

No. 26-196

IN THE
Supreme Court of the United States

SHERRY DETWILER,

Petitioner,

v.

MID-COLUMBIA MEDICAL CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF *AMICUS CURIAE*
LORICA INSTITUTE FOR FREEDOM
OF EXPRESSION AND RELIGION
IN SUPPORT OF PETITIONER**

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I. Identity and Interest of the *Amicus*, Prior Notice to Counsel of Record of Intent to File

Amicus curiae Lorica Institute for Freedom of Expression and Religion is a not-for-profit corporation incorporated under the laws of Missouri. Its principal mission is to vindicate—by education, legal advocacy, and respectful participation in public debate—the rights of free expression and free exercise of religion guaranteed by the Constitution of the United States and other constitutional and positive law of the United States and her several federated states.¹

On September 3, 2026, undersigned counsel by email informed counsel of record for both petitioner and respondents that Lorica intended to file this brief in support of the petition to grant a writ of *certiorari*.

1. This brief has been authorized by Lorica’s governing agents. No counsel for any of the parties, nor any person or entity outside of Lorica and its corporate agents, has participated in the preparation or funding of this brief. It has been prepared solely by undersigned counsel. All counsel of record received timely notice of this filing pursuant to Supreme Court Rule 37.2.

II. Summary of The Argument: The contours of the statutory phrase “because of religion” in Title VII comprehended—at its adoption and currently—the use of moral decision making by a conscience informed by prayer and factual investigation. Free-form judicial invention of “tests” to circumscribe that phrase with judge-preferred linguistic boundaries to eliminate elements like those, what the panel majority and *en banc* majority of the Ninth Circuit did here, is improper.

The petition in this case comes after the dismissal under Federal Rule of Civil Procedure 12(b), with prejudice, of a complaint alleging that the petitioner-plaintiff’s, Sherry Detwiler’s, firing by her employer because of her objections to one form of testing for COVID-19 infection was not religious discrimination under Title VII – even though her employer’s *grant* of an exemption from a companion vaccination requirement *was* a religious “accommodation” of the very same scruple under Title VII.²

2. This contradiction is stated explicitly and unironically in the majority *Detwiler I* opinion early on:

[Ms.] Detwiler, relying on sources she found online, determined that COVID-19 vaccines were created from fetal cell lines [from an aborted fetus] and contained “neurotoxins, attenuated viruses, carcinogens, chemical wastes, and other potentially harmful substances.” She then informed MCMC that her Christian beliefs against ... the introduction of harmful substances into her body conflicted with the vaccine requirement. MCMC approved Detwiler’s request for a religious exemption from vaccination.

156 F.4th at 890-891. But because of that same research:

A Ninth Circuit panel affirmed that dismissal, over the dissent of Judge Van Dyke, in *Detwiler v. Mid-Columbia Medical Center*, 156 F.4th 886 (2025) (*Detwiler I*). The *en banc* panel convened to consider Ms. Detwiler’s petition for rehearing *en banc* denied rehearing. But eight members of the *en banc* panel (Judges Forrest, Tung, Nelson, Bress, Bumatay, Van Dyke, Collins, and Lee) dissented from that denial, with Judges Forrest and Tung writing comprehensive opinions explaining those dissents. *Detwiler v. Mid-Columbia Medical Center*, 172 F.4th 1072 (2026) (*Detwiler II*).

The issue was framed by Title VII’s explicit prohibition of workplace discrimination “because of ... religion.” 42 U.S.C. 2000e-2(a)(2). Though Title VII has never included a true definition of the word “religion” (in the

[Ms/] Detwiler requested a further accommodation, this time seeking an exemption from the weekly antigen testing [that employed ethylene oxide, EtO, swabs inserted into her body]. Detwiler informed MCMC that she found “multiple sources indicating that EtO is a carcinogenic substance.” In her second accommodation request, Detwiler [again] cited to her belief that her body is a “temple of God,” stating:

It is against my faith and my conscience to commit sin ... As part of my prayers, I have asked God for direction regarding the current COVID testing requirement [with EtO]. As I have prayed about what I should do, the Holy Spirit has moved on my heart and conscience that I must not participate in COVID testing that causes harm.

Id. at 891. Respondent, and eventually the majority of the *Detwiler I* panel, characterized that second objection to testing—substantively identical to her first objection to vaccination—as “secular” and so not protected by Title VII.

literal sense of “definition,” *videlicet*, to put linguistic bounds of meaning around the word), Congress in 1972 did insert an unbounding instruction in the “Definitions” section of Title VII commanding that the word “‘religion’ includes all aspects of religious observance and practice, as well as belief.” 42 U.S.C. 2000e(j).

