

Nos. 21-463 & 21-588

In the Supreme Court of the United States

WHOLE WOMEN'S HEALTH, ET AL.,
Petitioners,

v.

AUSTIN REEVE JACKSON, ET AL.,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF TEXAS, ET AL.,
Respondents.

*ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**BRIEF AMICUS CURIAE OF
THE BECKET FUND FOR RELIGIOUS LIBERTY
IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

May private parties interpose constitutional and civil rights defenses when they are sued by other private parties?

INTEREST OF THE *AMICUS*¹

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm that protects the free expression of all religious faiths. Becket has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. Becket has long defended the rights of private religious defendants sued by other private parties, in numerous cases in this Court and in the lower courts. Becket offers this brief to emphasize that defendants in civil actions should be able to raise all available constitutional and statutory civil rights defenses.

ARGUMENT

When private parties hale other private parties into court in violation of their constitutional or civil rights, courts can and do intervene to stop the violation. See *Whole Woman's Health v. Smith*, 896 F.3d 362 (5th Cir. 2018), cert. denied sub nom. *Whole Woman's Health v. Texas Catholic Conf. of Bishops*, 139 S. Ct. 1170 (2019) (quashing subpoena that intruded on internal church affairs). Indeed, because many federal and state statutes empower private parties to sue religious organizations, religious defendants have frequently had to raise constitutional and civil rights defenses in such cases, including in cases where *Amicus* has acted as counsel. See, e.g., *Hossanna-Tabor Evangelical Lutheran Church & Sch. v.*

¹ *Amicus* states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

EEOC, 565 U.S. 171 (2012) (ADA and Michigan state law claims); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (ADEA and ADA claims); *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968 (7th Cir. 2021) (en banc) (Title VII and ADA claims); *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3d Cir. 2018) (ministerial contract claims); *Belya v. Kapral*, No. 21-1498 (2d Cir. pending) (defamation claims); *In re Diocese of Lubbock*, 624 S.W.3d 506 (Tex. 2021) (cert. filed, No. 21-398) (defamation claims).² And whether the pecuniary rewards in these cases are denominated “bounties” or not, the incentives are the same: private parties can profit from suing religious defendants.

Religious defendants rightfully interpose constitutional and civil defenses to such private-party actions. Thus, when Whole Woman’s Health subpoenaed the Catholic bishops of Texas, the bishops successfully raised constitutional and civil defenses to defeat the attempt. Indeed, the Court has repeatedly encouraged raising such defenses where applicable. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) (religious defendants can raise First Amendment and RFRA defenses to private Title VII claims).

Here, whatever the ruling on the specific legal mechanism employed by Texas, one truism remains: turnabout is fair play. When Whole Woman’s Health

² Other private-party lawsuits against religious people abound and often reach this Court. See, e.g., *Dignity Health v. Minton*, No. 19-1135 (cert. filed March 13, 2020) (state sex and gender identity discrimination claims); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719 (2018) (state sexual orientation discrimination claims).

is sued by a private party, it ought to be able to raise whatever constitutional defenses it has, just like religious defendants already have done in hundreds of lawsuits around the country.

To be sure, on a proper understanding of the constitution, Whole Woman's Health's constitutional defense would be weak. As we have stated elsewhere, *Roe* and *Casey* were wrongly decided, have done grave harm to religious liberty, and ought to be overruled. See Becket Fund Br., *Dobbs v. Jackson Women's Health Org.*, No. 19-1392 (filed July 27, 2021). But once Whole Woman's Health is sued by a private party, it ought to have the chance to raise those defenses.

The Court should therefore affirm that private party defendants can raise available constitutional and civil rights defenses, such as the Free Exercise Clause or RFRA, once they are sued by other private parties.

CONCLUSION

The Fifth Circuit's decisions should be affirmed.

Respectfully submitted.

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