No. 24-3789

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BROWN, ET AL.,
Plaintiffs-Appellants,

v.

ALASKA AIRLINES, INC., ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 2:22-cv00668-BJR

BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL LAW IN SUPPORT OF APPELLANTS

John Eidsmoe
Counsel of Record
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
eidsmoeja@juno.com
talmadge@morallaw.org

October 16th, A.D. 2024

Counsel for *Amicus Curiae*

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Under Rule 26.1 and Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the *amicus* Foundation for Moral Law, Inc., certifies that it is not a subsidiary or affiliate of a publicly owned corporation.

/s/ *John Eidsmoe*

John Eidsmoe
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

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INTEREST OF THE *AMICUS*[1]

Amicus curiae Foundation for Moral Law ("the Foundation") is a national public-interest organization based in Alabama dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes Alaska Airlines has violated the Plaintiffs-Appellants' First Amendment rights to free speech and free exercise of religion and to an accommodation of their religious beliefs and practices under Title VII of the Civil Rights Act.

ARGUMENT

Don't ask a question if you don't want an honest answer.

But that is exactly what Alaska Airlines has done.

The Plaintiffs-Appellants are two Christian flight attendants, Plaintiffs Lacey Smith (Lacey) and Marli (Marli) Brown. Marli has been a flight attendant for eight years with an outstanding record, 78 kudos (compliments)

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[1] *Amicus* has received consent from Appellants to file this brief; *Amicus* requested consent from Appellees but has not received it at the time of this brief's filing. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

from customers, and one unsubstantiated complaint. Lacey had an excellent record for six years, with 58 "kudos" and no guest concerns. [2]

Alaska Airlines (the Company) has maintained internal employee-only communication network, Alaska's World, a website for posting information of interest to its personnel and invites its personnel to comment on the matters posted on the site. Until 2021, the Company appeared to invite employees to post comments critical of Company policies without fear of retaliation.

But on February 25, 2021, the Company posted a notice that it intended to take a public position in favor of the so-called Equality Act, an act that the Company must have known is both highly controversial and has incurred the opposition of many conservative Christians.

Lacey simply asked, "As a company, do you think it's possible to regulate morality?" Marli's post was more detailed, asking about the Equality Act's effect on women and girls who might be endangered by transgendered men entering their restrooms and dressing rooms, and raising other questions.

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[2] In 2020, Lacey had been suspended for 30 days for creating a petition titled "Depoliticizing Alaska Airline" in which she objected to the Company's support of Black Lives Matter during the 2020 riots. The Company says this played no role in its decision to terminate her; however, it shows a pattern of the Company's discrimination against those who hold conservative Christian views.

The Company responded to their posts, first by meeting with them, and then by firing them. Lacey and Marli filed grievances alleging, among other things, religious discrimination; the Company denied the grievances and refused to grant them a Last Chance Agreement to be reinstated with certain conditions. The Union refused to represent Lacey and Marli at arbitration, so Lacey and Marli timely filed EEOC charges, state charges, and a Complaint.

I. Lacey and Marli's claims of religious discrimination are properly before the Court.

The District Court dismissed Lacey's and Marli's claims, partly because the Court concluded they had not been raised as religious claims. *Amicus* respectfully disagrees.

First, this Court held in *Heller v. EBB Auto Co.,* 8 F2d 1422, 1439 (9th Cir. 1993) that the employee need not specifically inform the employer that his/her objection to a practice is religious. It is sufficient that the employer is generally aware that the employee holds religious beliefs that might conflict with the practice. *See also*, *Brown v. Polk County, Iowa,* 61 F.3d 650, 654 (8th Cir. 1995 (en banc)).

Second, during Lacey's grievance hearing before the Company, she explained that she believed the Company was engaged in religious discrimination against her and asked the Company for a religious accommodation.

