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### Brief for New Ways Ministry et al. as Amici Curiae Supporting Plaintiff, Koenke v. Saint Joseph University

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#### Recommended Citation

Brief for New Ways Ministry et al. as Amici Curiae Supporting Plaintiff, Koenke v. Saint Joseph University, 2:19-cv-04731-NIQA (E.D. Pa. Mar. 5, 2020).

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOEL KOENKE,  
Plaintiff,

v.

**FILED**

Case No. 2:19-cv-04731-NIQA

SAINT JOSEPH'S UNIVERSITY, **MAR - 5 2020**  
Defendant.

**KATE BARKMAN, Clerk**  
By \_\_\_\_\_ **Dep. Clerk**

**MOTION FOR LEAVE TO FILE AN AMICUS BRIEF AND BRIEF OF  
AMICI NEW WAYS MINISTRY; DIGNITYUSA; ARTHUR FITZMAURICE, Ph.D.;  
AND TRANSCATHOLIC IN SUPPORT OF PLAINTIFF**

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*On behalf of Amici Curiae*

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## MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(b),<sup>1</sup> Counsel of Record, Leslie C. Griffin, Esq., Boyd School of Law, UNLV, on behalf of proposed *Amici Curiae*, respectfully requests leave of this Court to submit the attached Brief in Opposition to the Defendant's Motion to Dismiss, and also request permission to exceed the page limit for the brief under Fed. R. App. P. 32(a)(7)(A). The proposed *Amici Curiae* hereby state as follows:

We amici are Catholics who support LGBTQI rights. We have done so repeatedly and consistently for many years. We have an interest in the Court's resolution of the question presented by this case and are well-situated to provide both desirable and relevant information to this Court.<sup>2</sup>

New Ways Ministry educates and advocates for justice and equality for lesbian, gay, bisexual, and transgender (LGBT) Catholics, and reconciliation within the larger church and civil communities.

DIGNITYUSA works for respect and justice for people of all sexual orientations, genders, and gender identities—especially gay, lesbian, bisexual, and transgender persons—in the Catholic Church and the world through education, advocacy, and support.

Dr. Arthur Fitzmaurice is a nationally renowned Catholic minister and public speaker regarding the civil rights of LGBTQI Catholics advocating for full inclusion and acceptance of LGBTQI persons in the Roman Catholic Church. Dr. Fitzmaurice served for fourteen (14) years as Chair of the Catholic Ministry with Lesbian and Gay Persons for the Los Angeles Archdiocese. He is the former resource director for the Catholic Association for Lesbian and Gay Ministry ("CALGM"). Dr. Fitzmaurice is the recipient of the prestigious *Lumen Christi* Award among other honors. Dr. Fitzmaurice specifically signs onto this Amicus Brief on behalf of Plaintiff, Noel Koenke, and supports the claims she makes in this case against Saint Joseph's University.

TransCatholic Apostolate ("TransCatholic") is a Roman Catholic apostolate that exists to support Roman Catholic religious and laity in understanding and ministering to transgender Catholics, their family, friends, and congregations.

For transgender Catholics and their families, TransCatholic is here to support their dignity and participation in the church. TransCatholic seeks to disseminate well-researched and

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<sup>1</sup> Although proposed *amici curiae* move herein pursuant to Federal Rule of Appellate Procedure 29(b), it is well-recognized that a Federal district court has "broad discretion" which it may exercise to permit *amici curiae* to participate in pending district court proceedings as well. See *Waste Mgmt of Pennsylvania, Inc v City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995).

<sup>2</sup> Ms. Koenke's counsel has reviewed, streamlined, and authored in part the attached Amicus Brief by making suggested or tracked changes where it is appropriate to make those suggestions. Amici and counsel have not received any remuneration for their participation in this proceeding from either party or any other interested individual.

reviewed information about gender identity in science, medicine, psychology, and Catholic teaching.

Very few courts – and as Ms. Koenke points out in her opposition brief, only one reported decision of a Federal circuit court – has explicitly addressed under what circumstances a minister can recover for sex-based harassment. We wish to supply our expertise on this subject as well as important information to consider about Saint Joseph’s University and the LGBT community. It is crucial that employees like Ms. Koenke be permitted to bring this type of claim and we want to ensure the Court understands the reasons why the law does not bar such a claim under these circumstances both for Ms. Koenke and those in similar situations.