Given that Congressional command to make the breadth of the term “religion” as expansive as possible, it is passing strange, and wholly illogical, that while both of Ms. Detwiler’s requests for accommodations are based on the same religious scruples, one (the vaccine accommodation request) fits within Title VII’s protections of religious belief, but the other (the testing accommodation request) is too “secular” to fit. That strange illogic obviously was not based on any jurisprudentially useable principle. It was pure dissembling from Ms. Detwiler’s employer when invoked to fire her, and it became judicial casuistry when accepted by the district court and Ninth Circuit in the decisions below.

The judicial casuistry begins with this portentous observation from the *Detwiler I* panel as it begins its religious-vs-secular analysis:

“The Ninth Circuit has not yet endorsed a test for determining the nature, whether religious or secular, of a belief underlying a Title VII claim. That said, cases from the First Amendment context, guidance from the Equal Employment Opportunity Commission (‘EEOC’), and a slew of district court cases [from within the Ninth Circuit] offer a logical approach.”

Detwiler I, 156 F.4th at 982.

That “slew” of authority in fact offers no logic, and is not really a slew, either. What the district court cases (from the federal districts of Washington and Oregon, mostly) rely on is a metastasizing growth of judicial misbehavior originally created by the Third Circuit in the 1980s that defies this Court’s contemporaneous, consistent, and increasingly urgent command to lower courts to stop the freeform judicial “test-creation” exercise when discerning the meaning of simple terms in positive law.³ The required method of analysis is to find to the scope and meaning of controlling statutory text according to the original public understanding at the time of the text’s promulgation.

The Ninth Circuit’s failure to deploy original public understanding of the controlling statutory term here, or even acknowledge its relevance, is sufficient reason to reverse and remand for proper reconsideration. But because the original public understanding—clearly discernible from roughly contemporaneous source material—was that the practice of many, probably most, Christian religions included a requirement that a religiously formed conscience must inform itself of all relevant facts, through secular sources when necessary, before making any decision with moral implications,

3. There is nothing the EEOC Guidance supporting the *Detwiler I* majority on this issue, at all. Judge Van Dyke’s dissent ably invokes, quotes, and analyzes EEOC Guidance to press the conclusion, contrary to the *Detwiler I* majority holding, that “[t]here is nothing improper under Title VII about an employee objecting to an employer’s mandate on the grounds that it both violates her religious beliefs *and* is unhealthy. What is improper is for a court to parse a sincere religious objection into separate ‘religious’ and ‘secular’ elements and then dismiss the complaint because the secular part is not religious.” 156 F.4th at 901.

the dismissal of Ms. Detwiler’s complaint was clearly improper. Remand to the Ninth Circuit with instruction to reverse the District Court’s dismissal is the proper course.

III. Argument

- a. **When discerning the meaning of language in federal positive law, this Court commands over and over and over, it is obligatory for federal courts to inquire what the original public understanding of the language was at the time of enactment; no court has yet even attempted that about the phrase “because of religion” in Title VII, but the Third Circuit (and now the Ninth here) have explicitly rejected it as a method of analysis.**

A federal court may not just assume a meaning for a word used in the Constitution or a federal statute. If there is a dispute about the scope or meaning of a term in such positive law, and the dispute is not settled by the text itself, the court must try to ascertain the scope or meaning according to the contemporaneous understanding at the time of the text’s promulgation. “If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives.” *Bostock v. Clayton County*, 590 U.S.644, 654-655 (2020) (analyzing the meaning of “sex” in Title VII); accord *Perrin v United States*, 44 U.S. 37, 42 (1979) (“unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning ... Therefore, we look to the ordinary meaning of the term ... at the time Congress enacted the statute”); cf. *Consumer*

Financial Credit Bureau v. Community Financial Services Association, 601 U.S. 416, 441 (2024) (approving analysis of the original meaning of “appropriation” in the Appropriation Clause of the Constitution because its “conclusion emerges from the Clause’s text, the history against which that text was enacted, and congressional practice immediately following ratification”) (quotation cleaned up) (Kagan, J., concurring).

Notwithstanding this settled doctrine, the Third Circuit has long gone its own way in adjudicating cases invoking positive law—the Constitution and federal statutes—that prohibits discrimination on the basis of religion. “Religion” is what judges say it is in the Third Circuit, and now the Ninth, not what the citizenry or Congress understands it to mean.

