No. 24-43

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

B.P.J., BY NEXT FRIEND AND MOTHER, HEATHER JACKSON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

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INTEREST OF *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It has filed briefs before this Court, both as counsel of record and as *amicus curiae*, explaining the widespread and predictable conflicts that arise when protections for religious liberty are not given their full scope. See, *e.g.*, *Obergefell* v. *Hodges*, 576 U.S. 644 (2015); *Bostock* v. *Clayton County,* 590 U.S. 644 (2020); *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657 (2020).

Becket also regularly defends faith organizations against regulatory mandates in providing healthcare that would violate their religious beliefs, including in situations where the government has sought to invoke *Bostock* in the Title IX context. See, *e.g., Franciscan All., Inc.* v. *Becerra*, 47 F.4th 368 (5th Cir. 2022); *Religious Sisters of Mercy* v. *Becerra*, 55 F.4th 583 (8th Cir. 2022).

Becket submits this brief to address the severe harms that would inevitably flow to religious

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief.

healthcare providers and religious educational institutions if Title IX is improperly interpreted to cover sexual orientation and gender identity.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court decided *Obergefell* and *Bostock*, it recognized the legitimate concerns shared by many that religious exercise would be negatively affected by expanding the conception of discrimination on the basis of sex. But in addressing those harmful sequelae, the Court limited itself to reminding Americans that, among other things, the "First Amendment ensures that religious organizations and persons are given proper protection" and the "promise of the free exercise of religion enshrined in our Constitution * * * lies at the heart of our pluralistic society." *Obergefell* v. *Hodges*, 576 U.S. 644, 679-680 (2015); *Bostock* v. *Clayton County,* 590 U.S. 644, 681 (2020).

The reminders fell on deaf ears. After *Obergefell* and *Bostock* were decided, government agencies, private parties, and many lower courts acted as if the Court had said nothing at all about religion, moving almost immediately to suppress religious exercise that conflicts in any way with the newly-announced rights. Far from being, like the Court, "deeply concerned" about protecting religious exercise, these actors have at every turn sought to minimize and thwart the ability of religious communities to follow their sincerely-held beliefs about human sexuality. They have paid lip service at most to the civil and constitutional rights this Court says ought to be protected.

The post-*Bostock* litigation landscape epitomizes the problem. Newly armed with *Bostock*, federal, state,

and local agencies, along with advocacy groups, launched an extended assault on religious liberty not only under Title VII, but also the Patient Protection and Affordable Care Act (ACA), which incorporates Title IX. Under the ACA, HHS attempted to force healthcare providers across the country to provide gender-transition procedures, irrespective of religious objections, while arguing that Title IX's religious exemption did not apply at all. And under Title VII, private plaintiffs—joined by the EEOC—have combined this Court's interpretation of "because of sex" with a view of the religious exemption so narrow that it would leave religious organizations virtually no ability to follow their own understandings of human sexuality in their workplaces.

This was no surprise. Attempts to force religious employers and healthcare providers to abandon sometimes millennia-old religious doctrines were predictable not only under the logic of *Bostock*, but also as a matter of political reality. It is no secret that issues of gender and sexuality remain "hotly contested," a reality borne out as much in our nation's executive agencies and courtrooms as in our legislatures. *Mahmoud* v. *Taylor*, 145 S. Ct. 2332, 2354 (2025).

As a result, the religious liberty of dissenting religious organizations now waxes and wanes with every new administration. With no clear end in sight, religious organizations are forced to endure perhaps decades of litigation as lower courts grapple with these issues. That can cause permanent damage to nonprofit religious bodies of limited means. Perhaps worse still, it leaves church and state permanently entangled.

The Court should do whatever it can to avoid hanging yet another millstone around the necks of religious

employers who seek to create faithful workplaces and religious schools who seek to instill their faith in the rising generation. Any ruling that Title IX covers sexual orientation and gender identity will unleash a new tidal wave of litigation, with federal, state, and local agencies doubling down on their attempts to force religious organizations either to conform or to be ousted from the public square. The Court should avoid more rounds of church-state conflict by interpreting Title IX to protect the constitutional rights of religious bodies.

ARGUMENT

Petitioners have ably explained why the text, history and tradition of Title IX indicate that the statute does not cover gender identity and sexual orientation. Pet.Br. 18-25. Rather than repeat that analysis here, *Amicus* instead describes below the effects of such a ruling on the religious exercise of two classes of religious bodies: religious healthcare providers and religious educational institutions.

I. Extending Title IX to cover gender identity would result in wide-ranging conflicts between government and religious healthcare providers.

Any interpretation of Title IX that includes gender identity and sexual orientation will further fuel an intense battle between the government and religious healthcare providers with strong views regarding gender-transition procedures. That's because Title IX's prohibition against sex-based discrimination is incorporated into Section 1557 of the ACA. 42 U.S.C. 18116(a). Specifically, the ACA forbids discrimination "on the ground prohibited" of "title IX of the Education

Amendments of 1972." *Ibid.* This means that any ruling from this Court on Title IX's scope will have an immediate impact on the thousands of religious healthcare providers across the country.

