Exhibit 1

essentially *carte blanche* to discriminate based on sex, race, national origin, and disability. No court has ever recognized the expansive exemptions to Title VII and the ADA that Defendants propose and for good reason. Excluding religiously affiliated employers from the mandates of antidiscrimination statutes would threaten decades of progress achieved by these important statutes and would render innumerable employees working in religiously affiliated organizations vulnerable to discrimination. While Defendants certainly have the right to their religious beliefs, the law does not permit them to use those beliefs to infringe upon the rights of others and to discriminate based on those views.

BACKGROUND

Emily Herx was a Language Arts and Literature teacher at St. Vincent de Paul, a Catholic school, from 2003 until 2011. (Dkt. 1 ¶¶ 8, 9.) She was not a minister nor was she involved in teaching religious studies. (*Id.* ¶¶ 10, 12, 13, 15.) When Ms. Herx and her husband decided to expand their family, she learned she suffered from infertility. (*Id.* ¶ 16.) In 2010, with the knowledge and support of her supervisor, Ms. Herx completed a first round of in vitro fertilization (IVF) to get pregnant. (*Id.* ¶ 17.) After advising her supervisor of her IVF treatment, Ms. Herx's teaching contract was renewed for the 2010-11 school year. (*Id.* ¶18.) Unfortunately, the first round of IVF was unsuccessful and when Ms. Herx requested time off for a second round, she was terminated. (*Id.* ¶¶ 19-22, 24.) At that point, Monsignor Kuzmich told Ms. Herx that, according to the teachings of the Catholic Church, IVF is a gravely immoral medical procedure. (Dkt. 14 ¶ 22.) Bishop Rhoades later added that IVF "very frequently involves the deliberate destruction or freezing of human embryos . . . [and] is an intrinsic evil, which means that no circumstances can justify it." (*Id.* ¶ 33.) It is undisputed that Ms. Herx's "performance as a teacher of Language Arts had nothing to do with the decision to not renew her

Contract." (*Id.* ¶ 30.) Rather, she was terminated solely for her decision to use IVF to become pregnant. Ms. Herx filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC), alleging discrimination on the basis of sex and disability. (Dkt. 1 ¶ 44.) After investigating her charges, the EEOC issued a Determination in Ms. Herx's favor and issued a Notice of Right to Sue. (Dkt. 5; Dkt. 1 ¶¶ 45, 46.) Ms. Herx filed a complaint in this Court under Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act (ADA). Defendants have moved for judgment on the pleadings dismissing Plaintiff's Complaint, arguing they are wholly exempt from Title VII and the ADA because they are a religiously affiliated employer, and that to the extent the statutes do not exempt them, the statutes are unconstitutional.

ARGUMENT

The primary question presented by Defendants' motion is whether a religiously affiliated school is permitted to discriminate against a lay teacher on the basis of her sex or disability, where other employers would face liability for engaging in such discrimination. Courts have held that discriminating against employees who become pregnant (including those who used IVF) amounts to impermissible sex discrimination under Title VII, our nation's principal workplace civil rights statute. Courts have also held that discriminating against employees who seek treatment for a disability (like seeking IVF treatment for infertility) violates the ADA. Defendants admit that they terminated Ms. Herx solely because she used IVF to get pregnant. This is simply illegal. Neither the statutes nor the Constitution give religiously affiliated employers a blanket right to discriminate against lay employees on the basis of sex or disability, even if motivated by sincerely held religious beliefs.

First, as a long line of cases confirm, Title VII prohibits all employers, including religiously affiliated ones like Defendants, from discriminating against lay employees on the basis of sex, regardless of their motivation. The ADA likewise proscribes religiously affiliated employers from discriminating on the basis of disability. In drafting both Title VII and the ADA, Congress specifically contemplated and rejected broad exemptions that would have entirely excluded religiously affiliated employers from the antidiscrimination mandates. Instead, it adopted narrow exemptions in both statutes, allowing religiously affiliated employers to

basis of sex because "[e]mployees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women." *Hall v. Nalco Co.*, 534 F.3d 644, 648-49 (7th Cir. 2008) (holding that an employee terminated for seeking IVF treatment stated a cognizable sex discrimination claim and reversing grant of defendant's motion for summary judgment).

Title VII's narrow statutory exemption—§ 702—upon which Defendants rely, permits religiously affiliated employers to favor only co-religionists. But it does not permit them to discriminate on the basis of sex, race, or national origin. The exemption states:

> 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 carrying on by such corporation, association, educational institution, or society of its activities.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (2012) (emphasis added).

This exemption is narrow, as many courts have observed:

> While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin. The statutory exemption applies to one particular reason for employment decision—that based upon religious preference.

Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) (citation omitted), *cert. denied*, 478 U.S. 1020 (1986);

organizations.") (citation and quotations omitted); *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 269 (N.D. Iowa 1980) (holding same); U.S. Equal Employment Opportunity Commission, Questions and Answers: Religious Discrimination in the Workplace (January 31, 2011), http://www.eeoc.gov/policy/ docs/qanda_religion.html ("Under Title VII, religious organizations are permitted to give employment preference to members of their own religion. . . . The exception does not allow religious organizations otherwise to discriminate in employment on the basis of race, color, national origin, sex, age, or disability. Thus, a religious organization is not permitted to engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.").[1]