The decision that said this first is *Africa v. Commonwealth of Pennsylvania*, 662 F.2d 1025 (1981), a Free Exercise Clause case involving a Pennsylvania inmate’s demand for an idiosyncratic diet conforming to his professed (also idiosyncratic, and probably pretextual) religion. Rather than analyze what “religion” was understood to mean and comprehend at the time of the ratification of the First Amendment, the Third Circuit created its own definition of “religion” from whole cloth:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

662 F.2d at 1032.

This, characterized most charitably, is gibberish. Can any court, or any human, analyze and ponder whether a belief touches “imponderable matters,” and does so “comprehensively” and not merely as an “isolated teaching”? Is the court so charged, then, to ponder whether the imponderable preponderates?

Rather than let this linguistic monster die ungrieved, however, a later panel of the Third Circuit adopted it as the test also to determine whether or not an employee’s request for accommodation is truly “because of religion” under Title VII. *Fallon v. Mercy Catholic Medical Center*, 877 F.3d 487, 491 (3d Cir. 2017). And *Fallon* adopted this as Title VII law, moreover, in a case involving an employee’s request to be exempted from a workplace flu vaccination requirement. *Id.*, 877 F.3d at 488.

In the aftermath of the COVID shutdowns, firings, and religious discrimination lawsuits, the American employment-defense bar seized *Fallon* as a plausibly useful authority, but was rebuffed by almost all circuit courts where a not-religious-enough challenge to a Title VII accommodation request was raised. *See, e.g., Bazinet v. Beth Israel Lahey Health, Inc.*, 113 F.4th 9 (1st Cir. 2024); *Barnett v. Inova HealthCare Servs.*, 125 F.4th 465 (4th Cir. 2025); *Wright v. Honeywell International, Inc.*, 148 F.4th 779 (5th Cir. 2025); *Lucky v. Landmark Med. of Mich., P.C.*, 103 F.4th 1241 (6th Cir. 2024); *Passarella v. Aspirus, Inc.*, 108 F.4th 1005 (7th Cir. 2024).

The Third Circuit, however, stuck to its *Africa-Fallon* guns in an unpublished decision—*Gatto v. Johnson & Johnson, Inc.*, No. 24-1992, 2025 WL 816732 (3d Cir. Mar. 14, 2025)—and the Ninth Circuit then followed it here in

Detwiler I, refused *en banc* to reconsider in *Detwiler II*, and a full blown circuit split was born.

Bostock warned, and warned precisely about the text of Title VII, that judicial free-wheeling that presses invented “tests” and mock-scholarly “definitions” onto statutory text “risk[s] amending statutes outside the legislative process reserved for the people’s representatives.” 590 U.S. at 654-655. *Africa*, *Fallon*, and *Detwiler* further demonstrate that such judicial free-wheeling can also lead to the illogic of charging judges to ponder whether things imponderable are preponderable enough to become legally recognizable. Or to making otherwise identical things—like Ms. Detwiler’s two requests for accommodation here—somehow opposite things, both “religious” if it can be used as a sop to an employee who balks at known risks of a vaccine, but purely “secular” if she balks at risks of a medical procedure, too. See note 2 above.

Sticking to the command of this Court to ascertain original public understanding of words and phrases in positive law may not always avoid vexing disagreement—as illustrated most recently by the dueling majority and dissenting opinions in *Trump v. Barbara*, No. 25-365, 609 U.S. — (June 30, 2026), all employing original public understanding to analyze the meaning of “under the jurisdiction thereof” in the Fourteenth Amendment—but it is undoubtedly a command that lower federal courts must obey. And had the Ninth Circuit obeyed in this case, it would not have affirmed dismissal of Ms. Detwiler’s complaint at the pleading stage, as the brief treatment in the section below shows about what was commonly understood to be within the comprehension of the term “religion” and the use of a well-formed “religious” conscience.

- b. Public understanding at the time of enactment and amendment of Title VII has comprehended that the application of a factually-informed conscience to matters of moral concern is quintessentially an exercise undertaken “because of religion.”**

Since at least the time that Thomas Aquinas lectured in Paris in the thirteenth century, Roman Catholic moral theology (or at least the Thomistic strain of it that has now triumphed its way into the Catechism of the Catholic Church) has taught that an individual’s informed, personal moral conscience *must* be consulted and obeyed even if it seems to contravene a social consensus of moral judgment, even a consensus within the church. *See, e.g.,* John Kavanaugh, S.J., Ph.D., “Uninformed Conscience,” *America, The Jesuit Review*, June 10, 2010, (“Conscience is a particular kind of judgment by which we [each] apply our knowledge of good and evil...Aquinas points out that when I make such a judgment, I should follow it...[but] we base our moral judgments not only on principles but on evidence, data and information...If I refuse to look at evidence or information in forming my moral judgment, I am actually refusing to act morally.”) And that doctrine, commonly now called “the primacy of conscience” is codified in the now-universal, current Catechism of the Catholic Church, formally promulgated in 1992: “A human being must always obey the certain judgment of his conscience. If he were to deliberately act against it, he would condemn himself.” English Translation of Catechism of the Catholic Church, (U.S. Catholic Conference, Inc. 1997), §§1790 and 1800; *cf.* J. Delany, “Ignorance,” in *The Catholic Encyclopedia* (Robert Appleton Company 1910)(online at www.newadvent.org/cathen/07648a.htm) (last visited