Indeed, even before *Bostock*, HHS attempted to trample the religious liberty of healthcare providers by mandating that covered healthcare entities provide gender-transition procedures—using the same interpretation of Title IX that Respondent now espouses. Despite this Court's exhortations to protect religious exercise, HHS took *Bostock* to strengthen, rather than weaken, its invasive regulations as they applied to religious organizations. The volatile history of the transgender mandate thus presents a cautionary tale of motivated bureaucrats seizing on an interpretation of Title IX that includes gender identity to relaunch needless attacks on religious entities.

A. HHS interpreted Title IX to create the transgender mandate while rejecting Title IX's religious exemption.

Section 1557 of the Affordable Care Act prohibits "discrimination" in health care on the "ground prohibited" under, *inter alia*, Title IX, which includes discrimination "on the basis of sex." 42 U.S.C. 18116(a); 20 U.S.C. 1681(a). In September 2015, the Department of Health and Human Services issued a notice of proposed rulemaking interpreting Title IX's prohibition against sex discrimination to include discrimination based on "gender identity," or one's "internal sense of gender" for purposes of Section 1557. 80 Fed. Reg. 54,172, 54,174, 54,176 (Sep. 8, 2015). Based on this interpretation, HHS proposed a transgender mandate that would require doctors, nurses, and hospitals

to perform gender-transition procedures like hysterectomies, mastectomies, and other treatments designed to alter a patient's body in response to gender dysphoria—or else be liable for "prohibited discrimination." *Id.* at 54,190. The proposed rule also required healthcare employers to provide insurance coverage for gender transitions. *Id.* at 54,189-54,190.

Of course, this proposed rule—premised as it was on "a hotly contested view of sex and gender that sharply conflicts with the religious beliefs" of many Americans, *Mahmoud*, 145 S. Ct. at 2354—was destined to cause church-state conflict. Many religious objectors provided comments on the proposed rule alerting HHS that it needed to include a religious exemption or otherwise ensure that the transgender mandate would not substantially burden their religious exercise.[2] But HHS did not. Its final rule left in place the requirement that doctors, including religious doctors, perform gender-transition procedures and that em-

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[2] See, *e.g.*, U.S. Conf. of Catholic Bishops, *et al.*, Comment Letter on Nondiscrimination in Health Programs and Activities (Nov. 6, 2015), https://perma.cc/Z3LX-2LSL (representing Christian Medical Association, National Association of Evangelicals and others); Catholic Health Ass'n, Comment Letter on Nondiscrimination in Health Programs and Activities (Nov. 9, 2015), https://perma.cc/Z2J3-4U8D (representing over 2,200 Catholic healthcare systems and organizations); Council for Christian Colls. & Univs., Comment Letter on Nondiscrimination in Health Programs and Activities (Nov. 9, 2015), https://perma.cc/48TQ-45U3 (on behalf of 143 institutions); Church Alliance, Comment Letter on Nondiscrimination in Health Programs and Activities (Nov. 9, 2015), https://perma.cc/7GKN-ECT4 (representing Protestant, Jewish, and Catholic churches).

ployers, including religious employers, provide insurance coverage for gender transitions. 81 Fed. Reg. 31,376 (May 18, 2016).

To accomplish this goal, HHS selectively incorporated Title IX, refusing to incorporate Title IX's robust religious exemption, which provides that the statute's "prohibition against discrimination * * * shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. 1681(a)(3). HHS's decision dramatically departed from Congress's choice to expressly confine Section 1557's scope to the "ground prohibited" under "title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*)," 42 U.S.C. 18116(a), which necessarily points to the entire scope of Title IX, including its religious exemption. Put differently, actions inconsistent with the religious tenets of religiously controlled institutions are not prohibited under the plain text of Title IX, 20 U.S.C. 1681(a)(3), and consequently are not a "ground prohibited" by that statute under the ACA, 42 U.S.C. 18116(a).

HHS justified its contrary à la carte incorporation of only Title IX's sex-discrimination prohibition by arguing (circularly) that "Section 1557 itself contains no religious exemption," and that, unlike healthcare, "students or parents selecting religious educational institutions typically do so as a matter of choice." 81 Fed. Reg. at 31,380. Thus, in HHS's view, the rights of religious healthcare providers—particularly those provid-

ing much needed services in "rural" areas or "emergency" circumstances, must yield. *Ibid.*[3]

This now-final rule forced religious healthcare professionals into the quintessential Hobson's choice. Those who did not violate their religious beliefs risked losing millions in federal Medicare and Medicaid funding, as well as debarment from government contracting, False Claims Act liability (including treble damages), and other enforcement proceedings brought by the Department of Justice. 81 Fed. Reg. at 31,440, 31,472. Noncompliant healthcare professionals would also face private lawsuits for damages and attorneys' fees. *Ibid.*

In summary, HHS knew that the transgender mandate conflicted with the religious beliefs of objectors, but sought to impose it anyway, doing nothing to alleviate that obvious conflict through either Title IX's religious exemption or RFRA. All this left religious healthcare professionals sitting on a powder keg: ruinous financial and professional penalties if they did not violate their religious beliefs.

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[3] Title IX was not the only protection for religious liberty that HHS jettisoned. The agency also dismissed concerns that religious healthcare providers "would be substantially burdened" under the Religious Freedom and Restoration Act (RFRA), 81 Fed. Reg. at 31,379, asking religious organizations to trust it to "make these determinations on a case-by-case basis" if and when religious healthcare professionals asserted their free exercise rights, while simultaneously stacking the decks by claiming a compelling interest to ensure "nondiscriminatory" healthcare access. *Id.* at 31,380.

