." *Loving* v. *Virginia*, 388 U. S. 1, 8 (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Id.*, at 11–12; see also *Yick Wo*, 118 U. S., at 373–375 (commercial property); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948) (housing covenants); *Hernandez* v. *Texas*, 347 U. S. 475 (1954) (composition of juries); *Dawson*, 350 U. S., at 877 (beaches and bathhouses); *Holmes* v. *Atlanta*, 350 U. S. 879 (1955) (*per curiam*) (golf courses); *Browder*, 352 U. S., at 903 (busing); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958) (*per curiam*) (public parks); *Bailey* v. *Patterson*, 369 U. S. 31 (1962) (*per curiam*) (transportation facilities); *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1 (1971) (education); *Batson* v. *Kentucky*, 476 U. S. 79 (1986) (peremptory jury strikes).

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984) (footnote omitted). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U. S., at 10; see also *Washington* v. *Davis*, 426 U. S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*, 118 U. S., at 369. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265, 289–290 (1978) (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal." *Id.*, at 290.

Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." *Adarand Constructors, Inc.* v. *Peña*, 515 U. S. 200, 227 (1995). Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." *Grutter* v. *Bollinger*, 539 U. S. 306, 326 (2003). Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest. *Fisher* v. *University of Tex. at Austin*, 570 U. S. 297, 311–312 (2013) (*Fisher I*) (internal quotation marks omitted).

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. See, *e.g.*, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 720 (2007); *Shaw* v. *Hunt*, 517 U. S.

899, 909–910 (1996); *post*, at 19–20, 30–31 (opinion of THOMAS, J.). The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. See *Johnson* v. *California*, 543 U. S. 499, 512–513 (2005).

Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice* v. *Cayetano*, 528 U. S. 495, 517 (2000) (quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943)). That principle cannot be overridden except in the most extraordinary case.

B

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school. 438 U. S., at 272–276. Each year, the school held 16 of its 100 seats open for members of certain minority groups, who were reviewed on a special admissions track separate from those in the main admissions pool. *Id.*, at 272–275. The plaintiff, Allan Bakke, was denied admission two years in a row, despite the admission of minority applicants with lower grade point averages and MCAT scores. *Id.*, at 276–277. Bakke subsequently sued the school, arguing that its set-aside program violated the Equal Protection Clause.

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U. S., at 323.

Justice Powell began by finding three of the school's four justifications for its policy not sufficiently compelling. The school's first justification of "reducing the historic deficit of traditionally disfavored minorities in medical schools," he wrote, was akin to "[p]referring members of any one group for no reason other than race or ethnic origin." *Bakke*, 438 U. S., at 306–307 (internal quotation marks omitted). Yet that was "discrimination for its own sake," which "the Constitution forbids." *Id.*, at 307 (citing, *inter alia*, *Loving*, 388 U. S., at 11). Justice Powell next observed that the goal of "remedying ... the effects of 'societal discrimination' " was also insufficient because it was "an amorphous concept of injury that may be ageless in its reach into the past." *Bakke*, 438 U. S., at 307. Finally, Justice Powell found there was "virtually no evidence in the record indicating that [the school's] special admissions program" would, as the school had argued, increase the number of doctors working in underserved areas. *Id.*, at 310.

Justice Powell then turned to the school's last interest asserted to be compelling—obtaining the educational benefits that flow from a racially diverse student body. That interest, in his view, was "a constitutionally permissible goal for an institution of higher education." *Id.*, at 311–312. And that was so, he opined, because a university was entitled as a matter of academic freedom "to make its own judgments as to ... the selection of its student body." *Id.*, at 312.

But a university's freedom was not unlimited. "Racial and ethnic distinctions of any sort are inherently suspect," Justice Powell explained, and antipathy toward them was deeply "rooted in our Nation's constitutional and demographic history." *Id.*, at 291. A university could not employ a quota system, for example, reserving "a specified number of seats in each class for individuals from the preferred ethnic groups." *Id.*, at 315. Nor could it impose a "multitrack program with a prescribed number of seats set aside for each identifiable category of applicants." *Ibid.* And neither still could it use race to foreclose an individual "from all consideration ... simply because he was not the right color." *Id.*, at 318.

The role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." *Id.*, at 317. And even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant." *Ibid.* Justice Powell derived this approach from what he called the "illuminating example" of the admissions system then used by Harvard College. *Id.*, at 316. Under that system, as described by Harvard in a brief it had filed with the Court, "the race of an applicant may tip the balance in his favor just as geographic origin or a life [experience] may tip the balance in other candidates' cases." *Ibid.* (internal quotation marks omitted). Harvard continued: "A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer." *Ibid.* (internal quotation marks omitted). The result, Harvard proclaimed, was that "race has been"—and should be—"a factor in some admission decisions." *Ibid.* (internal quotation marks omitted).

No other Member of the Court joined Justice Powell's opinion. Four Justices instead would have held that the government may use race for the purpose of "remedying the effects of past societal discrimination." *Id.*, at 362. . . . Four other Justices, meanwhile, would have struck down the Davis program as violative of Title VI. . . .

C

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." *Grutter*, 539 U. S., at 325. We accordingly took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. *Id.*, at 311. There, in another sharply divided decision, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325.

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id.*, at 328. In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. The school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." *Id.*, at 334. Neither could it "insulate applicants who belong to certain racial or ethnic groups from the competition for admission." *Ibid.* Nor still could it desire "some specified percentage of a particular group merely because of its race or ethnic origin." *Id.*, at 329–330 (quoting *Bakke*, 438 U. S., at 307 (opinion of Powell, J.)).

These limits, *Grutter* explained, were intended to guard against two dangers that all race-based government action portends. The first is the risk that the use of race will devolve into "illegitimate ... stereotyp[ing]." *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 493 (1989) (plurality opinion). Universities were thus not permitted to operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal quotation marks omitted). The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." *Id.*, at 341.

But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions. The Court stressed the fundamental principle that "there are serious problems of justice connected with the idea of [racial] preference itself." *Ibid.* (quoting *Bakke*, 438 U. S., at 298 (opinion of Powell, J.)). It observed that all "racial classifications, however compelling their goals,"

were "dangerous." *Grutter*, 539 U. S., at 342. And it cautioned that all "race-based governmental action" should "remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *Id.*, at 341 (internal quotation marks omitted).

To manage these concerns, *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. *Id.*, at 342. This requirement was critical, and *Grutter* emphasized it repeatedly. "[A]ll race-conscious admissions programs [must] have a termination point"; they "must have reasonable durational limits"; they "must be limited in time"; they must have "sunset provisions"; they "must have a logical end point"; their "deviation from the norm of equal treatment" must be "a temporary matter." *Ibid.* (internal quotation marks omitted). The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: "[e]nshrining a permanent justification for racial preferences," the Court explained, "would offend this fundamental equal protection principle." *Ibid* . . .

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education.... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U. S., at 343.

IV

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." Neither does UNC's. 567 F. Supp. 3d, at 612. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.

A

Because "[r]acial discrimination [is] invidious in all contexts," *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 619 (1991), we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, *Fisher* v. *University of Tex. at Austin*, 579 U. S. 365, 381 (2016) (*Fisher II*). "Classifying and assigning" students based on their race "requires more than ... an amorphous end to justify it." *Parents Involved*, 551 U. S., at 735.

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F. 3d, at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and

productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F. Supp. 3d, at 656.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? *Ibid.*; 980 F. 3d, at 173–174. Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." 567 F. Supp. 3d, at 656. Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. See *Johnson*, 543 U. S., at 512–513. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." *Franks* v. *Bowman Transp. Co.*, 424 U. S. 747, 763 (1976) (internal quotation marks omitted). And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations." *Dayton Bd. of Ed.* v. *Brinkman*, 433 U. S. 406, 420 (1977).

Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless. 567 F. Supp. 3d, at 656; 980 F. 3d, at 173–174. The interests that respondents seek, though plainly worthy, are inescapably imponderable.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, 567 F. Supp. 3d, at 591–592, and n. 7, while Harvard likewise "guard[s] against inadvertent drop-offs in representation" of certain minority groups from year to year . . . . To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. See, *e.g.*, 397 F. Supp. 3d, at 137, 178; 3 App. in No. 20–1199, at 1278, 1280–1283; 3 App. in No. 21–707, at 1234–1241. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, Who is Hispanic? (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories ... reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt,"

UNC's counsel responded, "[I] do not know the answer to that question." Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 6–7 (GORSUCH, J., concurring) (detailing the "incoherent" and "irrational stereotypes" that these racial categories further).

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet "[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is 'broadly diverse.' " *Parents Involved*, 551 U. S., at 724 (quoting *Grutter*, 539 U. S., at 329). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities' main response to these criticisms is, essentially, "trust us." . . . Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz* v. *Bollinger*, 539 U. S. 244, 270 (2003) (internal quotation marks omitted). The programs at issue here do not satisfy that standard.

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. 980 F. 3d, at 170, n. 29. And the District Court observed that Harvard's "policy of considering applicants' race ... overall results in fewer Asian American and white students being admitted." 397 F. Supp. 3d, at 178.

. . . College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. . . . Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. . . . How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? The "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley*, 334 U. S., at 22.

Respondents' admissions programs are infirm for a second reason as well. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter*, 539 U. S., at 333 (internal quotation marks omitted). That requirement is found throughout our Equal Protection Clause jurisprudence more generally. See, *e.g.*, *Schuette* v. *BAMN*, 572 U. S. 291, 308 (2014) (plurality opinion) ("In cautioning against 'impermissible racial stereotypes,' this Court has rejected the assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike ....' " (quoting *Shaw* v. *Reno*, 509 U. S. 630, 647 (1993))).

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke*, 438 U. S., at 316 (opinion of Powell, J.) (internal quotation marks omitted); see also Tr. of Oral Arg. in No. 20–1199, at 92. UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg. in No. 21–707, at 97; see also *id.*, at 96 (analogizing being of a certain race to being from a rural area).

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." *Shaw*, 509 U. S., at 647. The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

"One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice*, 528 U. S., at 517. But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," *Miller* v. *Johnson*, 515 U. S. 900, 911–912 (1995) (internal quotation marks omitted)—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution." *Id.*, at 912 (internal quotation marks omitted). Such stereotyping can only "cause[ ] continued hurt and injury," *Edmonson*, 500 U. S., at 631, contrary as it is to the "core purpose" of the Equal Protection Clause, *Palmore*, 466 U. S., at 432.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*, 539 U. S., at 342.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark," *id.*, at 86; or "precise number or percentage," *id.*, at 167; or "specified percentage," Brief for Respondent in No. 20–1199, at 38 (internal quotation marks omitted). So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." 397 F. Supp. 3d, at 146. And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group." *Ibid.*; see also *id.*, at 147 (District Court finding that Harvard uses race to "trac[k] how each class is shaping up relative to previous years with an eye towards achieving a level of racial diversity"); 2 App. in No. 20–1199, at 821–822.

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups.

* * *

UNC's admissions program operates similarly. The University frames the challenge it faces as "the admission and enrollment of underrepresented minorities," Brief for University Respondents in No. 21–707, at 7, a metric that turns solely on whether a group's "percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina," 567 F. Supp. 3d, at 591, n. 7; see also Tr. of Oral Arg. in No. 21–707, at 79. The University "has not yet fully achieved its diversity-related educational goals," it explains, in part due to its failure to obtain closer to proportional representation. Brief for University Respondents in No. 21–707, at 7; see also 567 F. Supp. 3d, at 594.

The problem with these approaches is well established. "[O]utright racial balancing" is "patently unconstitutional." *Fisher I*, 570 U. S., at 311 (internal quotation marks omitted). That is so, we have repeatedly explained, because "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller,* 515 U. S., at 911 (internal quotation marks omitted). By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs "effectively assure[ ] that race will always be relevant ... and that the ultimate goal of eliminating" race as a criterion "will never be achieved." *Croson*, 488 U. S., at 495 (internal quotation marks omitted).

Respondents' second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. 567 F. Supp. 3d, at 656. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these "qualitative standard[s]" are "difficult to measure." Tr. of Oral Arg. in No. 21–707, at 78; but see *Fisher II*, 579 U. S., at 381 (requiring race-based admissions programs to operate in a manner that is "sufficiently measurable").

Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." 539 U. S., at 343. The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. *Ibid.* That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. See Tr. of Oral Arg. in No. 20–1199, at 84–85; Tr. of Oral Arg. in No. 21–707, at 85–86. Indeed, the high school applicants that Harvard and UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided.

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary. See Brief for Respondent in No. 20–1199, at 52; Brief for University Respondents in No. 21–707, at 58–59. Respondents point to language in *Grutter* that, they contend, permits "the durational requirement [to] be met" with "periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."

539 U. S., at 342. But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted. *Ibid.*; see also *supra*, at 18.

Here, however, Harvard concedes that its race-based admissions program has no end point. Brief for Respondent in No. 20–1199, at 52 (Harvard "has not set a sunset date" for its program (internal quotation marks omitted)). And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. Tr. of Oral Arg. in No. 20–1199, at 91. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." 567 F. Supp. 3d, at 612. And UNC suggests that it might soon use race to a *greater* extent than it currently does. See Brief for University Respondents in No. 21–707, at 57. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

* * *

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867). A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

(Concurring opinions of Justices Thomas, Gorsuch, and Kavanaugh, and dissenting opinions of Justices Sotomayor and Jackson are omitted.)

At the end of page 352 add the following as new Note 1:

1. *PWFA and PUMP Acts*. Two new federal laws extend legal protection to pregnant workers and nursing mothers. The Pregnant Workers Fairness Act (PWFA), 42 U.S.C. Chap. 21G, §§ 2000GG1-6, amends Title VII and becomes effective on June 27, 2023. The law, which applies to employers of 15

or more employees and includes applicants for employment, prevents covered employers from discriminating against qualified employees, making it unlawful for an employer to:

- Deny employment opportunities to qualified employees who request reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions;

- Discriminate against qualified employees in the terms, conditions, or privileges of employment in response to requesting reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions; or

- Mandate that qualified employees take unpaid or paid leave if another reasonable accommodation can be provided to address known limitations related to pregnancy, childbirth, or related medical conditions.

The PWFA defines a "qualified employee" as an employee or applicant who can perform the essential functions of the position, with or without reasonable accommodations. An employee or applicant can be a qualified employee and must be provided reasonable accommodation even if they cannot complete an essential function of the position, if:

- The inability to perform an essential function of their position is temporary;

- The employee can perform this essential function of the position in the near future; and

- The employee's inability to perform an essential function can be reasonably accommodated.

The law further requires that employers provide reasonable accommodations to qualified employees who have known limitations related to pregnancy, childbirth, or related medical conditions, unless the employer can prove that the accommodation would cause an undue hardship on the operation of the business. Reasonable accommodation and undue hardship have the same meanings as under the ADA but the law does not require that the "known limitation" rises to the level of a disability under the ADA.

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) Act, 29 U.S.C. § 218(d), requires that all employers (with specific rules governing certain transportation employers) must provide accommodations to employees that need to express breast milk for a nursing child for up to one year after the child's birth. Covered employees must be provided with reasonable break times each time the employee needs to express milk as well as a non-bathroom location that is shielded from view and free from intrusion from both coworkers and the public. Employers are not required to compensate non-exempt employees for breaks they take under the PUMP Act, unless required by other federal, state, or local laws. But time spent on these breaks will "be considered hours worked if the employee is not completely relieved from duty during the entirety of such break." Employers may not dock exempt employees for time spent on such breaks. EEOC has issued detailed guidance on this new law.

The most relevant portions of both statutes are set forth below.

Pregnant Workers Fairness Act (PWFA), 42 U.S.C. Chap. 21G, §§ 2000GG1-6

42 U.S.C. § 2000GG

Definitions

As used in this chapter—

***

(2)the term "covered entity"—

(A)has the meaning given the term "respondent" in section 2000e(n) of this title; and

(B)includes—

(i) an employer, which means a person engaged in industry affecting commerce who has 15 or more employees as defined in section 2000e(b) of this title;

(ii) an employing office, as defined in section 1301 of title 2 and section 411(c) of title 3;

(iii) an entity employing a State employee described in section 2000e–16c(a) of this title; and

(iv)an entity to which section 2000e–16(a) of this title applies;

(3)the term "employee" means—

(A)an employee (including an applicant), as defined in section 2000e(f) of this title;

***

(4)the term "known limitation" means physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or employee's representative has communicated to the employer whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102);

***

(6)the term "qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

(A)any inability to perform an essential function is for a temporary period;

(B)the essential function could be performed in the near future; and

(C)the inability to perform the essential function can be reasonably accommodated; and

(7)the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111) and shall be construed as such terms are construed under such Act [42 U.S.C. 12101 et seq.] and as set forth in the regulations required by this chapter, including with regard to the interactive process that will typically be used to determine an appropriate reasonable accommodation.

42 U.S. Code § 2000gg–1 - Nondiscrimination with regard to reasonable accommodations related to pregnancy.

It shall be an unlawful employment practice for a covered entity to—

(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

(2) require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process referred to in section 2000gg(7) of this title;

(3) deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;

(4) require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee; or

5) take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

42 U.S. Code § 2000gg–2 - Remedies and enforcement

a) EMPLOYEES COVERED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

(1) IN GENERAL

The powers, remedies, and procedures provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4 et seq.) [42 U.S.C. 2000e–4, 2000e–5, 2000e–6, 2000e–8, 2000e–9, and 2000e–10] to the Commission, the Attorney General, or any person alleging a violation of title VII of such Act (42 U.S.C. 2000e et seq.) shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this chapter against an employee described in section 2000gg(3)(A) of this title except as provided in paragraphs (2) and (3) of this subsection.

(2) COSTS AND FEES

The powers, remedies, and procedures provided in subsections (b) and (c) of section 1988 of this title shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person alleging such practice.

(3) DAMAGES

The powers, remedies, and procedures provided in section 1981a of this title, including the limitations contained in subsection (b)(3) of such section 1981a, shall be the powers, remedies, and procedures this chapter provides to the Commission, the Attorney General, or any person alleging such practice

(not an employment practice specifically excluded from coverage under section 1981a(a)(1) of this title).

[Sections B, C, D and E dealing with federal employment are omitted]

(f) PROHIBITION AGAINST RETALIATION

(1) IN GENERAL

No person shall discriminate against any employee because such employee has opposed any act or practice made unlawful by this chapter or because such employee made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(2) PROHIBITION AGAINST COERCION

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(3) REMEDY

The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) LIMITATION

Notwithstanding subsections (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3), if an unlawful employment practice involves the provision of a reasonable accommodation pursuant to this chapter or regulations implementing this chapter, damages may not be awarded under section 1981a of this title if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.

***

42 U.S. Code § 2000gg–4 - Waiver of State immunity

A State shall not be immune under the 11th Amendment to the Constitution from an action in a Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S. Code § 2000gg–5 - Relationship to other laws

(a) IN GENERAL Nothing in this chapter shall be construed—

(1) to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions; or

(2) by regulation or otherwise, to require an employer-sponsored health plan to pay for or cover any particular item, procedure, or treatment or to affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement.

(b)RULE OF CONSTRUCTION

This chapter is subject to the applicability to religious employment set forth in section 2000e–1(a) of this title.

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP) Act, 29 U.S.C. § 218(d) Breastfeeding accommodations in the workplace

(a) IN GENERAL

An employer shall provide—

(1) a reasonable break time for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(2) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(b)COMPENSATION

(1) IN GENERAL

Subject to paragraph (2), an employer shall not be required to compensate an employee receiving reasonable break time under subsection (a)(1) for any time spent during the workday for such purpose unless otherwise required by Federal or State law or municipal ordinance.