Third, Marli wanted to argue religious discrimination during her grievance hearing but was persuaded not to do so by her Union representative. In their motion for summary judgment, Appellants have presented massive evidence that the Union representatives were hostile to Appellants' position and did not represent them with due diligence. Union representative Terry Taylor (LEC President in Seattle) posted in a Google Chat with other union representatives, "Can we PLEASE get someone to shut down comments, or put Marli and Lacey in a burlap bag and drop them in a well….She needs to go!" No reasonable person would want Taylor or Taylor's organization representing them in a labor dispute! And yet, Taylor was Marli's representative at the initial grievance hearing.

Nevertheless, when Marli met with Tiffany Lewis (Inflight Performance Supervisor) on March 4, 2021, she gave a statement and requested religious accommodation. After this meeting, Lewis prepared a Fact Finding Report for the Company which stated, "Marli identified herself as a Christian who would be connected to the religious protected class," "Marli shared she loves her LGBTQ co-workers and that the company support[s] equity as it relates to them," that Marli's intent with the post was to ask about the impact of the Equality Act on other protected classes

including religious people, women, and children, that Marli is sincere, and that no discipline should be taken.

Fourth, it is fair to assume that, before Company officials decided to take a position in favor of the Equality Act, they researched the Act and debates in Congress, in the media, and among the general public about it. They would certainly have been aware that much of the opposition to the Equality Act came from religious persons and religious groups.[3] This would put Company officials on notice that Lacey and Marli's concerns about the

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[3] See, Ryan T. Anderson, "How So-Called 'Equality Act' Threatens Religious Freedom," *Daily Signal,* July 23, 2015, https://www.dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/;
Melissa Moschella, Ph.D., "Parental Rights, Gender Ideology, and the Equality Act," The Heritage Foundation, March 16, 2021, https://www.heritage.org/gender/report/parental-rights-gender-ideology-and-the-equality-act;
Hon. Victoria S. Kolakowski, "Objections to Transgender and Nonbinary Inclusion and Equality and/or Gender Identify Protection, July 5, 2022, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-role-of-religious-objections-to-transgender-and-nonbinary-inclusion-and-equality/;
"The House Has Passed the Equality Act, But Religious Freedom Concerns Remain, *Deseret News,* February 25, 2021, https://www.deseret.com/indepth/2021/2/25/22296094/house-votes-on-the-equality-act-religious-freedom-concerns-biden-democrats-fairness-for-all/;
Tom Gjelten, "Some Faith Leaders Cal Equality Act Devastating; For Others, It's God's Will," NPR March 10, 2011, https://www.npr.org/2021/03/10/974672313/some-faith-leaders-call-equality-act-devastating-for-others-its-gods-will.

Equality Act may be religious in nature. Clearly, the Company was aware that Lacey and Marli's objections to the Equality Act were religiously based.

Likewise, the District Court's claim that Lacey and Marli must establish that they are part of a "group" that has suffered religious discrimination, and that they cannot do so because their beliefs "are undoubtedly held by some Christians, but not by other Christians," misses the point entirely. The question is whether Lacy and Marli, as individuals, have suffered discrimination. Whether they belong to a "group" that has suffered discrimination is not determinative. As the U.S. Supreme Court noted in *Thomas v. Review Bd., Ind. Empl. Sec. Div.,* 450 U.S. 707 at 715-16 (1980),

> The [lower] court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

And as the Supreme Court said in *United States v. Ballard,* 322 U.S. 78 at 87 (1944),

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mere mortals does not mean they can be made suspect before the law.

Moreover, the District Court mischaracterized the issue as whether the Company "would have fired Plaintiffs for posting those comments even if Plaintiffs were not Christian or religious." The question, rather, is whether Lacey and Marli's postings were motivated by their religious beliefs. If so, they are protected by Title VII of the Civil Rights Act, and the Company has the burden of proving that it could not accommodate their religious beliefs.