B. The transgender mandate forced religious providers into years of litigation to vindicate obvious rights.

Unsurprisingly, that powder keg ignited almost immediately. By the time of the Final Rule, religious health care providers had already received requests for gender-transition procedures that they could not provide without violating their religious beliefs. In addition, many religious health care providers covered their employees' healthcare costs and would now have to cover services related to gender transition. To protect their religious exercise, Franciscan Alliance—a Catholic hospital system that stood to be penalized over $900 million annually—and the Christian Medical and Dental Associations sued HHS, alleging among other things that the transgender mandate violated the Administrative Procedure Act by ignoring Title IX's religious exemption and RFRA. See *Franciscan All., Inc.* v. *Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). The district court issued a preliminary injunction preventing the mandate from going into effect. See *id.* at 696.

After issuing a preliminary injunction, the district court vacated the transgender mandate because "the Rule's conflict with its incorporated statute—Title IX—renders it contrary to law under the APA." *Franciscan All., Inc.* v. *Azar*, 414 F. Supp. 3d 928, 945 (N.D. Tex. 2019). The following year (under a new administration), HHS repealed the 2016 rule, replacing it with one that *did* adopt Title IX's religious exemption. 85 Fed. Reg. 37,160, 37,162 (June 19, 2020).

But these protections were fleeting. Three days after the new 2020 rule issued, this Court issued *Bostock*. See *Franciscan All., Inc.* v. *Becerra*, 47 F.4th 368,

372 (5th Cir. 2022). And despite that decision's expression of "deep[] concern[]" for religious liberty, *Bostock*, 590 U.S. at 681, agencies had no trouble giving those liberties no consideration at all.

On the day of taking office, President Biden issued an executive order establishing that his administration would "combat discrimination on the basis of gender identity" by enforcing *Bostock* with respect to laws that prohibit sex discrimination. Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021). The Administration then instructed federal agencies to interpret Title IX according to "*Bostock*'s textual analysis" as the "best reading" of the statute. *See* Memorandum from Pamela S. Karlan, Principal Deputy Asst. Att'y Gen. to Fed. Agency C.R. Dirs. & Gen. Couns. Re: Application of *Bostock* v. *Clayton County* to Title IX of the Education Amendments of 1972 (Mar. 26, 2021), https://perma.cc/CHE7-FLA3. HHS soon complied. Two months later, it published additional Section 1557 guidance interpreting Title IX as prohibiting sexual orientation and gender-identity discrimination "consistent with the Supreme Court's decision in *Bostock*" and abandoning the Title IX religious exemption yet again. Memorandum from Xavier Becerra, HHS Sec'y Re: Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972 (May 10, 2021), https://perma.cc/9TEW-FA6R.

Back in the underlying litigation, the district court rejected HHS's latest recharacterization of the transgender mandate as "materially indistinguishable from the 2016 rule" and entered a permanent injunction. *Franciscan All., Inc.* v. *Becerra*, 553 F. Supp. 3d 361, 373-378 (N.D. Tex. 2021). On appeal, the Fifth

Circuit affirmed. *Franciscan All.*, 47 F.4th at 376-380. HHS chose not to petition for certiorari.

Similar litigation filed by the Religious Sisters of Mercy, a Catholic order of nuns who run health clinics to care for the elderly and poor proceeded along a parallel track in North Dakota, leading to the same outcome. There, the district court did not decide the APA claim out of comity concerns with other district courts that previously enjoined the 2020 rule nationwide. *Religious Sisters of Mercy* v. *Azar*, 513 F. Supp. 3d 1113, 1144 (D.N.D. 2021), affirmed, *Religious Sisters of Mercy* v. *Becerra*, 55 F.4th 583 (8th Cir. 2022). However, the district court declared that, under RFRA, forcing "the Catholic Plaintiffs to perform and provide insurance coverage for gender-transition procedures violate[d] their sincerely held religious beliefs without satisfying strict scrutiny" and permanently enjoined enforcement against the plaintiffs. *Id.* at 1153. There, too, HHS chose not to petition for certiorari.

All told, religious healthcare providers rode an eight-year litigation roller coaster seeking relief from a burden on their fundamental religious rights that was clear the day HHS proposed the transgender mandate, with their rights and liberties rising and falling with every change in presidential administration.

But even this lengthy litigation has not brought about the transgender mandate's permanent demise. In 2024, HHS issued yet another a rule that, "[u]nder *Bostock*'s reasoning," would require healthcare professionals to offer gender transition services regardless of their religious beliefs. 89 Fed. Reg. 37,522, 37,673-37,674 (May 6, 2024). This time, too, HHS did not incorporate the Title IX religious exemption. And it once again decided to handle RFRA complaints on a case-

by-case basis, with the government having a self-declared compelling interest. *Id.* at 37,533, 37,674.