(2) RELIEF FROM DUTIES

Break time provided under subsection (a)(1) shall be considered hours worked if the employee is not completely relieved from duty during the entirety of such break.

(b) **EXEMPTION FOR SMALL EMPLOYERS**

An employer that employs less than 50 employees shall not be subject to the requirements of this section, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(d) EXEMPTION FOR CREWMEMBERS OF AIR CARRIERS

(1) IN GENERAL

An employer that is an air carrier shall not be subject to the requirements of this section with respect to an employee of such air carrier who is a crewmember.

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(e)APPLICABILITY TO RAIL CARRIERS

(1) IN GENERAL

Except as provided in paragraph (2), an employer that is a rail carrier shall be subject to the requirements of this section.

(2) CERTAIN EMPLOYEES An employer that is a rail carrier shall be subject to the requirements of this section with respect to an employee of such rail carrier who is a member of a train crew involved in the movement of a locomotive or rolling stock or who is an employee who maintains the right of way, provided that compliance with the requirements of this section does not—

(A) require the employer to incur significant expense, such as through the addition of such a member of a train crew in response to providing a break described in subsection (a)(1) to another such member of a train crew, removal or retrofitting of seats, or the modification or retrofitting of a locomotive or rolling stock; or

(B) result in unsafe conditions for an individual who is an employee who maintains the right of way.

(3) SIGNIFICANT EXPENSE

For purposes of paragraph (2)(A), it shall not be considered a significant expense to modify or retrofit a locomotive or rolling stock by installing a curtain or other screening protection.

(4) DEFINITIONS In this subsection:

(A) Employee who maintains the right of way

The term "employee who maintains the right of way" means an employee who is a safety-related railroad employee described in section 20102(4)(C) of title 49.

(B) Rail carrier

The term "rail carrier" means an employer described in section 213(b)(2) of this title.

(C) Train crew

The term "train crew" has the meaning given such term as used in chapter II of subtitle B of title 49, Code of Federal Regulations (or successor regulations).

(f) APPLICABILITY TO MOTORCOACH SERVICES OPERATORS

(1) IN GENERAL

Except as provided in paragraph (2), an employer that is a motorcoach services operator shall be subject to the requirements of this section.

(2) EMPLOYEES WHO ARE INVOLVED IN THE MOVEMENT OF A MOTORCOACH

An employer that is a motorcoach services operator shall be subject to the requirements of this section with respect to an employee of such motorcoach services operator who is involved in the movement of a motorcoach provided that compliance with the requirements of this section does not—

(A) require the employer to incur significant expense, such as through the removal or retrofitting of seats, the modification or retrofitting of a motorcoach, or unscheduled stops; or

(B) result in unsafe conditions for an employee of a motorcoach services operator or a passenger of a motorcoach.

(3) SIGNIFICANT EXPENSE For purposes of paragraph (2)(A), it shall not be considered a significant expense—

(A) to modify or retrofit a motorcoach by installing a curtain or other screening protection if an employee requests such a curtain or other screening protection; or

(B) for an employee to use scheduled stop time to express breast milk.

***

h) INTERACTION WITH STATE AND FEDERAL LAW

(1) LAWS PROVIDING GREATER PROTECTION

Nothing in this section shall preempt a State law or municipal ordinance that provides greater protections to employees than the protections provided for under this section.

(2) NO EFFECT ON TITLE 49 PREEMPTION

This section shall have no effect on the preemption of a State law or municipal ordinance that is preempted under subtitle IV, V, or VII of title 49.

On page 394, after note 4, add the following Note:

4.a. *Predispute Non-Disclosure and Non-Disparagement Clauses Unenforceable.* The Speak Out Act of 2022, 42 U.S. Code § 19401 et. seq. prohibits enforcement of a pre-dispute nondisclosure or non-disparagement clause regarding claims of sexual assault or sexual harassment. The Act was passed on December 7, 2022, and was effective immediately. It applies to all agreements entered into *after* December 7, 2022, but does not apply to clauses entered into prior to the law's effective date. The law specifically provides that state or local laws that provide similar or greater protections to claimants are not superseded, meaning that the broader bans in laws of several states (including California, New York and Illinois) are not preempted.

On Page 394, after note 5, add the following Note:

5.a. *New York Law and California Laws extending the statute of limitations for sexual assault claims.* New York amended its Adult Survivors Act (ASA) in late 2022 to suspend the statute of limitations for civil sexual assault claims for one year, or until November 2023, allowing such cases to proceed regardless of when the assault occurred. This legislation closed a loophole in the original ASA which extended the statute of limitations for such claims to 20 years but made no provision for sexual assault claims that had not been filed at the time of the amendment. The lookback law allowed E. Jean Carroll to file a sexual assault and defamation claim against former President Donald Trump, resulting in a $5 million jury verdict which is pending on appeal. California AB 2777, effective on January 1, 2023, creates a three-year lookback allowing claims for sexual assault to be filed until December 31, 2026. Former actor Bill Cosby has been sued ~~under New York and Ca~~lifornia law by several women claiming past sexual assault by him, but to date no cases have proceeded to trial.

On Page 403, add the following note 6.a.

6.a. *Music in the workplace can create a hostile work environment.* In *Sharp v S&S Activewear LLC*, ___ F. 4th ___ (9th Cir. June 7, 2023), the Ninth Circuit held that playing misogynistic music in the workplace can create a hostile work environment. The Ninth Circuit noted that decisions from other circuits "guide[s] us to recognize 'sexually graphic, violently misogynistic' music as one form of harassment that can pollute a workplace and give rise to a Title VII claim." The court found no occasion to discuss corporate liability where individuals in the workplace played such music because the music in question in S&S was played by the employer which considered the music "motivational" and continued to play it despite multiple employee complaints.

On page 451, add the following to end of note 5:

- *Beauty Pageants.* In *Green v. Miss United States of America*, LLC, 52 F. 4th 773 (9th Cir. 2022), the court ruled that applying the Oregon Public Accommodations Act (OPAA) to force a beauty pageant operator to accept a transgender woman as a contestant would violate its free speech rights, and that Oregon's stated reasons for passing OPAA did not constitute a sufficiently compelling interest to justify requiring the pageant to accept a transgender woman as a contestant. The court found that "who competes and succeeds in a pageant is how the pageant speaks" (italics original). The pageant allows only "natural born female[s]" to compete and does not believe that biological males who identify as female are women. The court found that the pageant communicates these views on womanhood every time it uses the word "woman" in a manner deserving First Amendment protection. "Requiring Miss United States of America to allow Green to compete in its pageants would be to explicitly require Miss United States of America to remove its 'natural born female' rule from its entry requirements."

On page 547, before the Note on Drug and Alcohol Addiction, add the following case:

Williams v Kincaid

45 F.4th 759 (4th Cir. 2022), *cert. denied* ___ U.S. ___ (2023)

Before MOTZ, HARRIS, and QUATTLEBAUM, Circuit Judges.

DIANA GRIBBON MOTZ, Circuit Judge:

Kesha Williams, a transgender woman with gender dysphoria, spent six months incarcerated in the Fairfax County Adult Detention Center. Though prison deputies initially assigned her to women's housing, they quickly moved her to men's housing when they learned that she was transgender. There, she experienced delays in medical treatment for her gender dysphoria, harassment by other inmates,

and persistent and intentional misgendering and harassment by prison deputies. Following her release from the detention center, Williams filed this § 1983 action against the Sheriff of Fairfax County, a prison deputy, and a prison nurse alleging violations of the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, the United States Constitution, and state common law. The district court dismissed the case, holding that the complaint failed to state grounds for relief with respect to some claims and that the statute of limitations barred others. For the reasons that follow, we disagree and so reverse and remand for further proceedings.

1.

Williams is a transgender woman whose gender identity (female) differs from the gender (male) she was assigned at birth. Prior to her incarceration, Williams changed her legal name and lived her life as a woman. Her home state of Maryland has recognized her gender as female and issued her a driver's license with that designation. Williams suffers from gender dysphoria, a "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth." Am. Compl. ¶ 12 (quoting the World Professional Association for Transgender Health Standards of Care (7th Version 2012) ("WPATH Standards")). People suffering from gender dysphoria often benefit from medical treatment, including hormone therapy. Williams had received such medical treatment in the form of a daily pill and biweekly injections for fifteen years prior to her incarceration.

At the outset of her incarceration, prison deputies searched Williams, assigned her housing on the women's side of the prison, and gave her uniforms typically provided to female inmates, including several bras and women's underwear. Later that same day, during her preliminary medical evaluation, Williams told the prison nurse, Xin Wang, that she is transgender, suffers from gender dysphoria, and for fifteen years had received hormone medical treatment for her gender dysphoria. Williams had brought this hormone medication with her to the prison and asked Nurse Wang to retrieve it for her. Nurse Wang did not return Williams' medicine to her; instead she instructed Williams to fill out a medical release form and indicated that prison healthcare staff would follow up with her soon.

In response to Nurse Wang's further questioning, Williams explained she had not undergone transfeminine bottom surgery. Because Williams retained the genitalia with which she was born, Nurse Wang labelled Williams as "male" and changed her prison records, including her housing assignment, to reflect that label. Pursuant to the prison's policy, which provides that "[m]ale inmates shall be classified as such if they have male genitals" and "[f]emale inmates shall be classified as such if they have female genitals," prison deputies required Williams to live on the men's side of the facility. Deputies also required her to give up the women's clothing she had previously received and to wear men's clothing.

As instructed by Nurse Wang, Williams filled out the medical release form later that same day. But two weeks went by without Williams receiving her prescribed hormone medication for gender dysphoria. As a result, Williams began experiencing significant mental and emotional distress. She requested a visit from a nurse, who directed her to fill out another medical release form. Williams did so. Nurse Wang received Williams' medical records on December 4, 2018, but did not approve the medication or re-initiate hormone treatment until on or about December 10. Subsequently, Nurse Wang failed to provide Williams with her approved and scheduled hormone treatment on two separate occasions.

While Williams was housed on the men's side of the prison, prison deputies repeatedly harassed her regarding her sex and gender identity. Deputies ignored her requests that they refer to her as a woman. Instead, they referred to her as "mister," "sir," "he," or "gentleman." Williams' requests for some accommodations — to shower privately and for body searches to be conducted by a female deputy — were denied. One deputy threatened to place her in solitary confinement if she resisted a search by

a male deputy. Male inmates also harassed Williams, causing her to fear for her safety throughout her incarceration in male housing. In January 2019, during a "shakedown" search of Williams' housing unit, Williams again requested that a female deputy conduct the body search. Despite the presence and availability of a female deputy, deputies ignored her request. Instead, a male deputy, Deputy Garcia, who knew Williams to be a woman but referred to her as a man, told her: "Sir, you are a male and I need to search you." He then subjected her to a "highly aggressive" search that resulted in bruising to her breast and caused her "pain for several days." Afterward, he "mocked Ms. Williams and made light of his actions in searching her person."

Williams' incarceration ended in May 2019. Thereafter, she brought this § 1983 action, asserting violations of the ADA, 42 U.S.C. §§ 12101 *et seq.* , the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.* , the U.S. Constitution, and state law. Williams filed her original complaint on November 16, 2020. That complaint named as defendants Stacey A. Kincaid, Sheriff of Fairfax County; nine "Custody Does"; and fifteen "Health Care Does." After limited discovery into the identities of prison employees, she filed an amended complaint two months later against only Sheriff Kincaid, Nurse Wang, and Deputy Garcia ("Defendants").

Defendants moved to dismiss the Amended Complaint. Sheriff Kincaid contended that the ADA and Rehabilitation Act afforded Williams no basis for relief because "gender dysphoria is not a 'disability' under the ADA." Kincaid Mem. in Support of Mot. to Dismiss at 8. Rather, according to Sheriff Kincaid, "it is an identity disorder not resulting from physical impairments." *Id.* The district court adopted this argument and dismissed the ADA and Rehabilitation Act claims against Sheriff Kincaid. The court also dismissed the claims against Nurse Wang and Deputy Garcia, holding that most were barred by the statute of limitations and that the acts alleged to have taken place within the limitations period were insufficient to state claims against those defendants. Finally, the court held that the gross negligence claims against Sheriff Kincaid and Deputy Garcia failed because they had exhibited "some degree of care for inmates such as" Williams. ***

II.

We first address Williams' claims against Sheriff Kincaid under the ADA and the Rehabilitation Act, reviewing de novo the district court's dismissal of those claims under Rule 12(b)(6). ***

Among its protections, the ADA prohibits public entities from discriminating against, or excluding from participation in the benefits of services, programs, and activities, any qualified individual with a disability…. The ADA defines the term "disability" broadly to include "a physical or mental impairment that substantially limits one or more major life activities of such individual." … Sheriff Kincaid does not dispute that gender dysphoria falls within that definition.

Instead, the Sheriff relies on the ADA's exclusions. The statute excludes from the broad definition of "disability" — and thus from the statute's protections — "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, *gender identity disorders not resulting from physical impairments* , [and] other sexual behavior disorders," as well as "compulsive gambling, kleptomania, ... pyromania ; or ... psychoactive substance use disorders resulting from current illegal use of drugs." *Id.* § 12211(b) (emphasis added). Sheriff Kincaid argues, and the district court held, that the exclusion for "gender identity disorders not resulting from physical impairments" applied to Williams' gender dysphoria and barred her ADA claim. Whether this is so constitutes a question of first impression for the federal appellate courts.

In addressing this question, we of course must follow Congress' direction. After a series of Supreme Court decisions narrowing the ADA, Congress responded in 2008 by instructing courts in an amendment to the ADA that the definition of "disability" "shall be construed in favor of broad coverage

of individuals under this chapter, to the maximum extent permitted by the [ADA's] terms." *Id.* § 12102(4)(A). In doing so, "Congress expressly directed courts to construe the amended [ADA] as broadly as possible." *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 332 (4th Cir. 2014). Moreover, because the 2008 amendments to the ADA were "intended to make it 'easier for people with disabilities to obtain protection under the ADA,' " *Jacobs v. N.C. Admin. Off. of the Cts.* , 780 F.3d 562, 572 (4th Cir. 2015) (quoting 29 C.F.R. § 1630.1(c)(4)), courts must construe the ADA's exclusions narrowly. *See Alexander v. Carrington Mortgage Servs., LLC* , 23 F.4th 370, 374 (4th Cir. 2022).

Williams poses two challenges to the district court's holding that she suffers from a "gender identity disorder [ ] not resulting from physical impairments." First, she contends that gender dysphoria categorically is *not* a "gender identity disorder [ ]." Second, Williams argues that even if her gender dysphoria is a "gender identity disorder[ ]," it results from a physical basis that places it outside the scope of the exclusion from ADA protection. Appellant Br. at 32. We consider each of these arguments in turn.

A.

We begin with Williams' first contention: that gender dysphoria categorically is not a "gender identity disorder[ ]," and so the exclusion from ADA protection of "gender identity disorders" does not affect ADA coverage for gender dysphoria. The text of the ADA does not define the term "gender identity disorders" and does not mention gender dysphoria at all. Thus, although the ADA specifically lists a number of exclusions from the definition of "disability," that list does not include gender dysphoria. To determine whether "gender identity disorders" includes gender dysphoria, we must look to the meaning of the ADA's "terms at the time of its enactment." *Bostock v. Clayton County* , —— U.S. —— –, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). That examination reveals that in 1990, "the time of the statute's adoption," "gender identity disorders" did not include gender dysphoria. *Id.*

In fact, in 1990, the medical community did not acknowledge gender dysphoria either as an independent diagnosis or as a subset of any other condition. But it did recognize a class of other disorders that it characterized as "gender identity disorders." According to the then-current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM), "[t]he essential feature" of a "gender identity disorder" was "an incongruence between assigned sex (i.e., the sex that is recorded on the birth certificate) and gender identity." Am. Psych. Ass'n, Diagnostic and Statistical Manual 71 (3d ed., rev. 1987) (DSM-III-R); *see Hall v. Florida* , 572 U.S. 701, 704, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014) (describing the DSM as "one of the basic texts used by psychiatrists and other experts"). We have recently recognized precisely this point: that a diagnosis of "gender identity disorder ... indicat[ed] that the clinical problem was the discordant gender identity." *Grimm v. Gloucester Cnty. Sch. Bd.* , 972 F.3d 586, 611 (4th Cir. 2020) (internal citation omitted), *cert. denied* , —— U.S. ——, 141 S. Ct. 2878, 210 L.Ed.2d 977 (2021). In other words, in 1990, the gender identity disorder diagnosis marked being transgender as a mental illness. *Id.*

Crucially, advances in medical understanding led the American Psychiatric Association (APA) in 2013 to remove "gender identity disorders" from the most recent DSM (5th ed. 2013), the DSM-5. At the same time as the APA removed "gender identity disorder" from the DSM-5, the APA added the diagnosis of "gender dysphoria," which did not exist as a diagnosis in 1990.

The very fact of revision suggests a meaningful difference, and the contrast between the definitions of the two terms — gender identity disorder and gender dysphoria — confirms that these revisions are not just semantic. Indeed, the definition of gender dysphoria differs dramatically from that of the now-rejected diagnosis of "gender identity disorder." Rather than focusing exclusively on a person's gender identity, the DSM-5 defines "gender dysphoria" as the "*clinically significant distress* " felt by some of those who experience "an incongruence between their gender identity and their assigned sex." DSM-5

at 451–53 (emphasis added); *see* Br. of Amici Curiae, The Disability Law Center, et al. in Supp. of Appellant at 9. And the DSM-5 explains that the discomfort or distress caused by gender dysphoria may result in intense anxiety, depression, suicidal ideation, and even suicide. DSM-5 at 454–55. In short, "being trans alone cannot sustain a diagnosis of gender dysphoria under the DSM-[5], as it could for a diagnosis of gender identity disorder under [earlier versions of the DSM]." Ali Szemanski, Note, *Why Trans Rights Are Disability Rights: The Promises and Perils of Seeking Gender Dysphoria Coverage Under the Americans with Disabilities Act*, 43 Harv. J. L. & Gender 137, 147 (2020). For if a transgender person does not experience "*clinically significant* distress," she could not be diagnosed as having gender dysphoria under the DSM-5. *See* DSM-5 at 453 (emphasis added).

Reflecting this shift in medical understanding, we and other courts have thus explained that a diagnosis of gender dysphoria, unlike that of "gender identity disorder[ ]," concerns itself primarily with *distress* and other disabling symptoms, rather than simply being transgender. In *Grimm*, we further explained that "left untreated, gender dysphoria can cause, among other things, depression, substance use, self-mutilation, other self-harm, and suicide."… Similarly, the Ninth Circuit has pointed out that "[f]ailure to follow an appropriate treatment plan [for gender dysphoria] can expose transgender individuals to a serious risk of psychological and physical harm." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 771 (9th Cir. 2019).