Although Title VII's plain text and courts' longstanding interpretation of that text leave no doubt, the legislative history also makes clear that Congress considered and rejected a blanket exemption for religiously affiliated employers. Congress instead chose an exemption that balances the First Amendment rights of such employers with the government's compelling interest in eradicating discrimination. The original version of Title VII passed by the House, H.R. 7152, included a broad exemption, entirely excluding religiously affiliated employers from the statute. *See Pac. Press*, 676 F.2d at 1276 (discussing legislative history of Civil Rights Act of 1964 and citing H.R. Rep. No. 914, 88th Cong., 1st Sess. 10 (1963), reprinted in EEOC, *Legislative History of Title VII and XI of Civil Rights Act of 1964* (1968), 1964 U.S. Code Cong. & Ad. News p. 2355). A substitute bill permitting religiously affiliated employers to discriminate on the basis of religion—but not on the basis of sex, race, or national origin—with respect to religious activities was passed by the Senate and House, and signed into law. *Id.*

[1] Defendants cite *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), which only highlights the limited scope of § 702. In *Amos,* a building engineer performing secular duties at a gymnasium associated with the Church of Latter-Day Saints was terminated because he was no longer in good standing with the Church. That is, he was terminated *on the basis of his religion* by a religiously affiliated entity, which is explicitly permitted by § 702.

Years later, in 1972, members of Congress once more proposed a blanket exemption for religiously affiliated employers, which was again rejected in favor of an amended exemption to permit religiously affiliated employers to discriminate on the basis of religion with respect to all (not just religious) activities.

A religiously affiliated employer's religious motivation for discriminatory conduct does not convert unlawful sex discrimination into permissible religious discrimination. Court after court—including this one—has rejected such arguments. *E.E.O.C. v. First Baptist Church*, No. S91-179M, 1992 WL 247584 (N.D. Ind. June 8, 1992) (Miller, J.). In *First Baptist*

B. The defenses under Title I of the ADA are likewise narrow and do not permit religiously affiliated employers to discriminate on the basis of disability.

The ADA was intended "'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,' said by Congress to be 43 million in number and growing." *Vande Zande v. State of Wis. Dep't. of Admin*., 44 F.3d 538, 541 (7th Cir. 1995) (quoting 24 U.S.C. § 12101(a), (b)(1) (2012)). "[L]awmakers made clear that the ADA was norm-changing legislation, akin to the legislative turning points in this country's struggle to overcome racial discrimination . . . . Unlike other legislation designed to

(1) In general

> This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals *of a particular religion* to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

> Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

42 U.S.C. § 12113(d) (2012) (emphasis added). The first defense (like § 702 in Title VII) permits a religiously affiliated employer to exercise a preference in favor of co-religionists. The second permits such employers to require employees to follow the religious tenets of the organization. Neither provides religiously affiliated employers a blanket exemption to discriminate on the basis of disability.

The structure of the ADA demonstrates that Title I of the ADA does not give religiously affiliated employers a blanket license to discriminate against the disabled. Title III of the ADA—which prohibits disability discrimination in the provision of public accommodations and services—contains a blanket exemption for religiously affiliated entities, stating that "[t]he provisions of this subchapter [Title III] shall not apply to . . . religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. § 12187 (2012). This broad exemption is a marked contrast to the narrow carve-outs provided to religiously affiliated employers under Title I of the ADA. If Congress intended to similarly exempt religiously affiliated employers broadly from the reach of Title I, it could have done so by including the same broad exemption used in Titl

not target religious exercise. Moreover, the minimal burden imposed by these statutes on a religiously affiliated employer's free exercise is outweighed by the compelling state interest in eradicating discrimination. Second, enforcing these statutes against religiously affiliated employers would not create an excessive entanglement of religion because the government's investigation into a discrimination claim is limited in time and scope, and does not require an evaluation of religious doctrine. As this Court put it, "[g]overnment regulation should not be held unconstitutional simply because it may in some way affect the otherwise unfettered operation of a religious institution." *First Baptist*, 1992 WL 247584, at *7.

A. Enforcement of Title VII and the ADA against religiously affiliated employers does not violate the Free Exercise Clause.

Since *Employment Division v. Smith*, "[r]egulations of general applicability, not intended to discriminate against a religion

See Vigars, 805 F. Supp. at 809 ("Title VII neither regulates religious beliefs, nor burdens religious acts, *because* of their religious motivation. On the contrary, it is clear that Title VII is a secular, neutral statute . . . ."). Accordingly, enforcement of these statutes against Defendants for sex and disability discrimination does not violate Defendants' free exercise of religion.

Even under the heightened pre-*Smith*

18 F. Supp. 2d 630 (E.D. La. 1998) (absent ministerial functions, Free Exercise Clause does not bar enforcement of the ADA), *aff'd* 198 F.3d 173 (5th Cir. 1999); *First Baptist*

discrimination issues would not to any degree entangle us in the C

backgrounds. Entirely exempting such organizations from neutral antidiscrimination statutes would have far-reaching effects and seriously threaten the progress legislatures, courts, and society have achieved towards eliminating discrimination and advancing equality.

Today, there are at least 600 hospitals,[5] 23,000 schools and colleges,[6] and 20,000 charities[7] affiliated with religious entities. Together these organizations employ more than 1.1 million people across the United States.[8] Defendants demand an exemption that would eliminate employment discrimination protections for these 1.1 million people and permit more than 40,000 employers to discriminate freely. Not only would such an exemption impact the employees working in such organizations, but the social effects would also be widespread given that religious organizations are affiliated with prominent hospitals, schools, colleges, and charities across the country. Defendants' position would take this country back to a time when, prior to the passage of Title VII and the ADA, religiously affiliated schools could refuse to hire teachers with HIV based on the religious belief that the virus indicates moral uncleanliness; religiously affiliated hospitals could discriminate against African-American doctors based on the religious belief that the races should not integrate; and religiously

This Court has already come to the conclusion that the Constitution does not grant religiously affiliated organizations *carte blanche* to discriminate against lay employees and it should do so again here.