II. Lacey and Marli are entitled to a religious accommodation.

Courts have generally held that the employer must at least attempt to accommodate the employee's religious belief or practice; *see Redmond v. Gaf Corp,* 574 F.2d 897, 901-02 (7th Cir. 1978); *Sheffield v. Northrup Worldwide Aircraft Service, Inc.,* 373 F. Supp. 937, 944 (M.D. Ala. 1974). And the employer has the burden of proving undue hardship and that an accommodation will not work; *Anderson v. Gen. Dynamics Convair Aerospace Div.,* 589 F.2d 397, 402 (9th Cir. 1978). But the Company never offered any kind of accommodation to Lacey or Marli, even though Lacey and Marli both requested religious accommodations.

An accommodation in this case should not have been difficult in this case, for many reasons. Lacey and Marli have been excellent flight attendants, with no disciplinary infractions whatsoever other than those relating to their religious beliefs. There is also absolutely no evidence whatsoever that Lacey or Marli have ever discriminated against LGBTQ persons, treated such persons unkindly, ever caused such persons to fear them or be uncomfortable around them—other than those who (without knowing them personally) have taken offense at their posts[4]—or ever would treat a passenger or fellow employee unkindly. The Appellant's testimony that she loves her LGBTQ friends is undisputed.

That being so, there are many possible accommodations. Here are only a few:

- Prohibit Lacey and Marli from posting on the internal communication network, either permanently or temporarily.
- Require that Lacey and Marli not discuss their views about the Equality Act or similar topics around passengers and fellow employees.

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[4] *Amicus* notes that several employees, based only upon seeing these posts, said they would feel uncomfortable working around Lacey and Marli. *Amicus* asks the Court to consider that in today's "cancel culture," a few individuals seem to make a practice of expressing offense in order to shut down any expression they disagree with.

- Counsel Lacey and Marli on the ways their comments on such topics could hurt or upset passengers or fellow employees.
- Counsel other employees on the fact that some people, for religious or other reasons, have religious or moral concerns about the Equality Act and the LGBTQ lifestyle, and that they need to be tolerant of and sensitive to the concerns of these people. Tolerance is, or should be, a two-way street.
- Impose lesser discipline such as a suspension followed by a probationary period. Remember that Marli had no prior disciplinary issues, and Lacey's post only asked whether it is possible to legislate morality.

Again, the burden is on the Company to prove that an accommodation would not work because it would impose an undue burden upon the employer. The Company has failed to meet that burden. In fact, the Company has not even tried to meet it.

CONCLUSION

If the Company were a state agency, its action would constitute content discrimination and viewpoint discrimination in the extreme. Even if not state action is involved, the Company's treatment of Lacey and Marli is egregious religious discrimination. Maintaining an internal communication network,

inviting and encouraging employees to post on the network, and then firing employees whose posts do not conform to the Company's politically-correct ideology, is not only a Title VII violation but also on its face offensive and unfair—a diverse chorus in which all are urged to sing, provided they all sing the same notes.

Amicus urges this Court to reverse the District Court's order granting summary judgment to Defendant and grant summary judgment to Plaintiffs instead.

Respectfully submitted,

John Eidsmoe
Counsel of Record
Talmadge Butts
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
eidsmoeja@juno.com
talmadge@morallaw.org

Counsel for *Amicus Curiae*

October 16th, A.D. 2024

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Rule 32(a)(7), Fed. R. App. P., because, excluding the parts of the document exempted by Rule 32(f), Fed. R. App. P., and 6th Cir. R. 32(b)(1), this document contains 2,062 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word in 14-point Times New Roman.

/s/ *John Eidsmoe*

John Eidsmoe
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

October 16th, A.D. 2024

CERTIFICATE REGARDING SERVICE

I certify that on October 16th, A.D. 2024, a true copy of this document is being filed electronically (via CM/ECF) and will thereby be served on all counsel of record.

/s/ *John Eidsmoe*

John Eidsmoe
FOUNDATION FOR MORAL LAW
P.O. Box 148
Gallant, AL 35972
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

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