Not only are "gender identity disorder" and gender dysphoria characterized by different symptoms; they also affect different populations. As Williams acknowledges in her complaint, "gender dysphoria" is "a disability suffered by many (but certainly not all) transgender people." Am. Compl. ¶ 2; *see also* Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause* , 57 B.C. L. Rev. 507, 516 (2016) ("For many transgender people, the incongruence between gender identity and assigned sex does not interfere with their lives; they are completely comfortable living just the way they are."); DSM-5 at 451 ("[N]ot all individuals will experience distress as a result of such [gender] incongruence."). But "[f]or a subset of transgender people ... the incongruence results in gender dysphoria — i.e., a feeling of stress and discomfort with one's assigned sex." Barry et al., *A Bare Desire to Harm*, at 516. In sum, the APA's removal of the "gender identity disorder" diagnosis and the addition of the "gender dysphoria" diagnosis to the DSM-5 reflected a significant shift in medical understanding. The obsolete diagnosis focused solely on cross-gender identification; the modern one on clinically significant distress. The DSM-5 itself emphasizes this distinction, explaining that the gender dysphoria diagnosis "focuses on dysphoria as the clinical problem, not identity per se." DSM-5 at 451. Put simply, while the older DSM pathologized the very existence of transgender people, the recent DSM-5's diagnosis of gender dysphoria takes as a given that being transgender is not a disability and affirms that a transgender person's medical needs are just as deserving of treatment and protection as anyone else's.

Thus, the ADA excludes from its protection anything falling within the plain meaning of "gender identity disorders," as that term was understood "at the time of its enactment." *Bostock*, 140 S. Ct. at 1738. But nothing in the ADA, then or now, compels the conclusion that gender dysphoria constitutes a "gender identity disorder" excluded from ADA protection. For these reasons, we agree with Williams that, as a matter of statutory construction, gender dysphoria is not a gender identity disorder.

And even putting aside our legal conclusion, at this early stage in the litigation, a dismissal of Williams' ADA claims would misunderstand the generosity with which complaints are to be reviewed. [Citations omitted] The difference between "gender identity disorders" and gender dysphoria, as revealed by the DSM and the WPATH Standards, would be more than enough support to "nudge [Williams'] claims" that gender dysphoria falls entirely outside of § 12211(b)'s exclusion for "gender identity disorders" "across the line from conceivable to plausible." *Twombly* , 550 U.S. at 570, 127 S.Ct. 1955.

Moreover, given Congress' express instruction that courts construe the ADA in favor of maximum protection for those with disabilities, we could not adopt an unnecessarily restrictive reading of the ADA. To so hold would be for a court to take it upon itself to rewrite the statute in two impermissible ways: by penciling a new condition into the list of exclusions, and by erasing Congress' command to construe the ADA as broadly as the text permits. We cannot add to the ADA's list of exclusions when Congress has not chosen to do so itself.

B.

Williams also contends that even if gender dysphoria and "gender identity disorder [ ]" were not categorically distinct, as we have held, her gender dysphoria nevertheless falls within the ADA's safe harbor for "gender identity disorders ... *resulting from physical impairments.* " Thus, Williams maintains that we must reverse the district court's dismissal of her ADA claims for an additional and independent reason — because her gender dysphoria has a "known physical basis." Br. of Appellant at 36.

In response, Sheriff Kincaid does *not* argue that gender dysphoria *never* results from a physical impairment; she concedes that it sometimes may. *See* Br. of Appellees at 15 ("[T]he question *is not* whether gender dysphoria could possibly be the result of the physical impairment ...." (emphasis added)); *id.* at 19 (noting that the DSM "indicates that gender dysphoria can result from a disorder of sex development, which would equate to resulting from physical impairment"). Rather, Sheriff Kincaid contends that Williams failed to explicitly *plead* that her gender dysphoria was the result of a physical impairment. Appellee Br. at 15. The district court (apparently assuming that gender dysphoria is a "gender identity disorder") based its dismissal of the ADA claim on this rationale alone.

In determining the correctness of this legal conclusion, we are once again guided by Congress' mandate that we must construe the definition of "disability" as broadly as the text of the ADA permits….Though the statute itself does not define the phrase "physical impairments," the Equal Employment Opportunity Commission (EEOC) has promulgated regulations defining the term expansively as "[a]ny physiological disorder or condition ... affecting one or more body systems, such as neurological ... and endocrine." 28 C.F.R. § 35.108(b)(1)(i). And we must defer to the EEOC's reasonable interpretations of ambiguous terms in the ADA….

In light of the broad scope of the ADA and the implementing regulations, we conclude that Williams has alleged sufficient facts to render plausible the inference that her gender dysphoria "result[s] from physical impairments." 42 U.S.C. § 12211(b)(1). Williams alleges that the medical treatment for *her* gender dysphoria "consisted primarily of a hormone therapy, which she used to effectively manage and alleviate the gender dysphoria she experienced," and that she had received this medical treatment for fifteen years. Am. Compl. ¶ 14. Thus, contrary to the dissent's assertion, Williams does not merely allege that gender dysphoria may require physical treatment such as hormone therapy; she maintains that her gender dysphoria requires it. Indeed, she invokes her need for hormone treatment in her complaint upwards of ten times. She explains that hormone treatment enables "feminization or masculinization of the body." *Id.* ¶ 29. And she alleges that without it, when the prison failed to provide this treatment, she experienced, inter alia, "emotional, psychological, and *physical* distress." *Id.* ¶ 123 (emphasis added).

These allegations suffice to raise "the reasonable inference" that Williams' gender dysphoria results from a physical impairment…. In particular, the need for hormone therapy may well indicate that her gender dysphoria has some physical basis. *See Grimm* , 972 F.3d at 596 (describing "hormone therapy" as a "physical transition treatment[ ]"). That Williams did not "specifically allege that her gender dysphoria is rooted in some physical component" by using those particular words does not render implausible the inference that her gender dysphoria has a physical basis. *Doe v. Pa. Dep't of Corr.* , No.

1:20-cv-00023, 2021 WL 1583556, at *11–12 (W.D. Pa. Feb. 19, 2021) (relying on plaintiff's argument "that the DSM-[5] provides evidence of a physical source" to conclude she plausibly alleged her gender dysphoria falls "outside of the statutory exclusion").

Indeed, in addition to the allegations regarding her hormone treatment, Williams points to medical and scientific research identifying possible physical bases of gender dysphoria. The Department of Justice has agreed that this emerging research renders the inference that gender dysphoria has a physical basis sufficiently plausible to survive a motion to dismiss. *See, e.g.* , Statement of Interest of the United States of America at 1–2, *Blatt v. Cabela's Retail, Inc.* , No. 5:14-cv-4822 (E.D. Pa. Nov. 16, 2015) ("In light of the evolving scientific evidence suggesting that gender dysphoria may have a physical basis, along with the remedial nature of the ADA and the relevant statutory and regulatory provisions directing that the term 'disability' and 'physical impairment' be read broadly, the [Gender Identity Disorder] Exclusion should be construed narrowly such that gender dysphoria falls outside its scope.").

***

C.

If there were any doubt that § 12211(b) does not foreclose Williams' ADA claim on a motion to dismiss, we would interpret that statute to permit that claim to proceed to avoid a serious constitutional question. When a statute "raises 'a serious doubt' as to its constitutionality," we must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." [Citations omitted]

As Williams points out, many transgender people experience gender dysphoria,....and both gender dysphoria and "gender identity disorder" (as it existed in 1990) are very "closely connected to transgender identity." Br. of Amici GLBTQ Legal Advocs. & Defs. et al. in Supp. of Appellee 21; *see also Grimm*, 972 F.3d at 596. Given that correlation, we have little trouble concluding that a law excluding from ADA protection *both* "gender identity disorders" *and* gender dysphoria would discriminate against transgender people as a class, implicating the Equal Protection Clause of the Fourteenth Amendment. [Citation omitted]

In part because of the long history of discrimination against transgender people, we have held that intermediate scrutiny applies to laws that discriminate against them. *See Grimm* , 972 F.3d at 610 ("[T]ransgender people constitute at least a quasi-suspect class."); *see also Karnoski v. Trump* , 926 F.3d 1180, 1200–02 (9th Cir. 2019). Thus, such laws will "fail unless they are substantially related to a sufficiently important governmental interest." *Grimm*, 972 F.3d at 608 (cleaned up). And "[t]o survive intermediate scrutiny, the state must provide an 'exceedingly persuasive justification' " for the law. *Id.* (quoting *United States v. Virginia* , 518 U.S. 515, 534, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (*VMI*)).

One need not look too closely to find evidence of discriminatory animus toward transgender people in the enactment of § 12211(b). *See generally* Kevin M. Barry, *Disabilityqueer: Federal Disability Rights Protection for Transgender People*, 16 Yale Human Rts. & Dev. J. 1 (2014) (detailing how moral opprobrium led to adoption of amendment excluding "gender identity disorders"). To begin with, the provision lists "gender identity disorders" alongside pedophilia, exhibitionism, and voyeurism. This grouping implicitly "brands all [transgender people] as [equivalent to] criminals, thereby making it more difficult for [them] to be treated in the same manner as everyone else." *Lawrence v. Texas* , 539 U.S. 558, 581, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring in the judgment).

The legislative history of the ADA reflects the moral judgment implicit in that list. For example, Senator Jesse Helms, a leading force behind the exclusion of gender identity disorders from the ADA, stated: "If this were a bill involving people in a wheelchair or those who have been injured in the war, that is one thing. But how in the world did you get to the place that you did not even [ex]clude transvestites?" Barry, *Disabilityqueer* , at 14 (quoting Helms). Another legislator advocating this exclusion, Senator William Armstrong, "could not imagine the sponsors would want to provide a protected legal status to somebody who has such disorders, particularly those [that] might have a moral content to them or which in the opinion of some people have a moral content." *Id.* at 13; *see also, e.g.* , 135 Cong. Rec. S10765-01 (daily ed. Sep. 6, 1989) ("In short, we are talking about behavior that is immoral, improper, or illegal and which individuals are engaging in of their own volition, admittedly for reasons we do not fully understand."). In the words of Professor Barry, who has outlined much of this legislative history, "[w]ith the passage of [the Armstrong-Helms] amendment, the ADA became, in effect, a moral code: 'disability' coverage applies to those we pity, not those we despise." *Id.* at 25.

Moreover, this is not the first time that courts have confronted a law that "withdraws from [one group], but no others, specific legal protection from the injuries caused by discrimination." *Romer v. Evans* , 517 U.S. 620, 627, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). In fact, by carving a safe harbor for discrimination out of broad antidiscrimination protections, § 12211(b) bears a striking resemblance to the Colorado law at issue in *Romer* , which repealed municipal antidiscrimination ordinances "to the extent they prohibit discrimination on the basis of 'homosexual, lesbian or bisexual orientation, conduct practices, or relationships.' " *Id.* at 624, 116 S.Ct. 1620. In *Romer*, the Court held that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634, 116 S.Ct. 1620. And indeed, we have previously recognized the ADA's exclusion of "gender identity disorders" *itself* as evidence of such discriminatory animus. *See Grimm*, 972 F.3d at 611.

In light of the "basic promise of equality ... that animates the ADA," we see no legitimate reason why Congress would intend to exclude from the ADA's protections transgender people who suffer from gender dysphoria. *Nat'l Fed. of the Blind*, 813 F.3d at 510. The only reason we can glean from the text and legislative record is "a bare ... desire to harm a politically unpopular group [, which] cannot constitute a legitimate governmental interest." *Romer* , 517 U.S. at 634, 116 S.Ct. 1620. And Sheriff Kincaid falls "far short of establishing [an] 'exceedingly persuasive justification' " for the exclusion — in fact, she has not even attempted to offer one. *VMI* , 518 U.S. at 546, 116 S.Ct. 2264 (internal citation omitted).

Because "a construction of the statute ... by which [this constitutional] question may be avoided" is readily available, *Zadvydas* , 533 U.S. at 689, 121 S.Ct. 2491, we reject a reading of § 12211(b) that would exclude gender dysphoria from the ADA's protections. As explained above, Williams' complaint amply supports *two* inferences that allow us to stop short of deciding this case on constitutional grounds: first, that gender dysphoria does not constitute a "gender identity disorder[ ]," and second, that Williams' gender dysphoria "result[s] from a physical impairment." 42 U.S.C. § 12211(b).

For all of these reasons, we reverse the district court's dismissal of Williams' ADA claims.

III. [Section III is omitted]

REVERSED AND REMANDED

[The opinion of Circuit Judge Quattlebaum, concurring in part and dissenting in part, is omitted].

On page 590, replace *TWA v. Hardison* with:

___U.S. ___ (June 29, 2023)

Justice Alito delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate the religious practice of their employees unless doing so would impose an "undue hardship on the conduct of the employer's business." 78 Stat. 253, as amended, 42 U. S. C. § 2000e(j). Based on a line in this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 84 (1977), many lower courts, including the Third Circuit below, have interpreted "undue hardship" to mean any effort or cost that is "more than ... *de minimis*." In this case, however, both parties—the plaintiff-petitioner, Gerald Groff, and the defendant-respondent, the Postmaster General, represented by the Solicitor General—agree that the *de minimis* reading of *Hardison* is a mistake. With the benefit of thorough briefing and oral argument, we today clarify what Title VII requires.

I

Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest, not "secular labor" and the "transport[ation]" of worldly "goods." In 2012, Groff began his employment with the United States Postal Service (USPS), which has more than 600,000 employees. He became a Rural Carrier Associate, a job that required him to assist regular carriers in the delivery of mail. When he took the position, it generally did not involve Sunday work. But within a few years, that changed. In 2013, USPS entered into an agreement with Amazon to begin facilitating Sunday deliveries, and in 2016, USPS signed a memorandum of understanding with the relevant union (the National Rural Letter Carriers' Association) that set out how Sunday and holiday parcel delivery would be handled. During a 2-month peak season, each post office would use its own staff to deliver packages. At all other times, Sunday and holiday deliveries would be carried out by employees (including Rural Carrier Associates like Groff) working from a "regional hub." For Quarryville, Pennsylvania, where Groff was originally stationed, the regional hub was the Lancaster Annex.

The memorandum specifies the order in which USPS employees are to be called on for Sunday work outside the peak season. First in line are each hub's "Assistant Rural Carriers"— part-time employees who are assigned to the hub and cover only Sundays and holidays. Second are any volunteers from the geographic area, who are assigned on a rotating basis. And third are all other carriers, who are compelled to do the work on a rotating basis. Groff fell into this third category, and after the memorandum of understanding was adopted, he was told that he would be required to work on Sunday. He then sought and received a transfer to Holtwood, a small rural USPS station that had only seven employees and that, at the time, did not make Sunday deliveries. But in March 2017, Amazon deliveries began there as well.

With Groff unwilling to work on Sundays, USPS made other arrangements. During the peak season, Sunday deliveries that would have otherwise been performed by Groff were carried out by the rest of the Holtwood staff, including the postmaster, whose job ordinarily does not involve delivering mail. During other months, Groff 's Sunday assignments were redistributed to other carriers assigned to the regional hub. Throughout this time, Groff continued to receive "progressive discipline" for failing to work on Sundays. 35 F. 4th 162, 166 (CA3 2022). Finally, in January 2019, he resigned.

A few months later, Groff sued under Title VII, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. § 2000e(j). The District Court granted summary judgment to USPS, 2021 WL 1264030 (ED Pa., Apr. 6,

2021), and the Third Circuit affirmed. The panel majority felt that it was "bound by [the] ruling" in *Hardison*, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th, at 174, n. 18 (quoting 432 U. S., at 84). Under Circuit precedent, the panel observed, this was "not a difficult threshold to pass," 35 F. 4th, at 174 (internal quotation marks omitted), and it held that this low standard was met in this case. Exempting Groff from Sunday work, the panel found, had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." *Id.*, at 175. Judge Hardiman dissented, concluding that adverse "effects on USPS employees in Lancaster or Holtwood" did not alone suffice to show the needed hardship "on the employer's *business*." *Id.*, at 177 (emphasis in original).

II

Because this case presents our first opportunity in nearly 50 years to explain the contours of *Hardison*, we begin by recounting the legal backdrop to that case, including the development of the Title VII provision barring religious discrimination and the Equal Employment Opportunity Commission's (EEOC's) regulations and guidance regarding that prohibition. We then summarize how the *Hardison* case progressed to final decision, and finally, we discuss how courts and the EEOC have understood its significance. This background helps to explain the clarifications we offer today.

A

Since its passage, Title VII of the Civil Rights Act of 1964 has made it unlawful for covered employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's ... religion." 42 U. S. C. § 2000e–2(a)(1) (1964 ed.). As originally enacted, Title VII did not spell out what it meant by discrimination "because of ... religion," but shortly after the statute's passage, the EEOC interpreted that provision to mean that employers were sometimes required to "accommodate" the "reasonable religious needs of employees." 29 CFR § 1605.1(a)(2) (1967). After some tinkering, the EEOC settled on a formulation that obligated employers "to make reasonable accommodations to the religious needs of employees" whenever that would not work an "undue hardship on the conduct of the employer's business." 29 CFR § 1605.1 (1968).

Between 1968 and 1972, the EEOC elaborated on its understanding of "undue hardship" in a "long line of decisions" addressing a variety of policies. . . . Those decisions addressed many accommodation issues that still arise frequently today, including the wearing of religious garb[3] and time off from work to attend to religious obligations.

EEOC decisions did not settle the question of undue hardship. In 1970, the Sixth Circuit held (in a Sabbath case) that Title VII as then written did not require an employer "to accede to or accommodate" religious practice because that "would raise grave" Establishment Clause questions. *Dewey* v. *Reynolds Metals Co.*, 429 F. 2d 324, 334. This Court granted certiorari, 400 U. S. 1008, but then affirmed by an evenly divided vote, 402 U. S. 689 (1971).

Responding to *Dewey* and another decision rejecting any duty to accommodate an employee's observance of the Sabbath, Congress amended Title VII in 1972. *Hardison*, 432 U. S., at 73–74; *id.*, at 88–89 (Marshall, J., dissenting). Tracking the EEOC's regulatory language, Congress provided that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U. S. C. § 2000e(j) (1970 ed., Supp. II).

B

The *Hardison* case concerned a dispute that arose during the interval between the issuance of the EEOC's "undue hardship" regulation and the 1972 amendment to Title VII. In 1967, Larry Hardison was hired as a clerk at the Stores Department in the Kansas City base of Trans World Airlines (TWA). The Stores Department was responsible for providing parts needed to repair and maintain aircraft. *Hardison* v. *Trans World Airlines*, 375 F. Supp. 877, 889 (WD Mo. 1974). It played an "essential role" and operated "24 hours per day, 365 days per year." *Hardison*, 432 U. S., at 66. After taking this job, Hardison underwent a religious conversion. He began to observe the Sabbath by absenting himself from work from sunset on Friday to sunset on Saturday, and this conflicted with his work schedule. The problem was solved for a time when Hardison, who worked in Building 1, switched to the night shift, but it resurfaced when he sought and obtained a transfer to the day shift in Building 2 so that he could spend evenings with his wife. 375 F. Supp., at 889. In that new building, he did not have enough seniority to avoid work during his Sabbath. Attempts at accommodation failed, and he was eventually "discharged on grounds of insubordination." 432 U. S., at 69.

Hardison sued TWA and his union, the International Association of Machinists and Aerospace Workers (IAM). The Eighth Circuit found that reasonable accommodations were available, and it rejected the defendants' Establishment Clause arguments. *Hardison* v. *Trans World Airlines, Inc.*, 527 F. 2d 33, 42–44 (1975).

Both TWA and IAM then filed petitions for certiorari, with TWA's lead petition asking this Court to decide whether the 1972 amendment of Title VII violated the Establishment Clause as applied in the decision below, particularly insofar as that decision had approved an accommodation that allegedly overrode seniority rights granted by the relevant collective bargaining agreement. The Court granted both petitions. 429 U. S. 958 (1976).