We ask this Court to accept our brief defending the legal rights of Noel Koenke to sue her employer, St. Joseph’s University, for employment discrimination. We understand the injuries LGBTQIs have suffered for many years, and ask this Court to listen to our understanding of Ms. Koenke’s suffering.

Respectfully submitted,

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*On behalf of Amici Curiae*

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## I. INTRODUCTION

We amici are Catholics who support LGBTQI rights. We have done so repeatedly and consistently for many years.

New Ways Ministry educates and advocates for justice and equality for lesbian, gay, bisexual, and transgender (LGBT) Catholics, and reconciliation within the larger church and civil communities. DignityUSA works for respect and justice for people of all sexual orientations, genders, and gender identities—especially gay, lesbian, bisexual, and transgender persons—in the Catholic Church and the world through education, advocacy, and support. TransCatholic is a Roman Catholic apostolate which exists to support the dignity and participation of transgender Catholics, and the organization seeks to disseminate well-researched and reviewed information about gender identity in science, medicine, psychology, and Catholic teaching. Dr. Arthur Fitzmaurice also signs onto this Amicus Brief and is a Catholic minister who advocates publicly for the rights of LGBTQI Catholics, served for fourteen (14) years as Chair of the Catholic Ministry with Lesbian and Gay Persons for the Los Angeles Archdiocese, and was formerly the resource director for the Catholic Association for Lesbian and Gay Ministry (“CALGM”).

We, like a majority of Catholics, support the right to same sex marriage. *See Attitudes on Same-Sex Marriage*, PEW RESEARCH CTR. (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

Saint Joseph’s University [SJU] employee Noel Koenke was told to “exercise discretion” about her same sex wedding and sexuality and to alter her Facebook page because of her sexual orientation. Her legal documents provide an overwhelming sense of the injuries that arose from this discrimination against her:

Ms. Koenke was subject to what she characterizes in her Complaint as “hateful and harassing conduct” on account of “sexual harassment” and “gender stereotyping,” which Ms. Koenke alleges occurred continuously throughout her employment. [citing Pl.’s Compl. at para. 16]. Ms. Koenke alleges she was subject to constant “harassment and abuse” to “remain closeted” during her employment. *See id.* at para. 16(j). Ms. Koenke alleges that this “harassment and abuse [she] experienced in being required to remain closeted” caused “fear of the negative consequences or repercussions if [Ms. Koenke] was suspected or found out.” *See id.* Ms. Koenke points to essentially a near-constant barrage of incidents which required her to remain in the closet during her employment. Ms. Koenke alleges such burdensome conditions caused her to attempt suicide on account of the above harassment before the point at which Ms. Koenke quit her employment. *See id.* at para. 16(j).

Ms. Koenke also alleges that she could not be fully open inside or even outside of work because Ms. Koenke’s supervisor went so far as to sit her down and demand she “should delete her current Facebook account, create a new Facebook account, but not add any of the employees of Defendant’s University to be Plaintiff’s Facebook friends.” *See Pl.’s*

Compl., ECF No. 1, para. 16(a). Ms. Koenke's supervisor, who was responsible for the harassing conduct, is the University's Deputy Title IX Coordinator, and is responsible under this umbrella for all of the University's students, with the exception of athletics. *See id.* at para. 9.

Pl.'s Br. in Resp. to Mot. to Dismiss, p. 2.