Religious medical providers and several states sued to stop this latest iteration, and multiple federal courts enjoined the "ever-changing" rule. *Florida* v. *Department of Health & Hum. Servs.*, 739 F. Supp. 3d 1091, 1110 (M.D. Fla. 2024); *Tennessee* v. *Becerra*, 739 F. Supp. 3d 467, 486 (S.D. Miss. 2024); *Texas* v. *Becerra*, 739 F. Supp. 3d 522, 529 (E.D. Tex. 2024).

For now, the regulatory pendulum has swung back the other way, but with no guarantees it will remain so. In February 2025, with President Trump back in office, HHS rescinded its prior guidance on gender affirming care, civil rights, and patient privacy.[4] And in May 2025, HHS announced the recission of the Biden-era guidance document interpreting Section 1557. 90 Fed. Reg. 20393 (May 14, 2025). But that current protection will only become permanent if this Court correctly decides that Title IX does not cover sexual orientation and gender identity discrimination. Until then, it remains nothing more than an act of political grace, sure to be removed the second a future presidential administration finds it politically advantageous.[5]

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[4] Memorandum from Anthony F. Archeval, HHS Acting Dir. Re: Recission of "HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy" (issued Feb. 20, 2025), https://perma.cc/5BEJ-767V.

[5] Even with the 2025 rescission, one district court has ruled that parts of the 2016 rule must nevertheless be "[r]eanimat[ed]." *Walker* v. *Kennedy*, No. 20-cv-2834, 2025 WL 1871070, at *6 (E.D.N.Y. July 8, 2025). Cf. *Lamb's Chapel* v. *Center Moriches*

C. Extending Title IX to cover gender identity would embolden federal agencies to impose a similar transgender mandate in the future.

The turbulent history of the transgender mandate demonstrates that religious healthcare providers cannot rely on HHS to protect their religious beliefs. Rather, HHS has repeatedly given short shrift to religious objectors, leaving them to fend for themselves in the courts.

Nor is the transgender mandate a one-off. The contraceptive mandate serves as yet another example of how protections for religious objectors ebb and flow with the political winds. *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U.S. 657, 664-673 (2020) (recounting HHS's history of refusing to protect religious objectors through RFRA).

Despite "[three] decisions from this Court" in their favor "and multiple failed regulatory attempts," the Little Sisters of the Poor are still in court defending their "ability to continue in their noble work without violating their sincerely held religious beliefs." *Little Sisters*, 591 U.S. at 686-687. That's because after remand from this Court in 2020, the Biden Administration successfully stayed proceedings for multiple years as it purported to reconsider the contraception mandate yet again, with the case re-opening only after the second Trump Administration said it wouldn't. *Pennsylvania* v. *Trump*, No. 17-cv-4540, 2025 WL 2349798, at *9-10 (E.D. Pa. Aug. 13, 2025). Once re-opened, the

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Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

district court vacated the rule that after seven years of litigation would have provided full relief. *Id.* at *24-26. Getting the RFRA analysis "entirely backwards," *Little Sisters*, 591 U.S. at 703 (Alito, J., concurring), the trial court found the agency picked an overly broad solution to the RFRA concern, did not consider other alternatives, and acted by "an erroneous conclusion that RFRA compelled" the rule. *Pennsylvania*, 2025 WL 2349798 at *18-20, *24; but see *Little Sisters*, 591 U.S. at 704 (Alito, J., concurring) (concluding religious exemption was "required by RFRA"). And all of this disregards this Court's guidance that the "capacious grant of authority" brought "unchecked" discretion to create exemptions from the agency's own guidelines. *Id.* at 676.

The end result of this regulatory ping-pong on religious liberty is clear: "What's past is prologue." Should this Court determine Title IX covers gender identity, HHS will be off to the races formulating yet another transgender mandate as soon as it is politically advantageous to do so, with nary a thought to the predictable, well-known, and avoidable burdens placed on religious healthcare providers. But this time, there will be one key difference: rather than needing to argue that courts should accept its attempt to bootstrap the interpretation of one statute onto another, HHS will be armed with a directly on-point holding from this Court. Only this Court can prevent that outcome.

II. Extending Title IX to cover gender identity would result in wide-ranging conflicts between government and religious educational institutions.

The transgender mandate is not the only way that *Bostock* has been misused to run roughshod over religious institutions. Religious educational institutions have been frequent targets of attempts "to violate their religious convictions." *Bostock*, 590 U.S. at 681. In *Bostock*, this Court explicitly mentioned Title VII's exemption for religious employers as one of the "doctrines" safeguarding "the promise of the free exercise of religion," which "lies at the heart of our pluralistic society." *Id.* at 681-682. That did not stop plaintiffs across the country, joined by the EEOC, from wielding *Bostock*'s interpretation of Title VII as a cudgel against religious institutions, arguing that Title VII's exemption does not shield religious employers from *any* Title VII claims.