When the Court took that action, all counsel had good reason to expect that the Establishment Clause would figure prominently in the Court's analysis. As noted above, in June 1971, the Court, by an equally divided vote, had affirmed the Sixth Circuit's decision in *Dewey*, which had heavily relied on Establishment Clause avoidance to reject the interpretation of Title VII set out in the EEOC's reasonable-accommodation guidelines. Just over three weeks later, the Court had handed down its (now abrogated) decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971) which adopted a test under which any law whose "principal or primary effect" "was to advance religion" was unconstitutional. *Id.*, at 612–613. Because it could be argued that granting a special accommodation to a religious practice had just such a purpose and effect, some thought that *Lemon* posed a serious problem for the 1972 amendment of Title VII. And shortly before review was granted in *Hardison*, the Court had announced that the Justices were evenly divided in a case that challenged the 1972 amendment as a violation of the Establishment Clause. *Parker Seal Co.* v. *Cummins*, 429 U. S. 65 (1976) (*per curiam*).

Against this backdrop, both TWA and IAM challenged the constitutionality of requiring any accommodation for religious practice. . . . Applying the three-part *Lemon* test, TWA argued that any such accommodation has the primary purpose and effect of advancing religion and entails "pervasive" government "entanglement ... in religious issues." The union's brief made a similar argument, but stressed the special status of seniority rights under Title VII, *id.*, at 24–36.

Despite the prominence of the Establishment Clause in the briefs submitted by the parties and their *amici*, constitutional concerns played no on-stage role in the Court's opinion, which focused instead on seniority rights. The opinion stated that "the principal issue on which TWA and the union came to this Court" was whether Title VII "require[s] an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." 432 U. S., at 83, and n. 14. The Court held that Title VII imposed no such requirement. *Ibid.* This conclusion, the Court found, was "supported by the fact that seniority systems are afforded special treatment under Title VII itself." *Id.*, at 81. It noted that Title VII

expressly provides special protection for " 'bona fide seniority ... system[s],' " *id*., at 81–82 (quoting 42 U. S. C. § 2000e–2(h)), and it cited precedent reading the statute " 'to make clear that the routine application of a bona fide seniority system [is] not ... unlawful under Title VII.' " 432 U. S., at 82 (quoting *Teamsters* v. *United States*, 431 U. S. 324, 352 (1977)). Invoking these authorities, the Court found that the statute did not require an accommodation that involuntarily deprived employees of seniority rights. 432 U. S., at 80.

Applying this interpretation of Title VII and disagreeing with the Eighth Circuit's evaluation of the factual record, the Court identified no way in which TWA, without violating seniority rights, could have feasibly accommodated Hardison's request for an exemption from work on his Sabbath. The Court found that not enough co-workers were willing to take Hardison's shift voluntarily, that compelling them to do so would have violated their seniority rights, and that leaving the Stores Department short-handed would have adversely affected its "essential" mission. *Id*., at 68, 80.

The Court also rejected two other options offered in Justice Marshall's dissent: (1) paying other workers overtime wages to induce them to work on Saturdays and making up for that increased cost by requiring Hardison to work overtime for regular wages at other times and (2) forcing TWA to pay overtime for Saturday work for three months, after which, the dissent thought, Hardison could transfer back to the night shift in Building 1. The Court dismissed both of these options as not "feasible," *id*., at 83, n. 14, but it provided no explanation for its evaluation of the first. In dissent, Justice Marshall suggested one possible reason: that the collective bargaining agreement might have disallowed Hardison's working overtime for regular wages. *Id*., at 95 (dissenting opinion). But the majority did not embrace that explanation.

As for the second, the Court disputed the dissent's conclusion that Hardison, if he moved back to Building 1, would have had enough seniority to choose to work the night shift. *Id*., at 83, n. 14. That latter disagreement was key. The dissent thought that Hardison could have resumed the night shift in Building 1 after just three months, and it therefore calculated what it would have cost TWA to pay other workers' overtime wages on Saturdays for that finite period of time. According to that calculation, TWA's added expense for three months would have been $150 (about $1,250 in 2022 dollars). *Id*., at 92, n. 6. But the Court doubted that Hardison could have regained the seniority rights he had enjoyed in Building 1 prior to his transfer, and if that were true, TWA would have been required to pay other workers overtime for Saturday work indefinitely. Even under Justice Marshall's math, that would have worked out to $600 per year at the time, or roughly $5,000 per year today.

In the briefs and at argument, little space was devoted to the question of determining when increased costs amount to an "undue hardship" under the statute, but a single, but oft-quoted, sentence in the opinion of the Court, if taken literally, suggested that even a pittance might be too much for an employer to be forced to endure. The line read as follows: "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id*., at 84.

Although this line would later be viewed by many lower courts as the authoritative interpretation of the statutory term "undue hardship," it is doubtful that it was meant to take on that large role. In responding to Justice Marshall's dissent, the Court described the governing standard quite differently, stating three times that an accommodation is not required when it entails "substantial" "costs" or "expenditures." *Id*., at 83, n. 14. This formulation suggests that an employer may be required to bear costs and make expenditures that are not "substantial." Of course, there is a big difference between costs and expenditures that are not "substantial" and those that are "de minimis," which is to say, so "very small or trifling" that that they are not even worth noticing. Black's Law Dictionary 388 (5th ed. 1979).

The Court's response to Justice Marshall's estimate of the extra costs that TWA would have been required to foot is also telling. The majority did not argue that Justice Marshall's math produced

considerably "more than a *de minimis* cost" (as it certainly did). Instead, the Court responded that Justice Marshall's calculation involved assumptions that were not "feasible under the circumstances" and would have produced a different conflict with "the seniority rights of other employees." . . .

Ultimately, then, it is not clear that any of the possible accommodations would have actually solved Hardison's problem without transgressing seniority rights. The *Hardison* Court was very clear that those rights were off-limits. Its guidance on "undue hardship" in situations not involving seniority rights is much less clear.

C

Even though *Hardison*'s reference to "*de minimis*" was undercut by conflicting language and was fleeting in comparison to its discussion of the "principal issue" of seniority rights, lower courts have latched on to "*de minimis*" as the governing standard.

To be sure, as the Solicitor General notes, some lower courts have understood that the protection for religious adherents is greater than "more than ... *de minimis*" might suggest when read in isolation. But a bevy of diverse religious organizations has told this Court that the *de minimis* test has blessed the denial of even minor accommodation in many cases, making it harder for members of minority faiths to enter the job market. . . .

The EEOC has also accepted *Hardison* as prescribing a " 'more than a *de minimis* cost' " test, 29 CFR § 1605.2(e)(1) (2022), but has tried in some ways to soften its impact. It has specifically cautioned (as has the Solicitor General in this case) against extending the phrase to cover such things as the "administrative costs" involved in reworking schedules, the "infrequent" or temporary "payment of premium wages for a substitute," and "voluntary substitutes and swaps" when they are not contrary to a "bona fide seniority system." §§ 1605.2(e)(1), (2).

Nevertheless, some courts have rejected even the EEOC's gloss on "*de minimis*."[12] And in other cases, courts have rejected accommodations that the EEOC's guidelines consider to be ordinarily required, such as the relaxation of dress codes and coverage for occasional absences. . . .

Today, the Solicitor General disavows its prior position that *Hardison* should be overruled—but only on the understanding that *Hardison* does not compel courts to read the "more than *de minimis*" standard "literally" or in a manner that undermines *Hardison*'s references to "substantial" cost. With the benefit of comprehensive briefing and oral argument, we agree.

III

We hold that showing "more than a *de minimis* cost," as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase. In describing an employer's "undue hardship" defense, *Hardison* referred repeatedly to "substantial" burdens, and that formulation better explains the decision. We therefore, like the parties, understand *Hardison* to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of "undue hardship" in ordinary speech.

A

As we have explained, we do not write on a blank slate in determining what an employer must prove to defend a denial of a religious accommodation, but we think it reasonable to begin with Title VII's text. . . . Here, the key statutory term is "undue hardship." In common parlance, a "hardship" is, at a minimum, "something hard to bear." Random House Dictionary of the English Language 646 (1966) (Random House). Other definitions go further. See, *e.g.*, Webster's Third New International Dictionary 1033 (1971) (Webster's Third) ("something that causes or entails suffering or privation"); American Heritage Dictionary 601 (1969) (American Heritage) ("[e]xtreme privation; adversity; suffering"); Black's Law Dictionary, at 646 ("privation, suffering, adversity"). But under any definition, a hardship is more severe than a mere burden. So even if Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. Random House 1547; see, *e.g.*, Webster's Third 2492 ("inappropriate," "unsuited," or "exceeding or violating propriety or fitness"); American Heritage 1398 ("excessive"). The Government agrees, noting that " 'undue hardship means something greater than hardship.' . . .

When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than *de minimis*, *i.e.*, something that is "very small or trifling." Black's Law Dictionary, at 388. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures." 432 U. S., at 83, n. 14.

Similarly, while we do not rely on the pre-1972 EEOC decisions described above to define the term, we do observe that these decisions often found that accommodations that entailed substantial costs were required. Nothing in this history plausibly suggests that "undue hardship" in Title VII should be read to mean anything less than its meaning in ordinary use. . . .

In short, no factor discussed by the parties—the ordinary meaning of "undue hardship," the EEOC guidelines that *Hardison* concluded that the 1972 amendment " 'ratified,' " 432 U. S., at 76, n. 11 (internal quotation marks omitted), the use of that term by the EEOC prior to those amendments, and the common use of that term in other statutes—supports reducing *Hardison* to its "more than a *de minimis* cost" line. . . .

B

In this case, both parties agree that the "*de minimis*" test is not right, but they differ slightly in the alternative language they prefer. Groff likes the phrase "significant difficulty or expense." The Government, disavowing its prior position that Title VII's text requires overruling *Hardison*, points us to *Hardison*'s repeated references to "substantial expenditures" or "substantial additional costs." We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business. *Hardison*, 432 U. S., at 83, n. 14.

What matters more than a favored synonym for "undue hardship" (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer." Brief for United States 40 (internal quotation marks omitted).

C

The main difference between the parties lies in the further steps they would ask us to take in elaborating upon their standards. Groff would not simply borrow the phrase "significant difficulty or expense" from the Americans with Disabilities Act (ADA) but would have us instruct lower courts to "draw upon decades of ADA caselaw." The Government, on the other hand, requests that we opine that the EEOC's construction of *Hardison* has been basically correct.

Both of these suggestions go too far. We have no reservations in saying that a good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by our clarifying decision today. After all, as a public advocate for employee rights, much of the EEOC's guidance has focused on what should be accommodated. Accordingly, today's clarification may prompt little, if any, change in the agency's guidance explaining why no undue hardship is imposed by temporary costs, voluntary shift swapping, occasional shift swapping, or administrative costs. See 29 CFR § 1605.2(d). But it would not be prudent to ratify *in toto* a body of EEOC interpretation that has not had the benefit of the clarification we adopt today. What is most important is that "undue hardship" in Title VII means what it says, and courts should resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test.

D

The erroneous *de minimis* interpretation of *Hardison* may have had the effect of leading courts to pay insufficient attention to what the actual text of Title VII means with regard to several recurring issues. Since we are now brushing away that mistaken view of *Hardison*'s holding, clarification of some of those issues—in line with the parties' agreement in this case—is in order.

First, on the second question presented, both parties agree that the language of Title VII requires an assessment of a possible accommodation's effect on "the conduct of the employer's business." 42 U. S. C. § 2000e(j); see 35 F. 4th, at 177–178 (Hardiman, J., dissenting). As the Solicitor General put it, not all "impacts on coworkers ... are relevant," but only "coworker impacts" that go on to "affec[t] the conduct of the business." So an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court cannot stop its analysis without examining whether that further logical step is shown in a particular case.

On this point, the Solicitor General took pains to clarify that some evidence that occasionally is used to show "impacts" on coworkers is "off the table" for consideration. *Id.*, at 102. Specifically, a coworker's dislike of "religious practice and expression in the workplace" or "the mere fact [of] an accommodation" is not "cognizable to factor into the undue hardship inquiry." *Id.*, at 89–90. To the extent that this was not previously clear, we agree. An employer who fails to provide an accommodation has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue." If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself. . . .

Second, as the Solicitor General's authorities underscore, Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. This distinction matters. Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.

IV

Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-

specific application of that clarified standard to the lower courts in the first instance. The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test, 35 F. 4th, at 175, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees. Without foreclosing the possibility that USPS will prevail, we think it appropriate to leave it to the lower courts to apply our clarified context-specific standard, and to decide whether any further factual development is needed.

Justice Sotomayor, with whom Justice Jackson joins, concurring. (omitted)

On page 611 add the following case:

Braidwood Management Inc. v EEOC
___ F. 4th ___ (5th Cir. June 20, 2023)

Before Smith, Clement and Wilson, *Circuit Judges*.

Jerry E. Smith, *Circuit Judge*

In *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740–41, 1743 (2020), the Court determined that Title VII of the Civil Rights Act of 1964 forbids employers from discriminating against homosexuals and transgender per-sons, holding that such discrimination is "on the basis of sex." Yet the Court punted on how religious liberties would be affected by its ruling and on the practical scope of the Title VII protections afforded by *Bostock*. Instead, the Court identified three potential avenues of legal recourse for religious and faith-based employers to shield themselves from any potential infringement of their religious rights. The avenues were Title VII's religious exception, 42 U.S.C. § 2000e–1(a), the ministerial exception of the First Amendment, and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4. *Bostock*, 140 S. Ct. at 1754.

In expanding discrimination "on the basis of sex" to include sexual orientation and concepts of gender identity such as transgenderism, the *Bostock* Court gave little guidance on how courts should apply those defenses and exemptions to religious employers. Addressing those issues of first impression, we affirm in large part, reverse in part, and remand.

I A

This is a suit by two Texas employers: Braidwood Management, Inc. ("Braidwood"), and Bear Creek Bible Church ("Bear Creek"). Braidwood is a management company that employs the workers of Hotze Health & Well-ness Center, Hotze Vitamins, and Physicians Preference Pharmacy International LLC. Steven Hotze controls or owns the business entities and is the sole trustee and beneficiary of the trust that owns Braidwood. He is also the sole board member of Braidwood, serving as President, Secretary, and Treasurer. Braidwood has close to seventy employees who work at those entities.

Hotze runs his corporations as "Christian" businesses—*to-wit*, he does not permit Braidwood to employ individuals who engage in behavior he considers sexually immoral or gender non-conforming, nor does he allow Braidwood to recognize homosexual marriage. To Hotze, that would "lend approval to homosexual behavior and make him complicit in sin." Hotze also gives a nonreligious reason for refusing to recognize same-sex marriage: He will not allow Braidwood to recogn ize same-sex marriage becaus e Tex as continues to define marriage in heterosexual terms.

Braidwood enforces a sex-specific dress code that disallows gender-non-conforming behavior. For example, "biological" men must wear professional attire, including a tie, if they have contact with customers. On the other hand, "biological" women may not wear a tie but may wear skirts, blouses, shoes with heels, and fingernail polish; men are forbidden from wearing those accessories, because "cross-dressing" is strictly forbidden. Hotze also does not countenance Braidwood employees' using a restroom opposite their biological sex, regardless of any asserted gender identity. There is no record evidence of any job applicant or employee of Braidwood who has claimed he was discriminated against under these policies.

Bear Creek is a nondenominational church whose bylaws state that "marriage is exclusively the union of one genetic male and one genetic female." Accordingly, the church requires its employees to live according to its professed views on Biblical teaching. To that end, Bear Creek will not hire "practicing homosexuals, bisexuals, crossdressers, or transgender or gender non-conforming individuals." The church asserts that any employee who enters into a homosexual marriage will be fired. Bear Creek, like Braidwood, requires each employee to use the restroom of his or her biological sex. Bear Creek has over fifteen employees, some of whom are non-ministerial, and so is subject to Title VII. Finally, Bear Creek also asserts that it is compelled to obey civil authorities per Biblical teachings.

The church avers that it employed three persons who participated in conduct that it considered immoral and against its religious values, but Bear Creek never fired any of them based on its values. The first was a homosexual pedophile caught molesting children after he left Bear Creek's employment. The second was dismissed for poor performance, and only after dismissal did Bear Creek discover the former employee was gay. The third engaged in cross-dressing but voluntarily left before Bear Creek took any employment action. Two of the three were pastors. The other was an administrative staff member.

As per their closely held religious beliefs, Braidwood and Bear Creek assert that Title VII, as interpreted in the EEOC's guidance and *Bostock*, prevents them from operating their places of employment in a way compatible with their Christian beliefs. These two plaintiffs have implicitly asserted that they will not alter or discontinue their employment practices. And all parties admitted in district court that numerous policies promulgated by plaintiffs (such as those about dress codes and segregating bathroom usage by solely biological sex) already clearly violate EEOC guidance. Both plaintiffs also contend that they are focused on individuals' behavior, not their asserted identity. Thus, for example, plaintiffs will hire homosexual employees who follow their code of sexual conduct. Although the EEOC has not brought an enforcement action against either party, it has not forsworn or disclaimed its willingness to bring an enforcement action against plaintiffs or other similarly situated members of their proposed classes.

B.

Title VII forbids employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). The act also prohibits an employer from "limit[ing], segregat[ing], or classify[ing] . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex." *Id.* § 2000e-2(a)(2). Either the EEOC or an affected employee (if the EEOC declines to act) is statutorily authorized to bring an enforcement action. *Id.* § 2000e-5(f)(1).

The EEOC has not historically enforced Title VII's prohibitions against religious entities' engaging in potential discrimination against homosexuals and gender non-conformists. In one case, however, the EEOC brought an enforcement action against an avowedly Christian funeral home that prohibited a biological male from cross-dressing per the employee's claimed gender identity as female.[1] Despite the employer's sincere religious objections to gender-non-conforming

conduct, *see* 884 F.3d at 567, the EEOC took the position that the employer's RFRA defense was invalid, *see id.* at 585.

Still, most Title VII suits are brought by employees, not the EEOC. Moreover, the EEOC alleges that it counsels its investigators to respect employers' religious liberties when deciding whether to bring an enforcement action; it has a guidance manual that instructs its investigators on addressing potential religious-discrimination issues.

But even before *Bostock*, the EEOC interpreted statutory prohibitions on sex discrimination to include sexual orientation and gender identity. The EEOC has stated that employers must treat homosexual marriage as the same as heterosexual marriage, and bathroom policy should be dictated by an employee's asserted gender identity as distinguished from his or her biological sex. The EEOC has no official guidance indicating any exemptions for employers that oppose homosexual or transgender behavior on religious grounds.

Then in *Bostock*, 140 S. Ct. at 1740–41, the Court ruled that discrimination based on sexual orientation or transgender status is discrimination "because of sex" and thus falls within the ambit of Title VII. The Court explained that an employer that fires an employee for conduct or attributes it would permit in a member of the other biological sex makes sex the "but-for cause" of the termination, violating Title VII. *Id.* That said, an employer would not violate Title VII if it takes adverse employment action against an employee for conduct or attributes that it would tolerate in neither sex. *Id.* at 1742.

Still, *Bostock* is delphic, with a nebulous description of the scope of its ruling. For example, the Court recognized that "[b]ecause 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." *Id.* at 1754. But the Court declined to expound on what that might mean in practice or how the Court would "address bathrooms, locker rooms, or any-thing else of the kind." *Id.* at 1753.

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VI.