This brief supports Ms. Koenke's legal right to sue SJU for the damages arising from the stress and pain this discrimination caused her. The ministerial exception should not bar her employment discrimination claim at any time. Law professors who support the ministerial exception have explained that it should not be used to "bar damage claims for pervasive, hostile environments based on sex." *See, e.g.,* Ira C. Lupu & Robert W. Tuttle, *#metoo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 249, 249 (2019). The ministerial exception especially should not bar her claim on a motion to dismiss, because further discovery is necessary before any *affirmative defense* like the ministerial exception can be proved. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 195 (2012) (the exception is an affirmative defense, not a jurisdictional bar); *Petruska v. Gannon University*, 462 F.3d 294, 310 (3d Cir. 2006) (concluding that plaintiff's breach of contract claim, which did not infringe on employer's freedom to select ministers, survived motion to dismiss based on ministerial exception); *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 172 (5th Cir. 2012) ("Given the nature of the ministerial exception, we suspect that only in the rarest of circumstances would dismissal under Rule 12(b)(6)—in other words, based solely on the pleadings—be warranted."); *Fratello v. Archdiocese of New York*, 863 F.3d 190, 198 (2d Cir. 2017) ("After finding that it could not determine whether the ministerial exception applied to Fratello's claims on a motion to dismiss, the district court appropriately ordered discovery limited to whether Fratello was a minister within the meaning of the exception."); *Collette v Archdiocese of Chicago*, 200 F. Supp. 3d 730, 735–36 (N.D. Ill. 2016) (whether ministerial exception was applicable could not be resolved at motion to dismiss phase).

Because of these shared values, we write to express our outrage that SJU harassed Noel Koenke, a lesbian employee, placing her in a constant hostile working environment because she is a lesbian and was getting married. The law should not permit or encourage such conduct; moreover, this conduct is not allowed by religious freedom.

## II. KOENKE'S RIGHTS ARE PROTECTED UNDER UNIVERSITY POLICIES AND SAINT JOSEPH'S UNIVERSITY HOLDS ITSELF OUT AS AN LGBT-INCLUSIVE UNIVERSITY.

SJU has a broad Non-Discrimination Statement, which claims:

[T]he University does not discriminate on the basis of sex/gender, race, age of 40 or over, color, religion, national origin, ethnic origin, *sexual orientation*, gender identity, disability, genetic information, pregnancy, marital status, and military

and military veteran status, and any other status protected by law in the administration of its admission, educational, financial aid, *employment*, athletic, or recreational policies or programs.

*Non-Discrimination Statement*, SAINT JOSEPH'S UNIV., [https://www.sju.edu/non-discrimination-statement#\\_ga=2.79348567.2109563632.1580844546-58946985.1580844546](https://www.sju.edu/non-discrimination-statement#_ga=2.79348567.2109563632.1580844546-58946985.1580844546) (last visited Feb. 13, 2020) (emphasis added). The University's Policy Prohibiting Discrimination, Harassment and Retaliation recognizes employees' rights of "Freedom from unlawful Discrimination, Harassment, and Retaliation of Any Type," as well as the "Freedom to be heard without fear of reprisal." *Saint Joseph's University Policy Prohibiting Discrimination, Harassment and Retaliation*, SAINT JOSEPH'S UNIV. 1, 1 (last updated Aug. 2019), <https://sites.sju.edu/humanresources/files/2018/09/Policy-Prohibiting-Discrimination-Harassment-and-Retaliation.pdf>. Harassment is identified as "[v]erbal, written, visual, or physical conduct directed toward an individual due to that individual's Protected Category status that has the purpose or effect of unreasonably interfering with the individual's work or academic performance, or otherwise creating an intimidating, hostile, or offensive working or learning environment." *Id.* at 3. Harassing conduct includes negative stereotyping and "threatening, intimidating or hostile acts that relate to the Protected Categories." *Id.* at 4. SJU's Policy handbook specifically identifies "sexual orientation" and "marital status" as "Protected Categories under the law." *Id.* at 2-3.

Despite all these written protections, Koenke was subjected to repeated harassment as university officials told her to hide her lesbian identity and same sex marriage while working at the university. They asked her to hide who she is, forcing her to pretend to be heterosexual. SJU operates a policy of non-discrimination and anti-harassment which extends to "sexual orientation," and, according to Ms. Koenke's Complaint, it did so at the time of the alleged discrimination in this case as well. According to Ms. Koenke's Complaint, the University went further and even stated that sexual-orientation discrimination was actually considered a form of sex discrimination that violated Title IX. *See* Pltf.'s Compl., Dkt. No. 1, at para. 13 (quoting the University's 2013 Non-Discrimination and Anti-Harassment Policy, at p. 1).