A. *Bostock* unleashed a surge of attacks on religious institutions under Title VII.

Properly interpreted, Title VII's religious exemption protects religious employers against claims arising under *Bostock*. The exemption provides that "[t]his subchapter shall not apply * * * to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion." 42 U.S.C. 2000e-1(a).[6] Title VII de-

[6] A similar exemption specific to religious schools provides that "it shall not be an unlawful employment practice * * * to hire and employ employees of a particular religion." 42 U.S.C. 2000e-

fines "religion" to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. 2000e(j). As Judge Easterbrook has explained, "'[t]his subchapter' refers to Title 42, Chapter 21, Subchapter VI, which comprises all of Title VII," meaning that the exemption "permits a religious employer to require the staff to abide by religious rules" and to dismiss an employee who fails to do so. *Starkey* v. *Roman Catholic Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring); see also *Little* v. *Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (exemption protects a religious employer's ability to employ only individuals "whose beliefs and conduct are consistent with the employer's religious precepts"). That included the right to dismiss an employee who violates religious behavioral requirements by engaging in conduct inconsistent with the "decent and honorable" beliefs many religious employers hold "with utmost, sincere conviction" regarding marriage, sex, and gender. *Obergefell* v. *Hodges*, 576 U.S. 644, 672, 679 (2015); see also *Mahmoud* v. *Taylor*, 145 S. Ct. 2332, 2353-2354 (2025) (recognizing sincere beliefs of "[m]any Americans" regarding marriage, sex, and gender).

Despite this "straightforward reading," *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring), the exemption's scope was "disputed" at the time of *Bostock*, with some lower courts holding it "provide[s] only narrow protection," *Bostock*, 590 U.S. at 730 (Alito, J., dissent-

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2(e)(2). While *Amicus* addresses only the provision applicable to all employers above, the two provisions operate similarly for claims arising under *Bostock*.

ing). Litigants across the country immediately leveraged this opening to attack religious institutions, even in "cases where an employee admits she was dismissed for a *non-pretextual religious reason*"—*e.g.*, for entering a same-sex marriage in violation of church teachings—"but challenges that religious reason itself as discriminatory and therefore *illegal*." Luke W. Goodrich, *Religious Hiring Beyond the Ministerial Exception*, 101 Notre Dame L. Rev. ___, 12 (forthcoming 2026), https://perma.cc/SY2R-3R8L.

As with the transgender mandate, religious institutions in these cases have often ultimately and correctly prevailed—typically under the ministerial exception—but at quite a high cost. Rather than being able to rely upon the "complete immunity" afforded by Title VII's religious exemption, *Hishon* v. *King & Spalding*, 467 U.S. 69, 78 (1984), this onslaught has forced plaintiffs into years of litigation, often accompanied by invasive and entangling discovery into internal religious matters, all to vindicate rights that were clear from the outset.

Consider a few examples. In *McMahon* v. *World Vision Inc.*, 147 F.4th 959 (9th Cir. 2025), the plaintiff applied to work for World Vision, a Christian poverty-alleviation ministry that requires employees to abide by its religious standards of conduct, including a prohibition on "sexual conduct outside the Biblical covenant of marriage between a man and a woman." *Id.* at 967. The plaintiff affirmatively told World Vision she was "aligned" with these standards of conduct, yet disclosed after she had been offered a position that she was in a same-sex marriage. *Id.* at 969. Because this violated World Vision's religious standards of conduct, World Vision rescinded its offer of employment. *Ibid.*

Relying on *Bostock*, the plaintiff then sued World Vision for sex discrimination under Title VII. See *ibid.*

"The parties agree[d] that World Vision rescinded McMahon's job offer because she [was] in a same-sex marriage." *World Vision,* 147 F.4th at 973 n.6. And no one disputed that World Vision's decision was based on its religious doctrine. See *id.* at 969. Nevertheless, and after full merits discovery, McMahon argued—and the district court agreed—that the religious exemption covered only religious-discrimination claims, providing World Vision with no protection for its decision to apply its religiously motivated hiring guidelines. *McMahon* v. *World Vision*, 704 F. Supp. 3d 1121, 1134-1135 (W.D. Wash. 2023).

As amicus, the EEOC also argued the religious exemption does not cover religiously motivated employment decisions concerning sexuality or gender identity and that *Bostock* did not indicate otherwise because it "declin[ed] to resolve 'how * * * doctrines protecting religious liberty interact with Title VII." EEOC Br. 11, *McMahon* v. *World Vision*, No. 24-3259 (9th Cir. Oct. 28, 2024) (quoting *Bostock*, 590 U.S. at 682).[7] Other amici followed suit. See, *e.g.*, ACLU Br. 8-9, *McMahon* v. *World Vision*, No. 24-3259 (9th Cir. Oct. 28, 2024). The Ninth Circuit ultimately declined to rule on the issue, instead holding that the ministerial exception

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[7] The EEOC has taken a similar position regarding the religious exemption under the Pregnant Workers Fairness Act, which "directly incorporates Title VII's religious exemption and makes the entire PWFA 'subject to' the exemption." *Louisiana* v. *EEOC*, 705 F. Supp. 3d 643, 662 (W.D. La. 2024) (quoting 42 U.S.C. 2000gg-5(b)) ("EEOC contends that the PWFA exemption protects religious entities from claims of religious discrimination only.").

barred the plaintiff's claims. *World Vision*, 147 F.4th at 966 n.2.

World Vision is hardly an outlier. In *Billard* v. *Charlotte Catholic High Sch.*, 101 F.4th 316 (4th Cir. 2024), a Catholic high school did not renew a drama teacher's contract after he announced his marriage to another man in violation of Church teachings. See *id.* at 320-322. He sued under Title VII, even though it was undisputed that he had violated church doctrine on human sexuality. See *id.* at 322-323. As in *World Vision*, after discovery the district court, relying heavily on *Bostock*, held that Title VII's exemption is "narrowly drawn" and does not cover sex discrimination claims even when the decision is "related to a religious justification." *Billard* v. *Charlotte Catholic High Sch.*, No. 3:17-cv-11, 2021 WL4037431, at *10-11 (W.D.N.C. Sep. 3, 2021).