On the merits, and as we explain, we decide that RFRA requires that Braidwood, on an individual level, be exempted from Title VII because compliance with Title VII post-*Bostock* would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct. Moreover, the EEOC wholly fails to carry its burden to show that it has a compelling interest in refusing Braidwood an exemption, even post-*Bostock*. In *Bostock*, 140 S. Ct. at 1754, the Supreme Court noted that the free exercise of religion "lies at the heart of our pluralistic society." Nowhere was that commitment made more evident than with the passage of RFRA, which "was designed to provide very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 706. RFRA states that the federal government "shall not substantially burden a person's exercise of religion" unless the burden furthers a "compelling governmental interest" and is "the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(a)–(b). Additionally, the government "must accept the sincerely held . . . objections of religious entities." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

Because sincerity is not at issue, Braidwood must show that applying Title VII substantially burdens its ability to practice its religious faith. Braidwood maintains that it has sincere and deeply held religious beliefs that heterosexual marriage is the only form of marriage sanctioned by God, pre-marital sex is wrong, and "men and women are to dress and behave in accordance with distinct and God-ordained, biological sexual identity."

To that end, the EEOC guidance almost assuredly burdens the exercise of Braidwood's religious practice. For example, "a law that operates so as to make the practice of . . . religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion." *Hobby Lobby*, 573 U.S. at 710 (cleaned up). As the district court succinctly put it, "[E]mployers are required to choose between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions." We see no reason why that formulation is incorrect. Being forced to employ someone to represent the company who behaves in a manner directly violative of the company's convictions is a substantial burden and inhibits the practice of Braidwood's beliefs.

The EEOC's opposing arguments are uncompelling. Most of them involve discussing the inapplicability of deciding RFRA claims class-wide. We agree with the broad contours of that proposition. Still, the EEOC has presented no evidence indicating Braidwood's individual compliance with EEOC guidance is not a substantial burden on its religious practice. Instead, the agency primarily cites *East Texas Baptist*, 793 F.3d at 459, for the notion that a party seeking to take advantage of the shield of RFRA must first identify "acts [it is] required to perform" that run contrary to its religious beliefs. The EEOC's notion is not tenable.

As stated, the plaintiffs in *East Texas Baptist* did not have a ripe case because they had not presented evidence that they were required to pay third-party administrators for contraceptive services, and they could easily sue for injunctive relief before paying. *Id.* at 463. The same is not true of Braidwood.

Per EEOC guidance, Braidwood, to comply, must violate its beliefs: No money needs to exchange hands; instead, Braidwood's employment policies must broadly change, and it must tacitly endorse homosexual and transgender behavior. The EEOC's euphemistic phrasing that "the only action that Braidwood is required to take under Title VII is to refrain from taking adverse employment actions" is tantamount to saying the only action Braidwood needs to take is to comply wholeheartedly with the guidance it sees as sinful. That is precisely what RFRA is designed to prevent.

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[57] The EEOC contends that the Sixth Circuit rejected the argument that employing individuals who engage in conduct prohibited by their employer's religion automatically substantially burdens the employer's religious practice. *See Harris*, 884 F.3d at 588. The EEOC's comparison is inapt. First, the Sixth Circuit addressed the RFRA defense in the specific context of a dress code that strongly implicated sex stereotypes. *Id.* at 567, 571. The EEOC's guidance post-*Bostock* implicates far more than dress codes, and Braidwood has properly established those burdens on its religious practices. *Harris* is also not binding on this court, nor did the Supreme Court address the RFRA-based defense.

The providence of the Sixth Circuit's decision is also questionable. It relied heavily on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006). *Harris*, 884 F.3d at 589. That reliance appears erroneous. The Sixth Circuit essentially applied a First Amendment associational analysis to a RFRA defense. The court decided that "as a matter of law, bare compliance with Title VII—without actually assisting or facilitating [the employee's] transition efforts—does not amount to an endorsement of [the employee's] views." *Harris*, 884 F.3d at 589. But that begs the question.

And the *Rumsfeld* issue of outside speakers' recruiting for the military at a college is nothing like a religious business's being forced to employ someone it views as engaging in sinful behavior. A law student can easily distinguish between the messages military recruiters bring and the beliefs of the law school itself. The recruiter is not a school employee, but a government representative. The

same is not true of a customer at a Braidwood business, who can rationally believe that if a cross-dressing employee served her, Braidwood, despite professions of Christian belief, endorses that conduct.

Nor is the question in RFRA cases limited to third parties' subjective beliefs about what any business may endorse. Instead, "the question that RFRA presents . . . [is] whether the [government] mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 573 U.S. at 724. Braidwood claims that paying money to an employee—even one who conducts transgressive conduct off-premises and outside work hours—is itself impermissible be-cause lending support of any kind, including monetary compensation to employees, is for-bidden by its faith. Braidwood views employing those individuals as a tacit endorsement. To be protected from Title VII's mandates, Braidwood must show that such tacit endorsement substantially burdens its ability to practice its religious faith. But just because that belief does not comply with Title VII as a matter of law does not mean that a RFRA defense must fail.

Now the compelling-interest prong. After Braidwood demonstrates a substantial burden on its religious liberty, the EEOC must establish that its interpretation of Title VII advances a "compelling government interest" and that its interpretation is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). That is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The EEOC fails to meet that burden.

In the district court, the EEOC asserted that "it is beyond dispute that the government has a compelling interest in eradicating workplace discrimination," and RFRA does not "protect[] . . . discrimination in hiring . . . cloaked as religious practice." Using *Hobby Lobby*'s statement that the government "has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race," 573 U.S. at 733, the EEOC the states that sex should be treated the same in all cases, citing the plurality opinion in *Price Waterhouse v. Hopkins*. *See* 490 U.S. 228, 243 n.9 (1989) (plurality opinion).

Although the Supreme Court may some day determine that preventing commercial businesses from discriminating on factors specific to sexual orientation or gender identity is such a compelling government interest that it overrides religious liberty in all cases, it has never so far held that. And despite *Bostock*'s relying on *Hopkins* for a significant part of the ruling, the Court expressly did not extend the holding that far; instead, it noted that RFRA "might supersede Title VII's commands in appropriate cases." 140 S. Ct. at 1754. That qualification would be a nullity if the government's compelling interest in purportedly eradicating sex discrimination were a trump card against every RFRA claim.

Instead, in RFRA cases, the courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (alteration in original) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Under RFRA, the government cannot rely on generalized interests but, instead, must demonstrate a compelling interest in applying its challenged rule to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita*, 546 U.S. at 430–31. Even if there is compelling interest as a categorical matter, there may not be a compelling interest in prohibiting all instances of discrimination.

But we need not go so far, because the EEOC fails to carry its burden. It does not show a compelling interest in denying Braidwood, individually, an exemption. The agency does not even attempt to argue the point outside of gesturing to a generalized interest in prohibiting all forms of sex discrimination in every potential case. Moreover, even if we accepted the EEOC's formulation of its compelling interest, refusing to exempt Braidwood, and forcing it to hire and endorse the views of employees with opposing religious and moral views is not the least restrictive means of promoting that interest.[59] We affirm the summary judgment here.

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[59] An example of a less restrictive means of furthering the government's interest in preventing employment discrimination on the basis of sex under Title VII could involve the EEOC's propagating guidance that provides a framework for employers, like Braidwood, that oppose homosexual or transgender behavior on religious grounds, to obtain an exemption. The lack of any guidance or method of gaining an exemption gives rise to the inference that the EEOC "has no intention in granting an exception" regardless of an employer's religious exercise claim. *Fulton*, 141 S. Ct. at 1878.

VII.

Finally, Braidwood asks this court to decide, post-*Bostock*, what policies are prohibited by Title VII. Specifically, Braidwood requests a declaratory judgment that Title VII, as interpreted in *Bostock*, permits employers to discriminate against bisexuals and to establish sex-neutral codes of conduct that may exclude practicing homosexuals and transgender persons.[61]

On these issues, class-wide, the district court concluded that Title VII does not permit the classes to discriminate against bisexuals, nor did the court allow the classes to prohibit employees from taking hormone therapy or undergoing sex-reassignment surgery. On the other hand, the court held that the classes may "enforce a sexual ethic that applies evenly to heterosexual and homosexual sexual activity" and that Title VII, post-*Bostock*, does not prohibit employers from enforcing sex-specific dress code policies or sex-segregated bathroom policies.

Although plaintiffs have a valid cause of action, we decline to answer these open questions for Braidwood's policies because the class certifications have been reversed. Braidwood already has obtained statutory relief and does not represent a class requiring relief. On that ground, we vacate the judgments for all of the scope-of-Title-VII claims post-*Bostock*.

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[61] Namely, employer policies addressing hormone treatment and genital/sex-reassignment surgery, sex-neutral codes of conduct over sexual activities, dress codes, and sex-segregated bathroom policies.

On page 623 add the following case:

Starkey v Roman Catholic Archdiocese of Indianapolis

7th Cir. 2022

Before Easterbrook, Brennan, and St. Eve, Circuit Judges.

Brennan, *Circuit Judge*.

The ministerial exception, grounded in the First Amendment's Religion Clauses, bars interference with the selection and control of a religious organization's ministers. The issues here are whether a guidance counselor at a Catholic high school is a minister, and whether the ministerial exception applies to state law claims made by the guidance counselor.

I

Roncalli High School ("Roncalli") is a Catholic school in the Archdiocese of Indianapolis. Its mission is to "provide, in concert with parents, parish, and community, an educational opportunity which seeks to form Christian leaders in body, mind, and spirit." Roncalli supports and "further[s] the mission and purposes of" the Archdiocese. As the Archdiocese and Roncalli explain, their relationship is governed by Catholic theology and canon law.

Charles Weisenbach, Roncalli's principal, is responsible for hiring "faculty and staff whose values are compatible" with the school's mission. When hiring, Weisenbach considers whether a candidate is a "faithful Catholic," "involved in the Catholic community," and "wants to grow with" the school. If possible, the school prefers to hire Catholics for teaching, administrative, and guidance counseling positions. Ideally, "all teachers and guidance counselors that are hired would be qualified, faithful Catholics." After a candidate is hired, Roncalli continues to evaluate "which teachers and counselors are actively seeking opportunities to be involved in the faith formation and overall development of [its] students." This involvement is considered when deciding which employees to retain or promote.

Lynn Starkey began working at Roncalli in 1978 as an assistant band director and choral director. Her job included teaching choral music, selecting music for that curriculum (some of which was religious), and preparing "students for the music that was used during the all-school liturg[ies]." After three years, Starkey left Roncalli to complete a one-year master's degree in music education. When she returned, she transitioned into a new role as Roncalli's New Testament teacher and became a certified catechist. About seven years later, Starkey also became the school's fine arts chair. In that job she oversaw the school's "band, choir, the visual arts, and theater," as well as evaluated the teachers in the department. Although she did not consider this new position to be a promotion, it came with a pay raise and additional responsibilities. After about nine years, Starkey became a guidance counselor, a position for which she completed a master's degree in school counseling.

Some guidance counselors at Roncalli discuss and practice their faith with students. For example, one guidance counselor testified that praying and attending liturgies with students was a regular part of her job. Another former counselor disagreed and testified that she did not recall praying with students. Starkey submits that although some counselors might act in this capacity, she never discussed religion during a student consultation. Instead, when confronted with non-academic concerns, she would refer a student to a social worker or chaplain. Starkey acknowledges that at the principal's request, more than once she delivered a morning prayer over the school's public address system.

A decade later, Starkey became Roncalli's Co-Director of Guidance. This position involved supervision of the school's guidance counselors and oversight of the department's social work. Her responsibilities included tasks related to the budget, course catalog, course description book, and curriculum updates from the Indiana Department of Education. According to Starkey, her "job was to provide academic, college, and career guidance to students and to provide resources and referrals as needed." As a supervisor, she also discussed religious topics with staff and administration. For example, Starkey instructed staff how to prepare students of different faiths for the Catholic liturgy. And in May 2016, she wrote Weisenbach that if "school counselors had a Ministry Description, it would be identical to that of teachers," with only two exceptions unrelated to religion.

Starkey does not dispute that as Co-Director of Guidance she helped draft performance criteria for Roncalli to evaluate the guidance counselors under her supervision. Among the criteria for a "Distinguished School Counselor" half were religious factors, such as:

- School counselor embodies the charisms of Saint John XXIII [Angelo Roncalli] and lives out his traits.
- School counselor encourages students' spiritual life and resources in counseling conversation as appropriate (i.e. encouraging prayer/reflection, sharing one's own spiritual experiences as appropriate; encouraging retreat, parish, youth ministry, mission work).
- School counselor consistently attends their Sunday liturgy or church service.

Starkey is not a practicing Catholic. She did not receive religious training or claim religious tax deductions while at Roncalli. The school did not ask whether she donated financially to the Catholic Church or regularly attended Mass. Starkey does not dispute that she attended monthly school Masses, during which she received Communion and sang with the congregation. Several times she went to "Days of Reflection," an annual event meant to focus faculty "who are impacting kids in their spiritual life on a day-to-day basis" on the Catholic mission. These events involved a call-and-response Commissioning Prayer, in which faculty accepted the responsibilities of their ministry. Starkey and several others do not recall participating in the call-and-response prayer.

As part of her job, Starkey served on Roncalli's main leadership body, the Administrative Council. According to Weisenbach, "[m]ost faculty and staff recognize the Administrative Council as the lifeblood of decision-making at the school." The Council meets weekly to address Roncalli's "day-to-day operations and spiritual life." Together, "the Administrative Council and the Department Chairs are responsible for 95% of Roncalli's daily ministry, education, and operations." Along with these day-to-day operations, the Administrative Council makes decisions related to the school's religious mission, such as arranging logistics for an all-school liturgy and qualifications for a student to serve as a eucharistic minister.

Starkey maintains that although she may have been in a position to provide input on religious matters, she never actually did so. As a member of the Administrative Council, she contributed little to nothing on topics related to religion, and only voiced her opinion on non-religious matters that came before it. The Faculty Handbook did not list her as a leader of the "Faith Community," so she largely deferred to Council members who had religious titles and responsibilities. In her role on the Administrative Council, she participated in discussions about suicide prevention, holding a prayer service after the Parkland mass shooting, and how Roncalli should present itself as a Catholic option for faith formation and religious education.

Roncalli uses a one-year employment contract for teachers and guidance counselors. For more than thirty years, Roncalli has included a "morals clause" in those contracts. From 2007 to 2017, the school used a contract titled, "School Teacher Contract," which required employees refrain from "any personal conduct or lifestyle at variance with the policies of the Archdiocese or the moral or religious teachings of the Roman Catholic Church." Failure to do so would result in "default under th[e] contract." An employee was also in default if she engaged in "[c]ohabitation (living together) without being legally married." The school principal and the pastor could "suspend or terminate the employment" of a defaulted employee at his or her discretion.

For the 2017-18 school year, Roncalli instituted a new employment agreement entitled "Teaching Ministry Contract." It contained the same morals clause and attached a Ministry Description detailing the responsibilities of the position. The next year, in May 2018, Starkey signed a contract titled, "School Guidance Counselor Ministry Contract," which came with the "Archdiocese of Indianapolis Ministry Description." The updated contract included a similar morals clause, but now stated that an

employee was in default if the employee were to engage in a relationship "contrary to a valid marriage as seen through the eyes of the Catholic Church," which defines marriage as between a man and a woman. Catechism of the Catholic Church ¶ 1660 (2d ed. 2016).

The accompanying Ministry Description defined the primary functions of a school guidance counselor in part as:

> Adhering to mission and within the school's supervisory structure, including the school principal and pastor or high school principal and president, the school guidance counselor will collaborate with parents and fellow professional educators to foster the spiritual, academic, social, and emotional growth of the children entrusted in his/her care.

The Ministry Description also labeled guidance counselors "minister[s] of the faith," and stated that their position included "[f]acilitat[ing] [f]aith [f]ormation." A guidance counselor's responsibilities included:

1. Communicates the Catholic faith to students and families through implementation of the school's guidance curriculum, academic course planning, college and career planning, administration of the school's academic programs, and by offering direct support to individual students and families in efforts to foster the integration of faith, culture, and life.
2. Prays with and for students, families, and colleagues and their intentions. Participates in and celebrates liturgies and prayer services as appropriate.
3. Teaches and celebrates Catholic traditions and all observances in the Liturgical Year.
4. Models the example of Jesus, the Master Teacher, in what He taught, how He lived, and how He treated others.
5. Conveys the Church's message and carries out its mission by modeling a Christ-centered life.
6. Participates in religious instruction and Catholic formation, including Christian services, offered at the school.

Non-Catholic school guidance counselors are expected to participate to the fullest extent possible (e.g., non-Catholics would come forward to receive a blessing instead of Holy Communion in the Catholic Mass).

By signing the contract, Starkey acknowledged that she received the Ministry Description and agreed to fulfill "the duties and responsibilities" the agreement provided. Starkey does not dispute the text of these documents or her signatures on them. Instead, she argues that these documents do not describe either her or the school's actual conduct.

In August 2018, Starkey's colleague—the other Co-Director of Guidance—was placed on administrative leave after an Archdiocesan priest learned that she had entered a same-sex union. That same month Starkey informed Roncalli's leadership that she too was in a same-sex union. The school permitted her to finish her contract, but at the end of the year she received a letter from the principal explaining that her employment would not be renewed for the 2019-20 school year because her conduct violated the terms of her contract. Starkey then began working as a guidance counselor at a public school for a higher salary.

In July 2019, Starkey filed a complaint alleging Roncalli and the Archdiocese violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.,* as well as two Indiana state tort claims against the Archdiocese. Following discovery and the dismissal of the Title IX claims, Roncalli and the Archdiocese moved for summary judgment based on the ministerial exception, Title VII's religious exemption, the Religious Freedom and Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.,* and other grounds. The court granted

summary judgment based on the ministerial exception, without reaching the other issues. Starkey now appeals that decision on five claims: (1) Title VII Discrimination; (2) Title VII Retaliation; (3) Title VII Hostile Work Environment; (4) Intentional Interference with Contractual Relationship; and (5) Intentional Interference with Employment Relationship. ***

II

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I. From these Religion Clauses "flow[] the ministerial exception, which `ensures that the authority to select and control who will minister to the faithful —a matter strictly ecclesiastical—is the church's alone.'" *Demkovich v. St. Andrew the Apostle Par., Calumet City,* 3 F.4th 968, 975 (7th Cir. 2021) (en banc) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171, 194-95, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012)). Under that rule "courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch. v. Morrissey-Berru,* ___ U.S. ___, 140 S.Ct. 2049, 2060, 207 L.Ed.2d 870 (2020).

The Supreme Court unanimously endorsed the ministerial exception in *Hosanna-Tabor*. There, the Court considered a teacher's retaliation claim against an Evangelical Lutheran school under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq*. 565 U.S. at 177-79, 132 S.Ct. 694. When deciding whether the teacher was a minister, the Court declined to "adopt a rigid formula." *Id.* at 190, 132 S.Ct. 694. Rather, it considered all the circumstances of employment including: (1) "the formal title given" by the church; (2) "the substance reflected in that title"; (3) the individual's "own use of that title"; and (4) "the important religious functions" the individual performed for the church. *Id.* at 192, 132 S.Ct. 694. The Court noted that the school held the teacher "out as a minister, with a role distinct from that of most of its members"; her title "reflected a significant degree of religious training followed by a formal process of commissioning"; she held herself out as a minister; and her "job duties reflected a role in conveying the Church's message and carrying out its mission." *Id.* at 191-92, 132 S.Ct. 694. The Court ruled that the teacher was a minister, clarifying that the ministerial exception is "not limited to the head of a religious congregation." *Id.* at 190, 132 S.Ct. 694.