SJU has taken many pro-LGBTQI stances. On September 18, 2019, for example, the university hosted a speech by Father James Martin, S.J., a Jesuit priest who is a well-known advocate of gay equality. *See* Jeffrey Martin, *Reaching out to Marginalized Catholics: James Martin, S.J., Calls for Compassion*, SAINT JOSEPH'S UNIV. (Sept. 18, 2019), <https://www.sju.edu/news/reaching-out-marginalized-catholics-james-martin-sj-calls-compassion>. According to SJU's report on the lecture, Father Martin said, "While there are many groups who feel excluded from the Church — African-Americans, women and the poor among them — . . . *LGBT people are the most marginalized today.*" *Id.* (emphasis added). "They feel like *lepers* in the Church," he added, reminding the audience that they should "[b]e like Jesus. If the Church listened to LGBT people, 90 percent of homophobia and prejudice would disappear." *Id.* (emphasis added).

SJU's Center for Inclusion and Diversity also touts that it "promotes an institutional climate in which all members of the community understand their value and feel welcomed and



respected.” *Inclusion and Diversity at SJU*, SAINT JOSEPH’S UNIV., <https://sites.sju.edu/oid/> (last visited Feb. 13, 2020).

Additionally, Amicus New Ways Ministry placed SJU on its “partial list of over 130 known ‘LGBTQ-friendly’ Catholic colleges and universities.” See *LGBT-Friendly Catholic Colleges and Universities*, NEW WAYS MINISTRY, <https://www.newwaysministry.org/resources/lgbt-friendly-colleges/> (last visited Feb. 13, 2020). It also praised SJU’s decision to include gender-inclusive housing in its housing program. See *Gender-Inclusive Housing Now An Option at Saint Joseph’s University*, NEW WAYS MINISTRY, <https://www.newwaysministry.org/2019/03/18/gender-inclusive-housing-now-an-option-at-saint-josephs-university/>, (last visited Feb. 18, 2020). There is also hope that Philadelphia’s new archbishop, Nelson Perez, will dialogue with LGBTQIs. Gay Philadelphians share the “optimism” of Amici about Perez’s appointment. Robert Shine, *LGBTQ Advocates Welcome Philadelphia’s New Archbishop as “Breath of Fresh Air,”* NEW WAYS MINISTRY (Feb. 6, 2020), <https://www.newwaysministry.org/2020/02/06/lgbtq-advocates-welcome-philadelphias-new-archbishop-as-breath-of-fresh-air/>. Fr. Martin called the new archbishop a “terrific choice.” *Id.*

In Ms. Koenke’s case, it has been reported that at Saint Joseph’s University both the University Student Senate and Peer Ministers in the Office for Campus Ministry have spoken out for the University to follow its mission of *Cura Personalis*, or care for the whole person, as follows:

The reported harassment of Noel Koenke shows that the university does not care for the whole person, says the Senate: ***“We are not caring for the whole person if we dictate who it is acceptable to love. We are not caring for the whole person if we ask people to hide a part of their identity from the world.”***

NEW WAYS MINISTRY (Feb. 24, 2020), <https://www.newwaysministry.org/2020/02/24/students-at-st-josephs-u-react-to-alleged-forced-resignation-of-lgbtq-employee/> (emphasis added).

*The Hawk*, SJU’s student newspaper, supported Koenke and acknowledged its unhappiness that she had been mistreated by the university. *Standing with our mission*, THE HAWK NEWSPAPER (Jan. 28, 2020), <https://www.sjuhawknews.com/standing-with-our-mission/>. In the paper’s words,

If the university is going to have a mission statement preaching inclusivity and caring for the whole person, then they have to live up to it. We have a responsibility, and an even greater responsibility as a Jesuit institution, to show dignity and respect to all people.

The Editorial Board stands with Koenke and the LGBT community. We urge the university to take a stand supporting the LGBT community and all marginalized people on campus, and call on the administration to act in accordance with the university’s Jesuit mission of inclusivity.