But as in *World Vision*, the Fourth Circuit—over dissent—dodged the question by holding that the ministerial exception barred the teacher's claims—even though the school had "stipulated not to press the ministerial exception." *Billard*, 101 F.4th at 325; see *id.* at 333 (King, J., dissenting in part and concurring in the judgment) (stating that the school should have prevailed under the statutory religious exemption). The majority concluded that it would better "promote judicial restraint" to resurrect a waived constitutional argument than to address the squarely presented statutory question. See *id.* at 327-329.

A similar story played out in two parallel cases from the Seventh Circuit. There, two co-directors of guidance counseling at a Catholic high school separately sued their employer under Title VII when they were each dismissed for entering separate same-sex

unions in violation of Church teachings. See *Starkey*, 41 F.4th at 938; *Fitzgerald* v. *Roncalli High Sch., Inc.*, 73 F.4th 529, 530-531 (7th Cir. 2023). As in *World Vision*, the parties did "not dispute that [the school] had a nonpretextual religious policy against employees entering into same-sex marriages and that [the plaintiffs were] terminated because [they] did so." *Fitzgerald*, 73 F.4th at 537 (Brennan, J., concurring). Even so, relying on the same cramped view of the exemption and expansive understanding of *Bostock*, their claims went through years of discovery to determine whether the guidance counselors qualified as ministers before being resolved in the school's favor at summary judgment. See *Starkey*, 41 F.4th at 938; *Fitzgerald*, 72 F.4th at 531.

As in *World Vision* and *Billard*, the Seventh Circuit avoided ruling on the exemption issue, instead holding that each employee qualified as a minister. See *Starkey,* 41 F.4th at 940-942; *Fitzgerald*, 72 F.4th at 534. But in each case, one member of the panel wrote separately to explain that under "a straightforward reading," the exemption permits "a religious employer to require the staff to abide by religious rules," including prohibitions on "same-sex marriages." *Starkey*, 41 F.4th at 946 (Easterbrook, J., concurring); accord *Fitzgerald*, 73 F.4th at 534-535 (Brennan, J., concurring). But neither case's majority adopted, or even addressed, that position. Other courts have reached similar results. See, *e.g.*, *Braidwood Mgmt., Inc.* v. *EEOC*, 70 F.4th 914, 940 (5th Cir. 2023) (declining to define the scope of Title VII post-*Bostock*); *Butler* v. *St. Stanislaus Kostka Catholic Acad.*, 609 F. Supp. 3d 184, 200-201 (E.D.N.Y. 2022) (rejecting plaintiff's pretext argument under Title VII because

the inquiry would intrude on religious matter); *Ference* v. *Roman Catholic Diocese of Greensburg*, No. 22-797, 2023 WL 3876584, at *2-3 (W.D. Pa. Jan. 18, 2023), report and recommendation adopted in part, rejected in part, 2023 WL 3300499 (W.D. Pa. May 8, 2023) (recommending narrow interpretation of Title VII religious exemption); cf. *Califano* v. *Roman Catholic Diocese of Rockville Centre*, 751 F. Supp. 3d 42, 49-55 (E.D.N.Y. 2024) (rejecting ministerial exception and church autonomy defenses to Title VII claims); *Doe* v. *Catholic Relief Servs.*, 529 F. Supp. 3d 440, 446-449 (D. Md. 2021) (relying on *Bostock* to interpret Maryland employment discrimination law against religious employer).

While the ministerial-exception holdings in *Billard*, *World Vision*, *Starkey*, and *Fitzgerald* were correct, those analyses—and the accompanying years of discovery and litigation—should not have been necessary, and demonstrate the peril to religious employers that has arisen as a result of *Bostock*. Title VII's exemption enables "religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices." *Curay-Cramer* v. *Ursuline Acad.*, 450 F.3d 130, 141 (3d Cir. 2006). In each case, that is precisely what occurred: the employer took action after an employee violated faith-based requirements reflecting the church's doctrinal position on sexuality and marriage. That should have been the end of the matter. Instead, these religious institutions (and others) have been left struggling to shoulder the burdens of a "protracted legal process pitting church and state as adversaries" and the "prejudicial effects of incremental litigation." *Demkovich* v. *St. Andrew the Apostle Parish*, 3 F.4th 968,

982 (7th Cir. 2021) (en banc) (quoting *Rayburn* v. *General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985)).