Eight years later, in *Our Lady of Guadalupe,* the Court reviewed the consolidated appeals of two Catholic school teachers who alleged they were wrongfully terminated in violation of the ADA and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq*. 140 S. Ct. at 2056-59. The Court held that the ministerial exception barred both suits because there was "abundant record evidence that [both teachers] performed vital religious duties." *Id.* at 2066, 2069. Even though their "titles did not include the term `minister,' and they had less formal religious training, ... their core responsibilities as teachers of religion were essentially the same." *Id.* at 2066. The teachers were "expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Id.* They prayed and attended Mass with students and "prepared the children for their participation in other religious activities." *Id.* The schools' faculty handbooks stated that the teachers "were expected to help the schools carry out this mission." *Id.*

The Court in *Our Lady of Guadalupe* also clarified how courts should apply the ministerial exception. It explained that although the factors from *Hosanna-Tabor* are relevant, they are not requirements and are not even "necessarily important" in all cases. *Id.* at 2063. Rather, "[w]hat matters, at bottom, is what an employee does." *Id.* at 2064. Implicit in *Hosanna-Tabor* "was a recognition that educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Id.* The teacher in that case was a minister because she "had been entrusted with the responsibility of `transmitting the Lutheran faith to the next generation.'" *Id.* at 2064 (quoting *Hosanna-Tabor,* 565 U.S. at 192, 132

S.Ct. 694). The ministerial exception should therefore include "any `employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or *teacher of its faith.*" *Id.* (quoting *Hosanna-Tabor,* 565 U.S. at 199, 132 S.Ct. 694 (Alito, J., concurring)). This rule recognizes that "[t]he religious education and formation of students is the very reason for the existence of most private religious schools." *Id.* at 2055. For that reason, the "religious institution's explanation of the role of such employees in the life of the religion in question is important." *Id.* at 2066.

III

We consider first whether Lynn Starkey was a minister under the exception. The district court concluded that she was because Roncalli "expressly entrusted" her with "the responsibility of communicating the Catholic faith to students" and guiding the religious mission of the school.

The record supports the district court's conclusion. As the Co-Director of Guidance and a member of the Administrative Council, Starkey was one of the school leaders responsible for the vast majority of "Roncalli's daily ministry, education, and operations." She was expected to take part in the school's day-to-day operations, which included responsibilities that conveyed the Catholic faith to students, such as leading prayer over the public address system more than once. Her employment agreements and faculty handbooks recognized these job duties and responsibilities by stating that she was expected to carry out Roncalli's religious mission.

In this role, Starkey had supervisory authority over other guidance counselors. Their job included facilitating faith formation by communicating the Catholic religion to students, "modeling a Christ-centered life," and "pray[ing] with and for students." According to the Archdiocese's Ministry Description, guidance counselors were "to foster the spiritual, academic, social and emotional growth of the children entrusted in his/her care." Those counselors contributed to Roncalli's religious mission of putting faith into action by volunteering at service projects, going on mission trips, and attending a retreat program. Starkey helped develop the criteria used to evaluate guidance counselors, which included religious components like assisting students in faith formation and attending church services. In short, Starkey was entrusted with communicating the Catholic faith to children, supervising guidance counselors, and advising the principal on matters related to the school's religious mission.

Roncalli also held Starkey out as a minister. She was identified as a "minister of the faith" in her job description and employed under a "Ministry Contract" beginning in the 2017-18 school year. Her title, Co-Director of Guidance, reflected the substance of her position, which Starkey noted in salary-related communications with school administrators. This court has consistently applied the ministerial exception in employment cases brought by teachers, music directors, press secretaries, and organists, among other positions. [Citations omitted] Under this case law, Starkey as Co-Director of Guidance qualifies as a minister.

Starkey argues that even if she were entrusted with religious responsibilities, she should not be considered a minister because she never engaged in religious matters or held a formal religious title. For example, Starkey notes that she did not speak on religious topics during Administrative Council meetings, and she would not pray or discuss religion with students during one-on-one counseling sessions. She also does not recall participating in a call-and-response prayer led by the principal. Thus, Starkey maintains that she did not act in a ministerial capacity, even if she were entrusted to do so.

This argument misunderstands the ministerial exception. What an employee does involves what an employee is entrusted to do, not simply what acts an employee chooses to perform. *See Our Lady of Guadalupe,* 140 S. Ct. at 2055 (applying the exception to an "employment dispute involving teachers at religious schools who [were] entrusted with the responsibility of instructing their students in the

faith"). Under Starkey's theory, an individual placed in a ministerial role could immunize themself from the ministerial exception by failing to perform certain job duties and responsibilities. Religious institutions would then have less autonomy to remove an underperforming minister than a high-performing one. But an employee is still a minister if she fails to adequately perform the religious duties she was hired and entrusted to do. *Cf. Hosanna-Tabor,* 565 U.S. at 192, 132 S.Ct. 694 (noting "job duties" and "responsibilities" demonstrated that the teacher was entrusted with "transmitting the Lutheran faith to the next generation").

Starkey also contends the ministerial exception does not apply to her because at one point the Archdiocese's lawyers advised that guidance counselors were not ministers. Starkey cites emails from May 2016, which stated that "[s]chool counselors and social workers do not meet the definition for the ministerial exemption" for purposes of the Affordable Care Act. These emails do not support Starkey's contention. Rather, they show a lack of consensus among Weisenbach, Starkey, and the Archdiocese's lawyers over the legal definition of a minister for that Act. This confusion did not change the nature or expectations of Starkey's employment or her employment documents. Instead, the emails concerned prospective compliance with federal statutes, and neither the emails nor that Act are binding on this litigation.

Finally, Starkey asserts that Roncalli's Ministry Description and Ministry Contracts were pretextual because they were added only three months before the Archdiocese's lawyers concluded that guidance counselors did not qualify as ministers. But this ignores that the addition of a Ministry Description only made formal Starkey's role at Roncalli. For more than 30 years, Roncalli's employment contracts included a morals clause, and all evidence shows that the school considered Starkey to be a minister and entrusted her with religious duties. On this record, the changes to Roncalli's employment contracts are an honest formalization of Starkey's ongoing responsibilities. *See Sterlinski,* 934 F.3d at 571 ("The answer lies in separating pretextual justifications from honest ones.... If the court finds that the reason is honest, it does not ask whether the reason is *correct*—it is enough that the employer believe its own reason in good faith. And the burden of showing pretext rests with the plaintiff.").

We affirm the district court's decision that Starkey was a minister under the First Amendment's ministerial exception, as well as its ruling that the exception bars Starkey's three federal Title VII claims for discrimination, retaliation, and hostile work environment. We turn next to Starkey's state law claims.

IV

Starkey brings two Indiana state tort claims against the Archdiocese: Interference with Contractual Relationship and Intentional Interference with Employment Relationship. We must decide whether the ministerial exception applies to such state law claims.

The Supreme Court foresaw this issue in *Hosanna-Tabor* but declined to resolve it. The Court stated: "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise." *Hosanna-Tabor,* 565 U.S. at 196, 132 S.Ct. 694.

As the district court noted here, the doctrine of church autonomy is important to this question. In *Hosanna-Tabor,* the Court emphasized that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision." *Id.* at 188, 132 S.Ct. 694. Such an intrusion "interferes with the internal governance of the church" by "depriving [it] of control over the selection of those who will personify its beliefs." *Id.* But

the "distinction between what falls within the protection of the church autonomy doctrine is not easily reduced to a bright-line rule." Brief of Professors as *Amicus Curiae* at 19 (citing Richard W. Garnett, *The Freedom of the Church: (Toward) an Exposition, Translation, and Defense, in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 33, 50 (Micah Schwartzman et al. eds., 2015)). Instead, courts must look to the First Amendment, which "has struck the balance" between the "interest of society in the enforcement of employment discrimination statutes" and "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Hosanna-Tabor,* 565 U.S. at 196, 132 S.Ct. 694. As we have stated, church autonomy "means what it says: churches must have `independence in matters of faith and doctrine and in closely linked matters of internal government.'" *Demkovich,* 3 F.4th at 975 (quoting *Our Lady of Guadalupe,* 140 S. Ct. at 2061).

A year after *Our Lady of Guadalupe,* our court considered the scope of the ministerial exception in *Demkovich*. There, we held that the ministerial exception "applies to hostile work environment claims based on minister-on-minister harassment." *Id.* at 973. The decision relied on two principles from *Hosanna-Tabor* and *Our Lady of Guadalupe.* First, "although the[] cases involved allegations of discrimination in termination, their rationale is not limited to that context. The protected interest of a religious organization in its ministers covers the entire employment relationship, including hiring, firing, and supervising in between." *Id.* at 976-77 (citations omitted). Second, the ministerial exception prevents "civil intrusion and excessive entanglement," thereby reserving matters of ministerial employment for religious organizations. *Id.* at 977 (citations omitted).

Before *Hosanna-Tabor,* several circuits ruled that the ministerial exception barred state law claims. For example, in *Natal v. Christian & Missionary Alliance,* the First Circuit held that the Free Exercise Clause barred an inquiry into a reverend's claims that his "property and contract rights were mutilated, his reputation tarnished, and his emotional health ruined." 878 F.2d 1575, 1576-78 (1st Cir. 1989). In *Bell v. Presbyterian Church (U.S.A.),* the Fourth Circuit held that the First Amendment barred review of an even broader range of tort claims. 126 F.3d 328, 329, 333 (4th Cir. 1997). These included: (1) interference with a contract, (2) intentional infliction of emotional distress, (3) breach of the covenant of good faith and fair dealing, (4) interference with a prospective advantage, (5) wrongful termination, and (6) breach of an annual financial pledge. *Id.* at 329-30. For similar reasons, the Sixth Circuit held that it lacked jurisdiction to review a complaint that "contained claims for breach of contract, promissory estoppel, intentional infliction of emotional distress, and loss of consortium." *Lewis v. Seventh Day Adventists Lake Region Conf.,* 978 F.2d 940, 941-53 (6th Cir. 1992). *See also Hutchison v. Thomas,* 789 F.2d 392, 392-93 (6th Cir. 1986) (affirming the district court's decision to dismiss a complaint, which included claims for (1) improper application of religious provisions, (2) fraudulent or collusive or arbitrary action, (3) defamation, (4) intentional infliction of emotional distress, (5) breach of contract, and (6) loss of consortium on the minister's wife's part).

***

Our decision follows the lead of these other circuits. We hold that the ministerial exception applies to state law claims, like those for breach of contract and tortious conduct, that implicate ecclesiastical matters. A claim implicates ecclesiastical matters if it is "[o]f, relating to, or involving the church, esp[ecially] as an institution." *Ecclesiastical,* BLACK'S LAW DICTIONARY (11th ed. 2019). To hold otherwise would entangle courts in matters the First Amendment treats as "strictly ecclesiastical," and therefore the church's alone. *Hosanna-Tabor,* 565 U.S. at 194-95, 132 S.Ct. 694 ("The exception instead ensures that the authority to select and control who will minister to the faithful—a matter `strictly ecclesiastical'—is the church's alone." (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.,* 344 U.S. 94, 119, 73 S.Ct. 143, 97 L.Ed. 120 (1952))); *Demkovich,* 3 F.4th at 975 (same). This holding follows the Supreme Court's guidance and aligns with the decisions of other circuits to have considered this issue. We have found no decision that holds a contrary position on the application of the ministerial exception to state law claims, nor have the parties cited one to us.

Importantly, though, the ministerial exception is not applicable when a claim does not implicate an ecclesiastical matter. A minister who commits a tort outside the scope of employment may still be subject to liability. The same is true for a breach of contract unrelated to an ecclesiastical matter. As we have said before, "[i]f a minister's allegations rise to those levels, they may be independently actionable, as the protection of the ministerial exception inures to the religious organizations, not to the individuals within them." *Demkovich,* 3 F.4th at 982. To the best of our knowledge, "no court has held that the ministerial exception protects against criminal or personal tort liability," *id.,* and we do not hold so here.

Both of Starkey's state tort claims—Interference with Contractual Relationship[4] and Intentional Interference with Employment Relationship[5]—implicate ecclesiastical matters because they litigate the employment relationship between the religious organization and the employee. Each tort contains an element which requires either a valid relationship or a valid and enforceable contract. To evaluate either claim requires review of the Church's authority over the employer, the employer-employee relationship, and the contents of the employee's contract.

Such a review would result in excessive judicial entanglement in ecclesiastical matters. State law claims may not be used to deprive a religious organization of "control over the selection of those who will personify its beliefs." *Hosanna-Tabor,* 565 U.S. at 188, 132 S.Ct. 694. Just so, nor may those claims be used to shield ministers or religious organizations from liability in cases that do not implicate ecclesiastical matters. As the Court stated in *Hosanna-Tabor,* "the First Amendment has struck the balance" between the "interest of society in the enforcement of employment discrimination statutes" and "the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission." *Id.* at 196, 132 S.Ct. 694. Applying the ministerial exception to Starkey's state tort claims does not disrupt or change that balance. Rather, it respects the "special solicitude" the First Amendment provides to religious organizations without shielding them from liability in non-ecclesiastical matters. *Id.* at 189, 132 S.Ct. 694.

Because Starkey was a minister, the district court correctly determined that both of Starkey's state tort claims are barred by the First Amendment's ministerial exception.

V

Starkey was a minister because she was entrusted with communicating the Catholic faith to the school's students and guiding the school's religious mission. The ministerial exception bars all her claims, federal and state. This opinion therefore does not reach the parties' Title VII, RFRA, or other constitutional arguments. We AFFIRM the district court.

Easterbrook, *Circuit Judge*, concurring.

It is a stretch to call a high school guidance counsellor a minister. Even if the school expects counsellors to pray with students and discuss matters of faith with them, the job is predominantly secular. Designating the position as a minister by contract cannot be called pretextual, however, so I do not object to the majority's conclusion. See *Sterlinski v. Catholic Bishop of Chicago,* 934 F.3d 568, 571 (7th Cir. 2019).

I am concerned, however, by what seems to have become the norm in cases of this kind: starting with a constitutional question under *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 565 U.S. 171, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012), rather than with the statute, which is the proper sequence. See, e.g., *New York City Transit Authority v. Beazer,* 440 U.S. 568, 582, 99 S.Ct. 1355,

59 L.Ed.2d 587 (1979). The principal statutory question here is whether the Diocese is entitled to the benefit of the exemption in § 702(a) of the Civil Rights Act of 1964, which provides:

This 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 corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a). "This subchapter" refers to Title 42, Chapter 21, Subchapter VI, which comprises all of Title VII. The Diocese is a religious association, and the high school is a religious educational institution. Any temptation to limit this exception to authorizing the employment of co-religionists, and not any other form of religious selectivity, is squelched by the definitional clause in § 2000e(j), which tells us that religion includes "all aspects of religious observance and practice, as well as belief". (Section 2000e-2(e)(2) separately provides an exemption for employment of co-religionists by schools and colleges affiliated with religious groups.)

A straightforward reading of § 2000e-1(a), coupled with § 2000e(j), shows that the Diocese was entitled to fire Starkey without regard to any of the substantive rules in Title VII. It is undisputed that the Roman Catholic Church deems same-sex marriages improper on doctrinal grounds and that avoiding such marriages is a kind of religious observance. Same-sex marriages are lawful in secular society and are protected by Title VII when its rules apply, see *Bostock v. Clayton County,* ___ U.S. ___, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020), but are forbidden by many religious faiths. Section 702(a) permits a religious employer to require the staff to abide by religious rules. A religious school is entitled to limit its staff to people who will be role models by living the life prescribed by the faith, which is part of "religion" as § 2000e(j) defines that word.

So why isn't § 702(a) the first issue considered in all Title VII suits alleging discrimination by a religious organization? The answer may be that courts of appeals say that the exemption permits religious discrimination but no other kind. That the exemption permits religious associations to discriminate on religious grounds is plain enough. See *Corporation of the Presiding Bishop v. Amos,* 483 U.S. 327, 329, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987). But where does the "no other kind" limitation come from? Decisions such as *Kennedy v. St. Joseph's Ministries, Inc.,* 657 F.3d 189, 192 (4th Cir. 2011), which states that "Section 2000e-1(a) does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin", do not explain why "this subchapter" means something less than all of Title VII. See also, e.g., *McClure v. Salvation Army,* 460 F.2d 553, 558 (5th Cir. 1972); *EEOC v. Townley Engineering & Manufacturing Co.,* 859 F.2d 610, 616 (9th Cir. 1988); *Fratello v. Archdiocese of New York,* 863 F.3d 190, 200 n.21 (2d Cir. 2017). Some decisions, such as *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F.2d 1164, 1167 (4th Cir. 1985), mention legislative history, but not any that illuminates the meaning of "this subchapter".

Maybe what these decisions are getting at is that § 702(a) does not exempt all employment decisions by religious organizations. The decision must itself be religious, as that word is defined in Title VII. This means, for example, that sex discrimination unrelated to religious doctrine falls outside the scope of § 702(a). But when the decision is founded on religious beliefs, then all of Title VII drops out. I cannot imagine any plausible reading of "this subchapter" that boils down to "churches can discriminate against persons of other faiths but cannot discriminate on account of sex". One function of § 702(a) is to permit sex discrimination by religions that do not accept women as priests. The exemption does this by declaring all of "this subchapter" to be inapplicable. (Perhaps the "bona fide occupational qualification" exemption in § 2000e-2(e)(1) also covers a rule against female clergy, but § 702(a) seems a better fit for this role.)

Anyway, how could one distinguish religious discrimination from sex discrimination in Starkey's situation? Firing people who have same-sex partners is sex discrimination, *Bostock* holds. See also *Hively v. Ivy Tech Community College,* 853 F.3d 339 (7th Cir. 2017) (en banc). 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.

The block quotation above omits part of the exemption's language. The omitted words say that the subchapter "shall not apply to an employer with respect to the employment of aliens outside any State". That language has been understood to mean what it says: *none* of Title VII's substantive rules applies to aliens covered by § 702(a). See, e.g., *Rabé v. United Air Lines, Inc.,* 636 F.3d 866, 869 (7th Cir. 2011). What is true for the alien exemption must be true for the religious exemption as well.

Our circuit has never embraced the position that § 702(a) permits religious discrimination but not sex discrimination that has a religious footing. Section 702(a) will not resolve all claims made by employees of religious organizations, but it resolves many—including Starkey's.

On page 636, add the following note:

4.a. *Reassignment as retaliation to be decided by the Supreme Court*. The Court granted *certiorari* in *Muldrow v City of St. Louis*, 30 F. 4th 860 (8th Cir. 2022), *cert. granted* ___ U.S. ___ (June 30, 2023), where the Eighth Circuit concluded that reassignment of the plaintiff which did not result in a loss of income or promotional opportunities did not constitute an "adverse employment action" for purposes of her sex discrimination claim or a "materially adverse employment act" for purposes of her retaliation claim. The appellate court reasoned "that an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action." The Supreme Court granted review to consider this question: Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?

Add at the top of page 692 at the end of the overlapping paragraph:

In *United State ex. rel. Schutte v. SuperValu Inc.,* 143 S.Ct. 1391 (2023), the Court held that the scienter requirement in the FCA is satisfied by the defendant's subjective belief that its claims were false, regardless of what an objectively reasonable person would believe.