*Id.*

**III. THERE WAS NO RELIGIOUS JUSTIFICATION FOR MS. KOENKE'S ALLEGED HARASSMENT AS SHE HAS A CONSTITUTIONAL RIGHT TO A SAME-SEX CIVIL MARRIAGE RELATIONSHIP AND THERE IS NO RECOGNIZED DISTINCTION BETWEEN STATUS AND CONDUCT IN THE SEX/GENDER AND SEXUAL-ORIENTATION DISCRIMINATION CONTEXT.**

The Supreme Court of the United States has ruled that Ms. Koenke, along with everyone else, has a constitutional right to marry. That right is protected by the Due Process Clause of the Fourteenth Amendment. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). The Court explained that due process protects the “abiding connection between marriage and liberty.” *Id.* at 2599. Just as it had protected marriage by ending the ban on interracial marriage, and marriages based on women’s inequality, the Court recognized that same-sex couples also enjoy a constitutional right to marry. *Id.* The Court noted that “it would be contradictory ‘to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.’” *Id.* The Court explained, “[T]his Court’s cases and the Nation’s traditions make clear that marriage is a *keystone* of our social order.” *Id.* at 2601 (emphasis added); *see id.* at 2604 (“the right to marry is a *fundamental right* inherent in the liberty of the person.”).

The Constitution and statutory law cannot give individuals and institutions a right to harass or intimidate people because they are LGBTQI.

In fact, the United States Conference of Catholic Bishops (“USCCB”), has prohibited LGBTQI harassment explicitly since 2006 and possibly even before. *See Ministry to Persons with a Homosexual Inclination*, Guidelines for Pastoral Care 18 (2006) (“Church policies should explicitly reject unjust discrimination and harassment of any persons, including those with a homosexual inclination.”)

In contrast to what the SJU defendants have said in this lawsuit, Title IX does not give SJU a right to harass or intimidate. According to Title IX,

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. §1681. There is no way this statute gives defendants the right to harass someone for trying to live her constitutionally protected life.

The Supreme Court has ruled that Title VII “hostile environment” sexual harassment claims can take place between same sex individuals. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). “Title VII prohibits ‘discriminat[ion] . . . because of . . . sex’ in the ‘terms’ or ‘conditions’ of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.” *Id.* at 80. The Court “emphasized . . . that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances’

and ‘careful consideration of the social context in which particular behavior occurs and is experienced by its target.’” *Id.* at 81 [citations omitted].

It is not a sufficient answer for Defendant SJU to say Ms. Koenke was subject to disparate treatment because of the conduct or act of being in a same-sex marriage, rather than because of her sexual orientation, an identity or status, as Defendant SJU appears to do in its Motion to Dismiss. *See* Def.’s Mot. to Dismiss, p. 19. It is well-recognized, respectfully, that the law does not recognize such a distinction. Nor should the Court recognize any such distinction here.

For example, the Supreme Court of the United States recognized, in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), that, “[a] tax on wearing yarmulkes is a tax on Jews.” 506 U.S. 263, 270 (1993). The Court further recognized that “[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed.” *Id.*

This is also well-recognized in the case law when applied to a person’s sexual orientation and there is, therefore, no reason to make any such distinction in Ms. Koenke's case. *See Craig, et al. v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 370 P.3d 272, 282 (Colo. Ct. App., Div. 1 2015), *rev'd on other grounds by Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, 138 S. Ct. 1719 (June 4, 2018) (“Likewise, discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation.”). In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), the Supreme Court of the United States also upheld the legitimacy of requiring a religious group to adopt a non-discrimination policy based on sexual orientation to receive student organization status at a university. *Id.* at 689. The Court explained it was following the well-established rule of refusing “to distinguish between status and conduct in the [sexual orientation discrimination] context.” *Id.* at 689. It pointed out that the religious group, “CLS[,] contends that it does not exclude individuals because of sexual orientation, but rather ‘on the basis of a conjunction of conduct and the belief that the conduct is not wrong.’” *Id.* The Court, however, held that “[its] decisions have declined to distinguish between status and conduct in this context.” *Id.* (internal citation omitted).

*Martinez* also cited *Lawrence v. Texas* for this proposition, with its parentheticals explaining how sexual orientation discrimination arises.

*See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.”); *id.* at 583 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”).

*Id.* at 689, *cf. Attorney General v. Desilets*, 418 Mass. 316, 320 (1994) (granting summary judgment over landlords’ religious objections and ruling that the defendant discriminated based



on marital status, rather than conduct, when refusing to rent to unmarried persons living in a sexual relationship).