September 13, 2026) (“vincible” ignorance—that which can be cured by human faculties—is not exculpatory and must be cured by diligent inquiry before moral action is taken).

This, in broad principle, is also the three-legged stool of moral decision making in modern Anglican morality, too: “The threefold sources of authority in Anglicanism are scripture, tradition, and *reason*. . . Reason is understood to include the human capacity to discern the truth in both rational and intuitive ways. It is not limited to logic as such. *It takes into account and includes experience*” and acquired knowledge. Armentrout and Slocum, *An Episcopal Dictionary of The Church* (2000), entry for “Authority, Sources of (in Anglicanism),” (emphasis supplied). The *Dictionary* attributes this doctrine to “the theology of Richard Hooker (c. 1554-1600). It may be further traced to the teaching of Thomas Aquinas (1225-1274).” *Ibid.*

The substance of that doctrine is part of modern Methodist moral theology, too, articulated most famously in John Wesley’s Sermon 105:

Conscience, then, is that faculty whereby we are at once conscious of our own thoughts, words, and actions; and of their merit or demerit, of their being good or bad . . . be sure to obey it at all events; continually listen to its admonitions, and steadily follow them. Whatever it directs you to do, according to the word of God, do.

John Wesley, “Sermon 105 – On Conscience,” *The Sermons of John Wesley, 1872 Edition*, ¶¶3 and 18 (electronic

reprint at wesley.nnu.edu/john-wesley/the-sermons-of-john-wesley-1872-edition/sermon-105-on-conscience) (last visited September 13, 2026).

Judge Forrest’s dissent from the Ninth Circuit’s refusal to reconsider *Detwiler I en banc* adverts to this, too—citing the *Summa* of Aquinas itself as an example of a Christian demand for empirically informed moral decision-making, as well as the moral theology of John Calvin as a contrast⁴—but her admirable historical erudition omits the point that is more important to the jurisprudential point at issue here: The doctrine of a well-formed (and secularly *informed*) conscience in Christian moral theology was not a forgotten relic at the time of adoption of Title VII. It was a live proposition whose

4. “John Calvin described his view of God’s influence on man,” she wrote, “this way:

‘that God . . . inclines and moves the wills of men even in external things, and that their choice is not so free, but that its liberty is subject to the will of God. That your mind depends more on the influence of God, than on the liberty of your own choice.’ John Calvin, 1 *Institutes of the Christian Religion* 283 (John Allen trans., 6th ed. 1921). And Thomas Aquinas believed that divine revelation and human reason work in concert. *See, e.g.*, St. Thomas Aquinas, 1 *The Summa Theologica of Saint Thomas Aquinas* 2–3 (Fathers Eng. Dominican Province trans., 2d ed. 1920). These are matters on which there are divergent doctrines and opinions. The point is, imposing a concrete correlation between the immediate source of information and the source of motivation for action, as the court did here, misapprehends many beliefs and believers.

Detwiler II, 172 F.4th at 1079.

historical pedigree and religious foundation were, and are, available to serious Christian believers and even merely religiously curious Americans. It has been given serious treatment in widely available sources, written *in English*, throughout the latter half of the twentieth century and until today. All of the sources cited by Judge Forrest, and the authorities cited here, are modern English translations or modern English exegesis of that doctrine from the twentieth and twenty-first centuries.

The original public understanding of the phrase “because of ... religion” in Title VII undoubtedly comprehends Ms. Detwiler’s use of secular material to properly inform her sincere pursuit of moral, Christian decision making. It was error for the Ninth Circuit not to acknowledge this, and an even more grievous error not even to see that that historical fact is relevant.

IV. Conclusion

For all of these reasons, *amicus*, the Lorica Institute agrees with petitioner that the petition for writ of *certiorari* should be granted. *Amicus* respectfully requests that the Question Presented by the petition be modified to include the question whether consultation of secular, non-religious information in service of religious, moral decision making is within the breadth of activity described by the phrase “because of ... religion” in Title VII.

Respectfully submitted,

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