The "protracted" process under Title VII begins with an EEOC investigation responding to a charge of discrimination filed with the Commission by an aggrieved person, someone acting on the aggrieved person's behalf, or even a single member of the Commission itself. See 42 U.S.C. 2000e-5(b). The investigation can include issuing and compelling compliance with subpoenas for witnesses and evidence. 29 C.F.R. 1601.16. These investigations often last for years. See, *e.g.*, *EEOC* v. *Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 799 (4th Cir. 2000) (three years and ten months); *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 582 F. Supp. 2d 881, 882-883 (E.D. Mich. 2008) (two years and four months); *EEOC* v. *Catholic Univ. of Am.*, 856 F. Supp. 1, 2 (D.D.C. 1994) (two years and three months). And that's all *before* a lawsuit is even filed. Once that happens, the religious institution must continue to invest time and resources in the burdensome back and forth of litigation, which can last for several more years. In *EEOC* v. *Catholic University of America*, for example, the EEOC spent more than two years investigating Catholic University before initiating a lawsuit. 83 F.3d 455, 459 (D.C. Cir. 1996). It then took four more years—including a full, weeklong trial and subsequent appeal—for Catholic University to ultimately prevail. *Catholic Univ.*, 856 F. Supp. at 2; *Catholic Univ.*, 83 F.3d at 470.

The EEOC knows the burdens that its investigations and subsequent lawsuits place on religious institutions, and yet it has taken the position that the

rights of religious employers must wait until *after* the conclusion of a case—which can include full trials and multiple appeals—to be fully resolved. See, *e.g.*, EEOC Br., *Garrick* v. *Moody Bible Inst.*, 95 F.4th 1104 (7th Cir. 2024) (No. 21-2683). But many religious institutions do not have years' worth of resources to fend off such attacks. See David P. King *et al.*, *Nat'l Study of Congregations' Econ. Practices* 11 (2017) (more than 60% of congregations in the U.S. report receiving less than $250,000 annually across all sources). For such institutions, the substantial pressure imposed by a lawsuit can effectively deprive them of their rights even if judgment is never rendered against them. See *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 343-344 (1987) (Brennan, J., concurring) ("As a result" of the threat of government intrusion, "the community's process of self-definition would be shaped in part by the prospects of litigation.").

Bostock's lack of clarity on religious defenses also means that religious employers face considerable uncertainty regarding any employee who does not qualify as a minister. Title VII's exemption "alleviat[es] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 339 (majority op.); see also *Korte* v. *Sebelius*, 735 F.3d 654, 678 (7th Cir. 2013) (Title VII's religious exemption is a "legislative application[] of the church-autonomy doctrine"). It thus allows religious employers to make religiously-motivated employment decisions concerning *all* employees, not just the subset that qualify as ministers. Without this integral protection, religious employers would not have the necessary control over church doctrine or "the standard of morals required" of members

of their religious communities because the government could punish them for standing firm in their religious convictions. *Watson* v. *Jones*, 13 Wall. 679, 733 (1872). Thus, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Amos*, 483 U.S. at 336. But because *Bostock* (and the lower courts) left the question open, religious employers have no guarantee that they will be protected when they make employment decisions that are consistent with their religious doctrines.

A recent case from Virginia demonstrates this point well. In *Zinski* v. *Liberty University, Inc.*, a staff member in the information technology department was dismissed after undergoing a gender transition, which violated Liberty University's religious beliefs and faith-based code of conduct for employees. 777 F. Supp. 3d 601, 610-611 (W.D. Va. 2025).

Liberty University moved to dismiss the Title VII claim on both Title VII and ministerial exception grounds. The district court rejected the school's ministerial exception argument, see *Zinski*, 777 F. Supp. 3d at 637-638, 648-650, and reasoned that *Bostock* somehow supported its conclusion that Title VII's religious exemption "provide[s] only narrow exemptions for the religious employer to discriminate on the basis of an employee's espoused religious belief," despite this Court's admonitions to respect the religious beliefs of employers. See *id.* at 630-633. As a result, Liberty University is being punished for upholding its religious requirements for employees, even though this Court has indicated that the opposite should occur. The University has been left with no choice but to seek to vindicate its rights before the Fourth Circuit, see *Zinski* v.

Liberty University, Inc., No. 25-1581 (4th Cir. appeal docketed May 23, 2025), but without the benefit of a clear holding on the scope of the religious exemption that should have come from *Billard*.

B. A similar wave of litigation under Title IX will follow if the Court adopts *Bostock*'s reasoning here.

"Religious education is vital to many faiths practiced in the United States." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 754 (2020). Indeed, "educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Carson* v. *Makin*, 596 U.S. 767, 787 (2022) (quoting *Our Lady*, 591 U.S. at 753-754). Because religious schools are so central to "transmitting the * * * faith to the next generation," *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 192 (2012), this Court has repeatedly forbidden the government from attempting to "scrutiniz[e] whether and how a religious school pursues its educational mission." *Carson*, 596 U.S. at 787; see also *NLRB* v. *Catholic Bishop of Chi.*, 440 U.S. 490, 502-504 (1979) ("We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.").

Title IX's religious exemption is one statutory embodiment of this principle. While Title IX prohibits sex discrimination by religious institutions, it does "not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. 1681(a)(3).

Among other things, religious schools rely on this exemption to ensure that members of their campus communities align with and abide by their religious beliefs regarding marriage, sex, and gender; to protect private, sex-segregated spaces (such as dormitories, bathrooms, and locker rooms) consistent with the schools' religious teachings regarding gender; and to enable school counselors to counsel students in a manner consistent with the school's religious beliefs concerning marriage, sex, and gender.[8] As this illustrates, without an exemption, religious schools would face extremely broad regulation, surveillance, and control under Title IX on matters of unusual sensitivity and religious importance.