On Page 832, add new Section E:

E. The Challenge of Artificial Intelligence

Computers today can aggregate a great deal of information, both public and private. They are able to engage in what is termed "machine learning," where the machine corrects its statements continuously (and automatically) as it obtains new information. This new information technology raises issues of possible discriminatory algorithms and intrusions on privacy. Governments have been slow **to** react. One early law, enacted by the New York City Council in Nov. 2021, requires employers and employment agencies who use "automated employment decision tools" (in lieu of a subjective decisional process) must (1) conduct a "bias audit" no more than one year prior to use, and (2) give employees or applicants notice of such use and the "job qualifications and characteristics that such automated employment decision tool will use in the assessment of such candidate or employee." Int. No. 194-A (adding new Subch. 25 to Ch. 5 of Title 20 of the Admin. Code of the City of New York). Illinois and Maryland have laws regulating the use of AI in video interviews.

On page 853, following note 9 (note 10 to be deleted), add:

Note: Shift in Legal Climate Toward No-Compete Clauses

During the Biden administration, there has been a clear shift in the federal and state legal climate regarding the enforceability of no-compete clauses in employment. On January 5, 2023, the Federal Trade Commission (FTC) promulgated a notice of proposed rulemaking (NPRM) that would make it an "unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a noncompete clause where the employer has no good faith basis to believe the worker is subject to an enforceable non-compete clause." The proposed rule is not limited to low-wage workers and does not draw a distinction between an employee's having access to the employer's trade secrets or other commercially valuable information. See Samuel Estreicher & Zachary G. Garrett, FTC Authority to Ban Non-compete Clauses in Employment Agreements? N.Y.L.J. (Mar. 27, 2023), reposted in Justia Verdict, Mar. 27, 2023. There is some question whether the FTC has authority to use rulemaking, as opposed adjudication, in dealing with unfair methods of competition, see Maureen K. Olhausen, Dead End Road: National Petroleum Refiners Association and FTC "Unfair Methods of Competition Rulemaking" (Baker & Botts, July 13, 2022).

State laws regulating no-compete clauses are growing apace. See Roy Maurer, State Laws Limiting Non-Competes Vary Significantly ((SHRM, March 31, 2022):

- "Laws in California and Washington void venue clauses that stipulate another state's law—usually the state in which the business is headquartered—is the governing law of the employment contract….
- State laws that ban noncompete agreements with low-wage workers. The tricky part is how each state defines a low-wage worker. In Washington, it's someone who makes less than $107,000 a year; in Illinois, less than $75,000 a year; whereas in Maine, low-wage workers are defined as anyone making under about $54,000 a year; and in New Hampshire, it's anyone making up to $14.50 an hour.
- Rhode Island law prohibits noncompetes with nonexempt workers. Massachusetts goes further, not allowing employers to enforce noncompete agreements with any workers who were fired or laid off. Bay State employers also have the option to provide at least 50 percent of workers' highest salary to them during the time they are restricted by a noncompete.
- The law in Illinois includes a 14-day notice requirement, giving workers the opportunity to consider the agreement and the ability to take it to an attorney."
- In June 2023, the New York legislature passed a ban (awaiting gubernatorial signature) on no-compete clauses dealing with a "covered individual," a term including "any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, is in a position of economic dependence on, and under an obligation to perform duties for that other person." 2023 N.Y. Senate-Assembly S3100A, A1278B.

On Page 885, under the heading "Salary Basis Test", add the following case;

HELIX ENERGY SOLUTIONS GROUP, INC. v. HEWITT
143 S.Ct. 677 (2023)

Justice KAGAN delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 (FLSA) guarantees that covered employees receive overtime

pay when they work more than 40 hours a week. But an employee is not covered, and so is not entitled to overtime compensation, if he works "in a bona fide executive, administrative, or professional capacity," as those "terms are defined" by agency regulations. 29 U.S.C. § 213(a)(1). Under the regulations, an employee falls within the "bona fide executive" exemption only if (among other things) he is paid on a "salary basis." 29 C.F.R. § 541.100(a)(1) (2015); see § 541.601(b)(1). Additional regulations elaborate on the salary-basis requirement, as applied to both lower-income and higher-income employees.

The question here is whether a high-earning employee is compensated on a "salary basis" when his paycheck is based solely on a daily rate—so that he receives a certain amount if he works one day in a week, twice as much for two days, three times as much for three, and so on. We hold that such an employee is not paid on a salary basis, and thus is entitled to overtime pay.

I

A

Congress enacted the FLSA to eliminate both "substandard wages" and "oppressive working hours." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). The statute addresses the former concern by guaranteeing a minimum wage. See 29 U.S.C. § 206. It addresses the latter by requiring time-and-a-half pay for work over 40 hours a week—even for workers whose regular compensation far exceeds "the statutory minimum." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942); see § 207. The overtime provision was designed both to "compensate [employees] for the burden" of working extra-long hours and to increase overall employment by incentivizing employers to widen their "distribution of available work." *Id.*, at 578, 62 S.Ct. 1216. Employees therefore are not "deprived of the benefits of [overtime compensation] simply because they are well paid." *Jewell Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 167, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945).

The FLSA, however, exempts certain categories of workers from its protections, including the overtime-pay guarantee. The statutory exemption relevant here applies to "any employee employed in a bona fide executive, administrative, or professional capacity ... (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])." § 213(a)(1). Under that provision, the Secretary sets out a standard for determining when an employee is a "bona fide executive." If that standard is met, the employee has no right to overtime wages.

From as early as 1940, the Secretary's "bona fide executive" standard has comprised three distinct parts. See 84 Fed. Reg. 51230 (2019) (summarizing the standard's history). The first is the "salary basis" test—the subject matter of this case. *Ibid.* The basic idea for now (greater detail and disputation will follow) is that an employee can be a bona fide executive only if he receives a "predetermined and fixed salary"—one that does not vary with the precise amount of time he works. *Ibid.* The second element is the "salary level" test: It asks whether that preset salary exceeds a specified amount. *Ibid.* And the third is the "duties" test, which focuses on the nature of the employee's job responsibilities. *Ibid.* When all three criteria are met, the employee (because considered a bona fide executive) is excluded from the FLSA's protections.

Now, though, add a layer of complexity to that description: The Secretary has implemented the bona fide executive standard through two separate and slightly different rules, one applying to lower-income employees and the other to higher-income ones. The so-called "general rule" pertains to employees making less than $100,000 in "total annual compensation," including not only salary but also commissions, bonuses, and the like. 29 C.F.R. §§ 541.100, 541.601(a), (b)(1). That rule considers employees to be executives when they are "[c]ompensated on a salary basis" (salary-basis test); "at a

rate of not less than $455 per week" (salary-level test); and carry out three listed responsibilities—managing the enterprise, directing other employees, and exercising power to hire and fire (duties test). § 541.100(a). A different rule—the one applicable here—addresses employees making at least $100,000 per year (again, including all forms of pay), who are labeled "highly compensated employees." § 541.601. That rule—usually known as the HCE rule—amends only the duties test, while restating the other two. In the HCE rule, the duties test becomes easier to satisfy: An employee must "regularly perform[ ]" just one (not all) of the three responsibilities listed in the general rule. § 541.601(a); see 69 Fed. Reg. 22174 (2004) (explaining that the HCE rule uses a "more flexible duties standard" and thus leads to more exemptions). But the salary-basis and salary-level tests carry over from the general rule to the HCE rule in identical form. The HCE rule too states that an employee can count as an executive (and thus lose the FLSA's protections) only if he receives "at least $455 per week paid on a salary ... basis." § 541.601(b)(1).

Two other regulations give content to the salary-basis test at the heart of this case. (After giving full citations, we refer to them simply as § 602(a) and § 604(b).) The main salary-basis provision, set out in two sentences of § 541.602(a), states:

> "An employee will be considered to be paid on a 'salary basis' ... if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to [certain exceptions], an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked."

The rule thus ensures that the employee will get at least part of his compensation through a preset weekly (or less frequent) salary, not subject to reduction because of exactly how many days he worked. If, as the rule's second sentence drives home, an employee works any part of a week, he must receive his "full salary for [that] week"—or else he is not paid on a salary basis and cannot qualify as a bona fide executive. *Ibid.*

Another provision, § 541.604(b), focuses on workers whose compensation is "computed on an hourly, a daily or a shift basis," rather than a weekly or less frequent one. That section states that an employer may base an employee's pay on an hourly, daily, or shift rate without "violating the salary basis requirement" or "losing the [bona fide executive] exemption" so long as two conditions are met. First, the employer must "also" guarantee the employee at least $455 each week (the minimum salary level) "regardless of the number of hours, days or shifts worked." *Ibid.* And second, that promised amount must bear a "reasonable relationship" to the "amount actually earned" in a typical week—more specifically, must be "roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." *Ibid.* Those conditions create a compensation system functioning much like a true salary—a steady stream of pay, which the employer cannot much vary and the employee may thus rely on week after week. See 69 Fed. Reg. 22184 (explaining that § 604(b)'s conditions ensure that daily or hourly pay is "[ ]consistent with the salary basis concept").

B

From 2014 to 2017, respondent Michael Hewitt worked for petitioner Helix Energy Solutions Group as a "toolpusher" on an offshore oil rig. Reporting to the captain, Hewitt oversaw various aspects of the rig's operations and supervised 12 to 14 workers. He typically, but not invariably, worked 12 hours a day, seven days a week—so 84 hours a week—during a 28-day "hitch." He then had 28 days off before reporting back to the vessel.

Helix paid Hewitt on a daily-rate basis, with no overtime compensation. The daily rate ranged, over the course of his employment, from $963 to $1,341 per day. His paycheck, issued every two weeks, amounted to his daily rate times the number of days he had worked in the pay period. So if Hewitt had worked only one day, his paycheck would total (at the range's low end) $963; but if he had worked all 14 days, his paycheck would come to $13,482. Under that compensation scheme, Helix paid Hewitt over $200,000 annually.

Hewitt filed this action under the FLSA to recover overtime pay. Helix asserted in response that Hewitt was exempt from the FLSA because he qualified as a bona fide executive. The dispute on that issue turned solely on whether Hewitt was paid on a salary basis; Hewitt conceded that his employment met the exemption's other requirements (the salary-level and duties tests). The District Court agreed with Helix's view that Hewitt was compensated on a salary basis, and accordingly granted the company summary judgment.

The Court of Appeals for the Fifth Circuit, sitting en banc, reversed that judgment, deciding that Hewitt was not paid on a salary basis and therefore could claim the FLSA's protections. See 15 F.4th 289 (2021). The 12-judge majority first held that a daily-rate employee (like Hewitt) does not fall within § 602(a) of the Secretary's regulations. That section, the court reasoned, covers only employees whose "compensation [is] paid 'on a weekly[ ] or less frequent basis,' 'without regard to the number of days or hours worked' "—the very opposite of a paid-by-the-day employee. *Id.*, at 291. Such "daily-rate" workers, the court continued, can qualify as salaried only through the "special rule" of § 604(b). *Ibid.* But Hewitt's compensation did not satisfy § 604(b)'s conditions; indeed, the court noted, "Helix does not even purport" to have met them. *Id.*, at 292. The court thus concluded that Hewitt, although highly paid, was not exempt from the FLSA. Six judges dissented in two opinions. The more expansive dissent argued that Hewitt's compensation "satisfied the salary basis test" of § 602(a). *Id.*, at 307 (opinion of Jones, J.). It further concluded that § 604(b) is not applicable at all to high-income employees—*i.e.*, those falling within the HCE rule because they earn over $100,000. See *id.*, at 309.

We . . . now affirm.

II

The critical question here is whether Hewitt was paid on a salary basis under § 602(a) of the Secretary's regulations. Indeed, the parties have taken all other issues off the table. They agree that Hewitt was exempt from the FLSA only if he was a bona fide executive. They agree, as they must, that under the regulations, a high-income employee like Hewitt counts as an executive when (but only when) he is paid on a salary basis; the salary paid is at or above the requisite level ($455 per week); and he performs at least one listed duty. See § 541.601; *supra*, at 683 - 684. In denying executive status, Hewitt puts all his chips on that standard's first part: He argues only that he was not paid on a salary basis. Helix then narrows the issues still further. As described above, a worker may be paid on a salary basis under either § 602(a) or § 604(b). See *supra*, at 683 - 684. But Helix acknowledges that Hewitt's compensation did not satisfy § 604(b)'s conditions. That is because Helix did not guarantee that Hewitt would receive each week an amount (above $455) bearing a "reasonable relationship" to the weekly amount he usually earned. So again, everything turns on whether Helix paid Hewitt on a salary basis as described in § 602(a). If yes, Hewitt was exempt from the FLSA and not entitled to overtime pay; if no, he was covered under the statute and can claim that extra money.

The answer is no: Helix did not pay Hewitt on a salary basis as defined in § 602(a). That section applies solely to employees paid by the week (or longer); it is not met when an employer pays an employee by the day, as Helix paid Hewitt. Daily-rate workers, of whatever income level, are paid on a salary basis only through the test set out in § 604(b) (which, again, Helix's payment scheme did not satisfy). Those conclusions follow from both the text and the structure of the regulations. And Helix's various policy

claims cannot justify departing from what the rules say.[3]

A

Consider again § 602(a)'s text, focusing on how it excludes daily-rate workers. An employee, the regulation says, is paid on a salary basis if but only if he "receive[s] the full salary for any week in which [he] performs any work without regard to the number of days or hours worked." To break that up just a bit: Whenever an employee works at all in a week, he must get his "full salary for [that] week"—what § 602(a)'s prior sentence calls the "predetermined amount." That amount must be "without regard to the number of days or hours worked"—or as the prior sentence says, it is "not subject to reduction because" the employee worked less than the full week. Nothing in that description fits a daily-rate worker, who by definition is paid for each day he works and no others. Suppose (to approximate the compensation scheme here) such a worker is paid $1,000 each day, and usually works seven days a week, for a total of $7,000. Now suppose he is ill and works just one day in a week, for a total of $1,000. Is that lesser amount (as Helix argues) a predetermined, "full salary for [the] week"—or is it just one day's pay out of the usual seven? Has the amount been paid "without regard to the number of days" he worked—or precisely *with* regard to that number? If ordinary language bears ordinary meaning, the answer to those questions is: the latter. A daily-rate worker's weekly pay is always a function of how many days he has labored. It can be calculated only by counting those days once the week is over—not, as § 602(a) requires, by ignoring that number and paying a predetermined amount.

In demanding that an employee receive a fixed amount for a week no matter how many days he has worked, § 602(a) embodies the standard meaning of the word "salary." At the time the salary-basis test came into effect, just as today, a "salary" referred to "fixed compensation regularly paid, as by the year, quarter, month, or week." Webster's New International Dictionary 2203 (2d ed. 1949); see Webster's Third New International Dictionary 2003 (2002) (similar). "Salary" was thus "often distinguished from wages," which denoted "[p]ay given for labor" at "short stated intervals." Webster's New International Dictionary, at 2203, 2863. As the Court of Appeals put the point, the "concept of 'salary' " is linked, "[a]s a matter of common parlance," to "the stability and security of a regular weekly, monthly, or annual pay structure." 15 F.4th at 291. Take away that kind of paycheck security and the idea of a salary also dissolves. A worker paid by the day or hour—docked for time he takes off and uncompensated for time he is not needed—is usually understood as a daily or hourly wage earner, not a salaried employee. So in excluding those workers—once again, because they do not receive a preset weekly salary regardless of the number of days worked—the salary-basis test just reflects what people ordinarily think being "salaried" means.

Helix primarily responds by invoking § 602(a)'s statement that an employee (to be salaried) must "receive[ ] each pay period on a weekly[ ] or less frequent basis" a preset and non-reducible sum. At first glance (and actually, see below, on second too), that language just confirms everything already shown: An employee must be paid on a "weekly [or biweekly or monthly] basis," not on a daily or hourly one. Or said more fully, the "basis" in that phrase is the unit of time used to calculate pay, and that unit must be a week or less frequent measure; it cannot be a day, or other more frequent measure, as it was for Hewitt. See Webster's New International Dictionary, at 225, 227 (defining "basis" and "base" as the "foundation" of a thing, "thus, a price used as a unit from which to calculate other prices"). But Helix contends that the single word "receives" converts § 602(a)'s focus: In saying that an employee must "receive[ ]" a fixed amount on a weekly or less frequent basis, the provision mandates only that he get his paycheck no more often than once a week (which of course most employees do). Because Hewitt's paycheck came every two weeks, and because that check always contained pay exceeding $455 (the salary level) for any week he had worked at all, Helix concludes that Hewitt was paid, under § 602(a), on a salary basis. See *ibid.*

But that interpretation of the "weekly basis" phrase—even putting § 602(a)'s other language to the side—is not the most natural one. As just suggested, a "basis" of payment typically refers to the unit or method for calculating pay, not the frequency of its distribution. Most simply put, an employee paid on an hourly basis is paid by the hour, an employee paid on a daily basis is paid by the day, and an employee paid on a weekly basis is paid by the week—irrespective of when or how often his employer actually doles out the money. The inclusion of the word "receives" in § 602(a) does not change that usual meaning. Suppose a lawyer tells a client that she wishes to "receive her pay on an hourly basis." The client would understand that the lawyer is proposing an hourly billable rate, not delivery of a paycheck every hour. Or consider a nurse who says she gets paid on a daily basis. She means that she receives compensation only for the days she works—not that she collects a paycheck every day. So too here, an employee receives compensation on a weekly—as opposed to a daily or hourly—basis, as § 602(a) demands, when he gets paid a weekly rate. The provision's temporal dividing line is not about paycheck frequency.

Our reading of § 602(a) also tracks how neighboring regulations use the term "basis" of payment. Over and over in the Secretary's rules, that term means the unit or method used to calculate earnings. So, for example, one provision states that "additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment [or] straight-time hourly amount)." § 541.604(a). Another provision defines what it means to be "paid on a 'fee basis,' " differentiating that method from "[p]ayments based on the number of hours or days worked." § 541.605(a). Still another says that for one class of employees, the salary-level test "may be met by compensation on an hourly basis" of "not less than $27.63 an hour." § 541.600(d). And as discussed below, § 604(b) refers to earnings computed "on an hourly, a daily or a shift basis" as distinct from "amount[s] paid on a salary basis regardless of the number of hours, days or shifts worked." For now, the point is simply that all those regulations use the language of "basis" in a similar vein—to describe the unit used to determine payment. And consistent with that usage, § 602(a)'s demand that a salaried worker get a preset, fixed amount "on a weekly[ ] or less frequent basis" means that his paycheck reflects how many weeks—not days or hours—he has worked.

The "weekly basis" phrase thus works hand in hand with the rest of § 602(a). Every part of the provision describes those paid a weekly rate, rather than a daily or hourly one. Recall that an employee, to meet the salary-basis test, must "receive [his] full salary for any week" in which he works at all. That "predetermined amount" cannot be changed because of "the number of days or hours" an employee actually labors. The amount must instead be paid "without regard to [that] number." Or said otherwise, the amount must be paid on "a weekly basis"—again, by the week, not by the day or hour. All that regulatory language—each phrase adding onto and reinforcing the others—reflects the standard meaning of a "salary," which connotes a steady and predictable stream of pay, week after week after week. Put it all together and a daily-rate worker does not qualify under § 602(a) as a salaried employee—even if (like Hewitt) his daily rate is high.