**IV. NEITHER THE MINISTERIAL EXCEPTION NOR THE CONSTITUTION'S RELIGION CLAUSES BAR MS. KOENKE'S CLAIMS FOR A NON-TANGIBLE SEXUALLY-HOSTILE WORK ENVIRONMENT UNDER TITLE IX.**

SJU argues that this case is barred by the ministerial exception. However, the Ninth Circuit ruled that sexual harassment cases are not barred by the ministerial exception. *See, e.g., Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 956, 853 (9th Cir. 2004) (stating that the plaintiff could have “redress for sexual harassment and retaliation without attaching liability to ministerial employment decisions protected by the First Amendment.”); *Bollard v. California Province of the Soc’y of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999) (reversing the district court’s decision that the ministerial exception barred the plaintiff’s sexual harassment claim). An Illinois district court clarified the analysis for ministerial exception with respect to employment actions:

What the analyses show is that when a minister brings a claim that does not challenge a tangible employment action, then whether the First Amendment bars the claim depends on a *case-by-case* analysis on the nature of the claim, the extent of the intrusion on religious doctrine, and the extent of the entanglement with church governance required by the particular litigation.

*Demkovich v St Andrew the Apostle Par.*, 343 F. Supp. 3d 772, 784–85 (N.D. Ill. 2018) (emphasis added); *see also Garrick v. Moody Bible Institute*, 2019 WL 4674570, at \*9 (N.D. Ill. Sept. 25, 2019) (“[C]hurch autonomy doctrine and ministerial exception did not apply to antagonistic treatment of female faculty members by male colleagues and inconsistent treatment of female faculty members by administration with respect to job duties, employment requirements, and performance reviews” even though the defendant raised the exception).

It is clear that Ms. Koenke is alleging harassment under the *Bollard* standard. That is the nature of this claim, which complains about the treatment Koenke received at SJU. Specifically, Ms. Koenke’s Complaint states she suffered “hateful and harassing conduct” based on allegedly continuously being forced to hide her sexual orientation at work. *See* Pltf.’s Compl., Dkt. No. 1, para. 13. She explains that she could not be open at work, and that “she could not always be fully open outside of work about Plaintiff’s employment, or relationship with and marriage to a person of the same sex (female), on account of Defendant’s conduct.” *See id.* at para. 16(v). Ms. Koenke alleges her supervisor sat her down and, apparently in an effort to have her wipe any online presence that suggested she was lesbian, wanted Ms. Koenke to “delete her Facebook account,” “create a new Facebook account,” and not add any of the University’s employees to be her Facebook friends. *See id.* at para. 16(a). This case presents a situation where the Plaintiff alleges the hostile environment ultimately caused her to attempt suicide. *See id.* at para. 16(k). Ms. Koenke appears to have subsequently requested that the conditions on her sexual identity be lifted, and when the Defendant SJU refused, Ms. Koenke terminated her employment. *See id.* at para. 16(hh)–(jj).

Ms. Koenke claims that SJU voluntarily hired Ms. Koenke knowing about her sexual orientation. *See id.* at para. 15. This Court cannot and should not distinguish between status and conduct for the reasons explained above. It is clear, therefore, that SJU and Ms. Koenke, at this stage of the case, conflict in their recitation of the facts, and dismissal is not appropriate.

Furthermore, Ms. Koenke did not advocate for same-sex marriage or gay rights. She did not claim any religious or other significance to her marriage beyond it being a civil marriage relationship just like her heterosexual co-employees' relationships. She simply entered into a civil marriage relationship and she alleges she was harassed based on this fact. Ms. Koenke also directly compares herself to a similarly situated individual who was not treated the same even though this heterosexual co-employee was marrying someone of the opposite sex. *See* Pltf.'s Compl., Dkt. No.1, para. 16(e). Disparate treatment and, as Ms. Koenke claims, harassment of this nature, would be actionable outside the ministerial exception. *See* Pltf.'s Br. in Response to Mot. to Dismiss, Dkt No. 8, pp. 15-16.