However, the exemption is not absolute, as it requires a school to be "controlled by a religious organization" to apply. 20 U.S.C. 1681(a)(3). For over thirty years, the Department of Education has maintained that this is not "an independent requirement that the controlling religious organization be a separate legal entity than the educational institution." Direct Grant Programs, 85 Fed. Reg. 59,916, 59,956 (Sep. 23, 2020); see also 34 C.F.R. 106.12(c). But a future agency (or a private litigant) may push for the opposite reading and try to narrow the exemption only to those institutions controlled by an external religious organization.

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[8] See, *e.g.*, Department of Education, Brigham Young Univ. Title IX Exemption Response Letter (Jan. 3, 2022), https://perma.cc/4AN5-QU3A; Department of Education, St. Gregory's Univ. Title IX Exemption Response Letter (Mar. 24, 2015), https://perma.cc/86DS-JN6S; Department of Education, Northwest Nazarene Univ. Title IX Exemption Response Letter (Aug. 18, 2014), https://perma.cc/DEX5-37F8.

Under that narrower reading of the exemption, many religious institutions may not satisfy the "controlled by" criterion due to "fundamentally theological choices driven by the content of different religious doctrines." *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 252 (2025). Several religious groups in the United States—including Baptist, Jewish, Sikh, and Muslim religious communities, among others—eschew hierarchy. Schools based on such faith traditions would arguably not be "controlled by" an independent religious body, thus depriving them of the exemption and opening them up to liability for sex discrimination claims.

If this Court holds that "sex" under Title IX includes sexual orientation and gender identity, then schools with traditional beliefs about sex, gender, and marriage—and particularly schools affiliated with non-hierarchical traditions—will come under heavy fire.

Some attacks have already begun. Since 2016, the Department of Education has been trying to redefine "sex" to include sexual orientation and gender identity. Department of Justice & Department of Educ., Dear Colleague Letter on Transgender Students at 2 (May 13, 2016), https://perma.cc/G7SQ-MSHJ. In 2024, the agency formally adopted this definition into the regulations implementing Title IX, though the rule has been partially vacated for the time being. See *Tennessee* v. *Cardona*, 762 F. Supp. 3d 615, 621, 627-628 (E.D. Ky. 2025).

Private litigants took this expansive definition and tried to punish religious schools with it. For example, in *Maxon* v. *Fuller Theological Seminary* students who were expelled from a seminary for entering same-sex

marriages sued under Title IX. See *Maxon*, No. 20-56156, 2021 WL 5882035, at *1-2 (9th Cir. Dec. 13, 2021). The students argued that the religious exemption did not apply because the seminary, which was controlled only by an internal religious board and not a separate church or denominational body, was not "controlled by a religious organization" under the statute. *Id.* at *1. The Ninth Circuit ultimately disagreed, adopting instead the Department of Education's interpretation that "controlled by" does not require the institution to be associated with an independent entity. *Ibid.* But this unpublished, non-precedential opinion—the only appellate decision in the country interpreting the scope of the exemption—provides only limited cover for religious institutions should other plaintiffs try a similar tactic.

This wasn't even the boldest approach opponents of the exemption have taken. Another set of activist plaintiffs recently challenged the exemption *itself* as unconstitutional in the hopes of imposing liability on religious schools for their beliefs concerning sex, gender, and marriage. See *Hunter* v. *Department of Educ.*, 115 F.4th 955, 960-962 (9th Cir. 2024); see also *ibid.* ("We have recently interpreted this provision to prevent federally funded educational institutions from discriminating against gay or transgender students." (citing *Bostock*)). Although this attempt was ultimately unsuccessful, it previews the inevitable attempts to cut back the religious exemption in whatever way possible.

A *Bostock*-style ruling from this Court regarding Title IX would only further embolden litigants in their efforts to punish religious schools for their beliefs.

Even if such claims are unsuccessful, religious institutions will be forced into expensive litigation requiring entangling inquiries into the doctrinal bases for their internal structure and their beliefs regarding sex, gender, and marriage. Cf. *McRaney* v. *North Am. Mission Bd. of the S. Baptist Convention, Inc.*, — F.4th —, 2025 WL 2602899, at *21 (5th Cir. 2025) ("NAMB has endured protracted discovery, two rounds of summary judgment, a previous appeal, and a close en banc rehearing poll. Regrettably, this litigation has caused NAMB's * * * 'church personnel and records' to 'become subject to … the full panoply of legal process designed to probe the mind of the church.'") (quoting *Rayburn*, 772 F.2d at 1171). While some religious institutions may have the resources and stamina to withstand years of litigation, others will not. Less-resilient institutions will be forced to cave to the demands of aggressive litigants, or else buckle under the weight of the assault. Either way, the risk to their religious operations is real.

* * *

Rather than merely hoping that lower courts, government agencies, and advocacy groups will respect the rights of religious institutions, this Court can and should avert predictable burdens on constitutionally-protected religious exercise by making clear that Title IX's definition of "sex" does not include sexual orientation or gender identity. Otherwise, many more religious institutions will need to endure their own decades-long "legal odyssey[s]" while the lower courts grapple with the questions this Court leaves open. *Little Sisters*, 591 U.S. at 704 (Alito, J., concurring).

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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