B

The broader regulatory structure—in particular, the role of § 604(b)—confirms our reading of § 602(a). Recall that § 604(b) lays out a second path—apart from § 602(a)—enabling a compensation scheme to meet the salary-basis requirement. See *supra*, at 683 - 684. And that second route is all about daily, hourly, or shift rates. Whereas § 602(a) addresses payments on "a weekly[ ] or less frequent basis," § 604(b) concerns payments "on an hourly, a daily or a shift basis." An employee's earnings, § 604(b) provides, "may be computed on" those shorter bases without "violating the salary basis requirement" so long as an employer "also" provides a guarantee of weekly payment approximating what the employee usually earns. See *supra*, at 683 - 684. Section 604(b) thus speaks directly to when daily and hourly rates are "[ ]consistent with the salary basis concept." 69 Fed. Reg. 22184; see *supra*, at 684. And by doing so, the provision reinforces the exclusion of those shorter rates from § 602(a)'s domain. Were § 602(a) also to cover daily- and hourly-rate employees, it would subvert § 604(b)'s strict

conditions on when their pay counts as a "salary." By contrast, when § 602(a) is limited to weekly-rate employees, it works in tandem with § 604(b). The two then offer non-overlapping paths to satisfy the salary-basis requirement, with § 604(b) taking over where § 602(a) leaves off.

Helix's argument to the contrary relies on carting § 604(b) off the stage. (So too the principal dissent's, —so we do not describe separately why that opinion is wrong.) True enough, Helix says, that § 604(b) usually provides an alternative route for meeting the salary-basis requirement. But that is not so, Helix asserts, when highly compensated employees like Hewitt are involved. Recall that the Secretary's regulations separately prescribe—in the "general rule" and the HCE rule—how lower- and higher-income employees satisfy the three-part standard for bona fide executive status. On Helix's view, only the general rule (for lower-income workers) has two different avenues—§ 602(a) and § 604(b)—for meeting the salary-basis test. The HCE rule, Helix argues, incorporates only § 602(a); it is independent of § 604(b). ("The separate requirements of [§ 604] do not apply to the HCE regulation"). And with § 604(b) out of the way, Helix does not have to confront (or so it says) the argument above—that it is anomalous to read § 602(a) as covering daily-rate workers when that is § 604(b)'s explicit function.

But to begin with, Helix could not succeed even if it were right about the (supposedly nonexistent) relationship between the HCE rule and § 604(b). That is so for two reasons. First, even without support from § 604(b), the plain text of § 602(a) excludes daily-rate workers like Hewitt, for all the reasons given in Part II–A. And Helix of course acknowledges that it must comply with § 602(a) to satisfy the HCE rule's salary-basis requirement. Second, even on Helix's view of the HCE rule, § 604(b) in fact confirms the plain-text, weekly-rate-only reading of § 602(a). Helix, after all, agrees that both provisions serve as pathways to meeting the salary-basis test when the general rule (for lower-income workers) is involved. And if in that context (as just shown) § 604(b) confirms that § 602(a) applies only to weekly-rate employees, then the same must be true in the HCE context. For § 602(a) cannot change meanings depending on whether it applies to the general rule or the HCE rule. It applies to both, and must mean the same thing in either context. So even supposing that the HCE rule incorporates only § 602(a), and not § 604(b), the two provisions still must be read to complement each other.

In any event, Helix is wrong that the HCE rule operates independently of § 604(b). The HCE rule refers to the salary-basis (and salary-level) requirement in the same way that the general rule does. Compare § 541.601(b)(1) (requiring "at least $455 per week paid on a salary or fee basis") with § 541.100(a)(1) (requiring payment "on a salary basis at a rate of not less than $455 per week"). And as already described, the two provisions giving content to that requirement—explaining when a person is indeed paid on a salary basis—are § 602(a) and § 604(b). So both those provisions should apply to both the general and the HCE rule—because both the former serve to define what both the latter identically require. Helix tries to avoid that reasoning by noting that a later version of the HCE rule than the one governing this case cross-references § 602(a) but not § 604(b). But that version is concededly not the rule at issue—which contains cross-references to neither provision, so offers no basis for Helix's distinction. And anyhow, Helix's own arguments belie the import of the added cross-reference. The general rule, in both its earlier and its later versions, also cross-references § 602(a) but not § 604(b)—yet Helix acknowledges that both those provisions apply in that (lower-income) context. There is no reason to give different meaning to the same cross-reference scheme in the later HCE rule. The upshot is that § 604(b) applies, just as § 602(a) does, to the HCE and general rules alike.

There is of course a difference between the HCE and general rules; it just has nothing to do with the salary-basis requirement. As Helix notes, the HCE rule is "streamlined" as compared to the one for lower-income workers. But the HCE rule's text makes clear what it is streamlined *with respect to*. Not salary basis, which (as just shown) is described identically for higher- and lower-income workers. Nor salary level, which is set at $455 per week for both groups. Rather, the difference is with respect to workplace duties. As noted above, lower-income employees cannot qualify as bona fide executives unless (1) their primary job is management; (2) they regularly direct the work of others; and (3) they

have authority to hire and fire. See § 541.100(a); *supra*, at 682 - 683. But higher-income employees need "regularly perform[ ]" only "one" of those "responsibilities" to so qualify. See § 541.601(a). That "more flexible duties standard" eases the way to executive status, and so to exemption from the FLSA. 69 Fed. Reg. 22174. But the HCE rule's streamlining stops at that point. Again, the rule leaves untouched the salary-basis requirement—so incorporates § 604(b) as well as § 602(a). And § 604(b)'s focus on daily and hourly workers confirms that § 602(a)—as its own text shows—pertains only to employees paid by the week (or longer). Hewitt was not.

C

Our reading of the relevant regulations, as laid out above, properly concludes this case. Helix urges us to consider the policy consequences of that reading, labeling them "far-reaching" and "deleterious." In Helix's view, holding that § 602(a)'s salary-basis test never captures daily-rate workers will give "windfalls" to high earners, disrupt and "increase costs" of industry operations, and "impos[e] significant retroactive liability." But as this Court has explained, "even the most formidable policy arguments cannot overcome a clear" textual directive. ***691** *BP p.l.c.* v. *Mayor and City Council of Baltimore*, 593 U. S. ——, ——, 141 S.Ct. 1532, 1541–1542, 209 L.Ed.2d 631 (2021) (internal quotation marks omitted). And anyway, Helix's appeal to consequences appears something less than formidable in the context of the FLSA's regulatory scheme. Indeed, it is Helix's own position that, if injected into that plan, would produce troubling outcomes—because it would deny overtime pay even to daily-rate employees making far less money than Hewitt.

Initially, Helix's complaint about "windfalls" for high earners fails in view of what this Court has observed about the FLSA: Workers are not "deprived of the benefits of the Act simply because they are well paid." *Jewell Ridge*, 325 U.S. at 167, 65 S.Ct. 1063 (explaining that the FLSA's breadth fits its aims of deterring overwork and "spread[ing] employment"); see *supra*, at 682. The Secretary of Labor has often reiterated that point, recognizing since the FLSA's enactment that Congress elected not to exempt all well-compensated workers. See, *e.g.*, 69 Fed. Reg. 22173; see also 15 F.4th at 290 (case below) ("Congress has repeatedly rejected efforts to categorically exempt all highly paid employees from overtime requirements"). That statutory choice undergirds how the HCE rule works. The rule spells out when higher-income employees like Hewitt are exempt from the FLSA (because they are "bona fide executive[s]"); but so too, it establishes when those workers are covered (because they are not). In thus carving up the class of higher-income workers, the salary-basis requirement is hardly unique. Another provision of the HCE rule states, for example, that various workers in "maintenance, construction and similar occupations" are never exempt as executives, "no matter how highly paid they might be." § 541.601(d). Throughout, the HCE rule reflects the statutory choice not to set a simple income level as the test for exemption. Some might have made a different choice, but that cannot affect what this Court decides.

Nor do Helix's operational and cost-based objections move the needle. Helix could come into compliance with the salary-basis requirement for Hewitt and similar employees in either of two ways. It could add to Hewitt's per-day rate a weekly guarantee that satisfies § 604(b)'s conditions. Or it could convert Hewitt's compensation to a straight weekly salary for time he spends on the rig. Helix protests that either option would make it pay for days Hewitt has not worked. But that is just to say that Helix wishes *neither* to pay employees a true salary *nor* to pay them overtime. And the whole point of the salary-basis requirement is to take that third option off the table, even though doing so may well increase costs. Of course, were that requirement novel, Helix's complaint about retroactive liability could have force. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–157, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012). But as described above, the salary-basis test, in largely the form it exists today, goes back to nearly the FLSA's beginnings. And the governing regulations—both § 602(a) and § 604(b)—make clear what that test means for a daily-rate worker like Hewitt: Because he is not paid on a salary basis, he is entitled to overtime compensation. So as the Court of Appeals remarked,

nothing about today's decision should "come as a surprise." 15 F.4th at 296.

It is in fact Helix's position that would create disturbing consequences, by depriving even workers at the heartland of the FLSA's protection—those paid less than $100,000 annually—of overtime pay. The problem arises because, as explained above, § 602(a) applies not only to the HCE rule but also to the general rule, exempting lower-earning employees as bona fide executives. And § 602(a) must mean the same thing as applied to both rules; not even Helix argues otherwise. So on Helix's view, any daily-rate employee who meets the general rule's three-part duties test; gets a paycheck no more frequently than every week; and receives at least $455 per week (about $24,000 per year) is excluded from the FLSA's overtime protections. See § 541.100; § 602(a). It is unclear how many, and what kinds of, employees are in that group, given the relative strictness of the general rule's duties test. But, for example, two organizations representing nurses have filed *amicus* briefs here, and it is easy to see why. Some nurses working on a per-day or per-shift basis are likely to meet the general rule's duties test; and their employers would assure them $455 per week in a heartbeat if doing so eliminated the need to pay overtime. And nurses, in the Government's view, are not alone: They "are just one of the many examples" of workers paid less than $100,000 a year who would, if Helix prevailed, lose their entitlement to overtime compensation. That consequence, unlike the ones Helix raises, is difficult, if not impossible, to reconcile with the FLSA's design.

* * *

Justice GORSUCH, dissenting (omitted).

Justice KAVANAUGH, with whom Justice ALITO joins, dissenting.

Michael Hewitt earned about $200,000 per year as a supervisor for Helix, a firm that provides services on offshore oil rigs. After being fired, Hewitt sued Helix under the Fair Labor Standards Act and sought hundreds of thousands of dollars in retroactive overtime pay. The Court today rules for Hewitt. I respectfully dissent. Unlike the Court, I would hold that Hewitt was a "bona fide executive" for Helix and therefore not entitled to overtime pay.

Under the Fair Labor Standards Act, many American workers are legally entitled to overtime pay when they work more than 40 hours per week. But the Act contains several exceptions, including an exception for employees who work in a "bona fide executive ... capacity." 29 U.S.C. § 213(a)(1). To determine whether an employee works in a bona fide executive capacity, the Department of Labor's implementing regulations look to, among other things, (i) the employee's duties, (ii) how much the employee is paid, and (iii) how the employee is paid—for example, by salary, wage, commission, or bonus.

Under the regulations, an employee who performs executive duties and earns at least $100,000 per year with a "predetermined" weekly salary of at least $455 for any week that he works is a bona fide executive and not entitled to overtime pay. 29 C.F.R. §§ 541.601, 541.602 (2015).

Per those regulations, Hewitt readily qualified as a bona fide executive. As everyone agrees, Hewitt performed executive duties, earned about $200,000 per year, and received a predetermined salary of at least $963 per week for any week that he worked.

Despite all that, the Court holds that Hewitt was not a bona fide executive and therefore was entitled to overtime pay under the regulations. The Court relies on two alternative rationales.

First, the Court reasons that Hewitt's pay was calculated on a *daily-rate* basis, while § 602 of the regulations requires a certain minimum "predetermined amount" calculated on a *weekly* or less frequent basis—specifically at least $455 per week. That is known as the salary-basis test. But

Hewitt's daily "predetermined" rate ($963 per day) was higher than the weekly minimum requirement of $455 per week specified in the regulations. If a worker is guaranteed at least $455 for any *day* that he works, that worker by definition is guaranteed at least $455 for any *week* that he works. As Helix rightly explains, a supervisor whose "pay is calculated based on a day rate above the weekly minimum receives more than enough on a salary basis to satisfy" the regulation.

To be sure, if Hewitt worked multiple days in a week, then his $963 guaranteed weekly salary would only be *part* of his total weekly compensation. But under the salary-basis test specified in the regulations, an employee's guaranteed weekly salary of at least $455 need only constitute "all *or part*" of his total weekly compensation. § 541.602(a) (emphasis added).

The Court's opinion never satisfactorily accounts for § 602's use of the phrase "or part." Stated simply, the regulations require only that an employee be guaranteed a "predetermined amount" of at least $455 per week as "part" of his total compensation for any week that he works. *Ibid.* Hewitt was guaranteed a "predetermined amount" of at least $455 per week (in fact, $963 per week) as part of his total compensation for any week that he worked. And that predetermined minimum amount of $963 was "not subject to reduction because of variations in the quality or quantity of the work performed." *Ibid.* Hewitt always received at least $963 per week that he worked.

Of course, this case would be different if Hewitt had been guaranteed, say, only $250 per day that he worked. Under those circumstances, Hewitt would not have been guaranteed at least $455 for any week that he worked. But here, Hewitt was guaranteed $963 for any *day* that he worked. Therefore, he was guaranteed at least $963 for any *week* that he worked.

The Court's contrary conclusion boils down to the head-scratching assertion that Hewitt was somehow not guaranteed to receive at least $455 for any *week* that he worked even though (as all agree) he was in fact guaranteed to receive $963 for any *day* that he worked.

Second, and alternatively, the Court relies on a separate section of the regulations—§ 604—that applies to executives who (unlike Hewitt) make less than $100,000 per year.

Under the overtime-pay regulations, as I have noted, executives who earn at least $100,000 per year and who are guaranteed a salary of at least $455 per week that they work are not entitled to overtime pay. § 541.601. Under § 604, some executives who make *less* than $100,000 per year are likewise not entitled to overtime pay if they are guaranteed at least $455 per week that they work *and at least two-thirds of their total compensation comes in the form of a weekly guarantee*. See § 541.100; § 541.604; Dept. of Labor, Wage and Hour Div., Opinion Letter (FLSA 2018–25, 2018).

Because Hewitt earned more than $100,000 per year and qualified as a highly compensated employee, the two-thirds requirement of § 604 did not apply to him. The Court's opinion nonetheless suggests that the two-thirds requirement may apply even to executives such as Hewitt who earn more than $100,000 per year. That is incorrect. To begin with, the introductory statement to the overtime regulations indicates that the two-thirds requirement does not apply to "highly compensated employees"—that is, those like Hewitt who earn at least $100,000 per year. See § 541.0. Moreover, the regulation for highly compensated employees (§ 601) does not refer to or incorporate § 604, which contains the two-thirds requirement, whereas § 601 now does refer to other provisions of the regulations. 29 C.F.R. § 541.601(b)(1) (2020). In addition, the regulation for highly compensated employees (§ 601) expressly authorizes an employer to make a catch-up payment to an employee near a year's end in order to push the employee over the $100,000 per year threshold. That regulation simultaneously makes clear that, for such a highly compensated employee, only about $25,000 of his compensation needs to be guaranteed in weekly salary. That express authorization for significant catch-up payments directly contravenes any suggestion that highly compensated employees who earn at least $100,000 per year are subject to the two-thirds requirement. In short, § 604's two-thirds

requirement did not apply to Hewitt, who earned about $200,000 per year.

To sum up, neither of the Court's two rationales holds up in light of the text of the regulations and the undisputed terms of Hewitt's pay. Because Hewitt performed executive duties, earned at least $100,000 per year, and received a guaranteed weekly salary of at least $455 for any week that he worked, I would hold that Hewitt was not legally entitled to overtime pay under the regulations.

One last point: Although the Court holds that Hewitt is entitled to overtime pay under the *regulations*, the regulations themselves may be inconsistent with the Fair Labor Standards Act. . . . Recall that the Act provides that employees who work in a "bona fide executive ... capacity" are not entitled to overtime pay. 29 U.S.C. § 213(a)(1). The Act focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So it is questionable whether the Department's regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act. It is especially dubious for the regulations to focus on how an employee is paid (for example, by salary, wage, commission, or bonus) to determine whether the employee is a bona fide executive. An executive employee's duties (and perhaps his total compensation) may be relevant to assessing whether the employee is a bona fide executive. But I am hard-pressed to understand why it would matter for assessing executive status whether an employee is paid by salary, wage, commission, bonus, or some combination thereof. In any event, I would leave it to the Fifth Circuit on remand to determine whether Helix forfeited the statutory issue. But whether in Hewitt's case on remand or in another case, the statutory question remains open for future resolution in the lower courts and perhaps ultimately in this Court.

On page 980, add the following to the conclusion of note 7:

Several circuit courts recently have concluded that the majority approach – allowing notification to potentially "similarly situated" class members based upon only a "modest factual showing" – is not appropriate. In *Swales v. KLLM Transport Services, L.L.C.,* 985 F.3d 430, 434 (5th Cir. 2021), the Fifth Circuit held that instead of "any test for 'conditional certification', a district court should identify, at the outset of the case, what facts and legal considerations will be material to determining whether a group of 'employees' is 'similarly situated.' And then it should authorize preliminary discovery accordingly. The amount of discovery necessary to make that determination will vary case by case, but the initial determination must be made, and as early as possible…. [T]he FLSA's similarity requirement is something that district courts should rigorously enforce at the outset of the litigation." The Sixth Circuit in *Clark v A&L Homecare and Training Center*, __ F. 4th ___, Nos. 22-3101/3102 (May 19, 2023), similarly held that a district court should not send notice upon merely a "modest showing" or under a "lenient standard" of similarity. Instead, the court held that that, "for a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a "strong likelihood" that those employees are similarly situated to the plaintiffs themselves…. That standard requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance." Slip op. at 8.

On page 994 add the following Note 9.a.:

9.a. *Continuing debate concerning the scope of Transunion.* Since publication of the 6th Edition, courts have struggled to decide standing disputes involving statutory claims under numerous statutes which did not allege injuries recognized at common law. *See generally* The Aftermath of "Transunion v Ramirez": An Emerging Circuit Split, New Jersey Law Journal Jan. 3, 2023 Edition (noting that claims of emotional distress damages have not always afforded plaintiffs standing.) The Supreme Court granted certiorari in *Acheson Hotels, LLC v. Laufer*, __S. Ct.__ (Mar. 27, 2023) (No. 22-429), a case placing the meaning of Transunion and Spokeo before the Court.

On Page 1025, insert before Note on Gilmer, add note 7:

7. The enforceability of class action waivers has prompted employees to file multiple individual arbitrations involving the same allegations against the same employer. The phenomenon has prompted the American Arbitration Association (AAA) and other leading service providers to promulgate special rules for such mass-filing cases. See Maximillian Zorn, The Response: Divergent Approaches to Mass Arbitration, and the Effect on Practice in State and Federal Court, 41 Alternatives to the High Cost of Litigation (May 8, 2023, Issue 6) 87-92. The availability offensive non-mutual issue preclusion is evaluated in Estreicher, Issue Preclusion in Employment Arbitration after *Epic Systems v. Lewi*s. 4 U. Pa. J. Law & Pub. Aff. 1 ed. 2019). 5 (No. 1, Nov. 2018) (with Lukacz Swiderski); and Fasman, Offensive, Non-Mutual Collateral Estoppel in Arbitration: The Rush to Arbitration's Ruin in Proc. N.Y.U. 71st Ann. Cont. on Labor (Charlotte Alexander ed. 2019).