We cannot conceive of a sincere reason to treat Ms. Koenke like this. It is our experience, in fact, that the opposite is true, and the conduct complained of by Ms. Koenke is contrary to the teachings of the Catholic Church and the USCCB regarding how individuals, including LGBT individuals, are to be treated. *See supra.* In an interview, Pope Francis said, "A person once asked me . . . if I approved of homosexuality. I replied with another question: 'Tell me: when God looks at a gay person, does he endorse the existence of this person with love, or reject and condemn this person?' We must always consider the person." Antonio Spadaro, *A Big Heart Open to God. An interview with Pope Francis*, AMERICA MAGAZINE (Sept. 30, 2013), <https://www.americamagazine.org/faith/2013/09/30/big-heart-open-god-interview-pope-francis>.

Ms. Koenke therefore advances a narrow claim not covered by the ministerial exception. Ms. Koenke's argument that her sexually-hostile work environment claim should proceed is valid. She argues that harassment is not tied to a sincere or direct religious justification. We write to express that, at this stage of the case, this view is plausible in light of what we know as LGBTQ+ Catholics.

It is important to emphasize that SJU takes a completely different stance publicly than it does in this litigation. We therefore write to acknowledge SJU's alleged public-facing commitment to LGBTQI equality for the reasons explained above. SJU's statements about the Roman Catholic Church's mission and teachings regarding LGBTQI people in this lawsuit does not appear to be this University's position on its religious mission or teaching regarding LGBTQI people publicly or even this University's recent statements about this case in particular which have been made publicly outside the litigation.

The University recently hosted a speech by Father James Martin, and is regarded by Amicus New Ways Ministry as one of the members of its "partial list of over 130 known 'LGBTQ-friendly' Catholic colleges and universities." *See* Jeffrey Martin, *supra*; *LGBT-Friendly Catholic Colleges and Universities*, *supra*. SJU includes gender-inclusive housing in its housing program, actively promotes LGBTQIA acceptance publicly, has multiple LGBT affinity groups at the school, operates a policy of non-discrimination and anti-harassment which extends to "sexual orientation," and it did so at the time of the alleged discrimination in this case.



*Saint Joseph's University Policy Prohibiting Discrimination, Harassment and Retaliation, supra.* At the time of the alleged discrimination, SJU went further and even stated that sexual-orientation discrimination was actually considered a form of sex discrimination that violated Title IX. *See* Pltf.'s Compl., Dkt. 1, at para. 13.

The Editorial Board of the University's student newspaper "condemn[ed] St. Joe's discriminatory actions" in this very case, as inconsistent with its mission and teachings. The Editorial Board stated instead that it must "stand with our mission" in supporting people who are LGBTQ+ instead. *See Standing with our mission, supra.* In fact, the student newspaper for SJU explained publicly what Amici herein wish to explain to the Court: "Being told to use discretion regarding her marriage is an overt form of harassment and discrimination that directly contradicts the Jesuit ideals our university is founded upon. The university's treatment of Koenke raises questions about our commitment to inclusivity and highlights the contradiction between the university's Jesuit mission and its actions...Catholic doctrine is not an excuse to overtly discriminate and harass a person. Catholicism, the Jesuit tradition and our university mission all emphasize the importance of inclusivity." *See supra.* In short, the article concluded, "If the university is going to have a mission statement preaching inclusivity and caring for the whole person, then they have to live up to it." *See id.*

Further, in a second news article outside of this litigation which was published recently about this case, a spokesperson for SJU was further quoted, on the record, as stating publicly: "St. Joseph's University did not discriminate against Noel Koenke. Quite the contrary, we treated her with dignity and respect, which is consistent with our mission and ethos,' [Gail] Benner[, University Spokesperson], said, in an email. 'Saint Joseph's is a mission-driven university committed to offering an inclusive environment for *all* students and *employees*, including members of the LGBTQ community.'" *St. Joseph's University Urges Judge to Dismiss Lesbian's Lawsuit*, (Dec. 11, 2019), <http://www.epgn.com/news/local/15550-st-joseph-s-university-urges-judge-to-dismiss-lesbian-s-lawsuit> (emphasis added).

Given these facts, together with the fact that Ms. Koenke's Complaint alleges that she was offered the job and Defendant knew she was gay, the University's position here is untenable. Ms. Koenke's narrow argument and claim would also in no way imperil the legitimacy of the Catholic Church in our opinion. Ms. Koenke's claim, or "strains" of it as she alleges, can be adjudicated based on purely neutral principles of non-discrimination and anti-harassment law.

Amici also direct this Court to two persuasive decisions on this subject which we believe further support Ms. Koenke's "strains" argument under *Bollard*. *See generally E.E.O.C. v. Fremont Christian Sch.*, 781 F.2d 1362, 1364 (9th Cir. 1986); *E.E.O.C. v Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1279 (9th Cir. 1982). In both of these cases, the Ninth Circuit permitted Title VII claims against religious organizations based on allegations that the female plaintiffs were compensated differently than similarly situated male co-employees. *Fremont Christian Sch.*, 781 F.2d at 1364-66; *Pacific Press*, 676 F.2d at 1274. Even though the defendant-employers offered evidence that they based such decisions on their religious beliefs, the courts did not allow the religious argument to win. *Fremont Christian Sch.*, 781 F.2d at 1366 ("While the language of [the statute] makes clear that religious institutions may base relevant hiring

decisions upon religious preferences, ‘religious employers are not immune from liability [under Title VII] for discrimination based on . . . sex . . . .’” (quoting *Pacific Press*, 676 F.2d at 1276)).

Furthermore, the relatively narrow scope of the ministerial exception, and the Supreme Court’s favorable pro-LGBTQI ruling in *Martinez*, shed light on what the scope of the Religion Clauses is regarding neutral laws of general applicability. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (university does not receive tax-exempt status for ban on interracial dating even where the university articulates an alleged religious justification for the discrimination); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (noting that “the Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race and prohibitions on racial discrimination are precisely tailored to achieve that critical goal,” and thus rejecting “the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction”); *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (finding compelling interest in eradicating sex discrimination despite challenges based on constitutional and expressive association rights raised by all-male civic organization).

In the context of the ministerial exception, *Bollard* makes clear that the ministerial exception does not apply to non-tangible sexually-hostile work environment claims. Therefore, at this stage of the case, Ms. Koenke’s non-tangible sexually-hostile work environment claims should move forward.

## V. CONCLUSION

We urge this Court to listen to the voices of LGBTQI Catholics, who understand the suffering of lesbian employees like Ms. Koenke. We ask this Court to deny Defendants’ Motion to Dismiss and to give Ms. Noel Koenke her justly deserved day in court.

Respectfully submitted,

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*On behalf of Amici Curiae*

**CERTIFICATE OF SERVICE**

I, LESLIE C. GRIFFIN, ESQUIRE, Attorney for Amici New Ways Ministry, DignityUSA, TransCatholic, and Dr. Arthur Fitzmaurice, for Plaintiff, Noel Koenke, do hereby certify that on this \_\_th day of March, 2020, Amici's Motion for Leave to File an Amicus Brief and the Amicus Brief, and accompanying documents, were filed using the Eastern District of Pennsylvania's ECF system, through which these documents are available for viewing and downloading, causing a notice of electronic filing to be served upon all counsel of record.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, JUSTIN F. ROBINETTE, ESQUIRE, Attorney for Plaintiff, Noel Koenke, do hereby certify that on this 5<sup>th</sup> day of March, 2020, the foregoing Motion for Leave to File an Amicus Brief, and accompanying documents, were filed with the Court, on behalf of Counsel for Amici Curiae, Leslie C. Griffin, Esquire, and were e-mailed upon all Counsel of Record, via e-mail to KDerewicz@littler.com and MRRomeo@littler.com, on this same date. Attorney Griffin's Application for Admission Pro Hac Vice is being filed on this same date with payment of the applicable admission fee. Both the Application Pro Hac Vice and the Motion for Leave to File Amicus Brief will be e-mailed to all Counsel of Record including Opposing Counsel for Defendant via the e-mail addresses set forth above, and to Attorney Griffin via e-mail to leslie.griffin@unlv.edu, on this same date.

Respectfully submitted,

**THE LAW OFFICES OF ERIC A. SHORE, P.C.**

DATED: 03/05/2020

  
JUSTIN F. ROBINETTE, ESQUIRE

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