No. 18-107

In the Supreme Court of the United States

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner*,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS AND OTHER RELIGIOUS ORGANIZATIONS IN SUPPORT OF PETITIONER AND SUPPORTING REVERSAL

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
HILLARY E. BYRNES
Associate General Counsel
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300
apicarello@usccb.org

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

State Statutes

Federal Bills

Other Authorities

INTEREST OF *AMICI*

The *amici* are national religious organizations that share the conviction that Title VII is not fairly read to address gender identity, and that such a reading would create serious burdens on religious liberty, speech, association, and other constitutional and statutory values.[1]

Individual statements of interest are set forth in Addendum A.

We submit this brief in support of the Petitioner. We urge this Court to hold that "sex" as used in Title VII does not mean "gender identity."

SUMMARY OF ARGUMENT

The post-enactment history of Title VII shows that the people, through their elected representatives, have repeatedly and consistently rejected the redefinition of Title VII proffered in this case. It is not the proper role of courts to read into the law what advocates have recognized it does not cover and have tried and failed on so many occasions to enact.

In forbidding workplace discrimination based on sex, Congress intended to level the playing field

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief, in whole, and that no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief. The Clerk of this Court has noted on the docket the blanket consent of the Petitioner and Respondent EEOC. Written consent from counsel for Respondent Aimee Stephens to the filing of this brief *amici curiae* has been filed with the Clerk.

between men and women. Differential treatment based on "gender identity," however, does not expose women to disadvantageous terms or conditions of employment to which men are not exposed (or vice versa). Therefore, it is not sex discrimination.

Nor is "gender identity" a protected class under the Sixth Circuit's "religious conversion" analogy. Unlike religion—which Title VII defines to include religious beliefs, practices, and observances—sex is an immutable characteristic. Furthermore, interpreting Title VII to prohibit discrimination based on an employee's religious conversion makes perfect sense because the employer's conduct is rooted in the very evil Congress intended to prevent: adverse work conditions that flow from hostility to the employee's religious beliefs, practices, and observances. Unfavorable workplace treatment owing to what purports to be a "sex change," however, is not grounded in sexism or hostility to the employee's sex. In such cases the evil that Congress intended to prevent when it prohibited sex discrimination in the workplace—treating women less favorably than men (or vice versa)—is simply not implicated.

Construing the term "sex" to include "gender identity" will create conflicts with many religious believers and with their institutions. Such an interpretation will affect the ability of churches and faith-based schools and charities to hire and retain employees who, by word and conduct, accept or at least do not contradict the church's religious message. It will also have an impact in the commercial workplace. Ordinary religious believers whose religious and moral views about being male or female are related to the

biological differences between men and women may be found to have engaged in "unwelcome" speech if they simply refer to a "transitioning" employee by his or her biological sex. Workplace policies and training to prevent such claims will almost certainly convey the message that the expression of religious and moral views critical of gender transitioning will result in workplace discipline. Individually- or family-owned businesses like the Petitioner in this case may face a similar marginalization of their religious and moral views or be driven out of business.

Construing Title VII to forbid discrimination based on gender identity can be expected to easily migrate to areas of law beyond the workplace, creating innumerable conflicts with religious liberty. Such a construction could affect the ability of health care providers to perform services in accord with their professional judgment as well as their religious and moral convictions. It could also affect the ability of faith-based and other schools to deal effectively and prudently with the problem of gender dysphoria, in such areas as locker room and bathroom access, use of pronouns, single-sex housing, and the preservation of educational and athletic opportunities for women.

A holding that "sex" means "gender identity" would entangle this Court and lower courts in a constitutional and statutory thicket for years to come. With neither legislative text nor history to guide them, courts will be forced on a case-by-case basis to determine the scope of such a holding in the face of competing constitutional and statutory values. The Judiciary will be called upon to decide when the bar on "gender identity" discrimination must yield to

constitutional protections for religious liberty, speech, association, and the choice of a livelihood. Courts will also be forced to take up dormant questions regarding the meaning and scope of Title VII's religious exemptions. Given the absence of any affirmative expression of Congressional intent to forbid discrimination based on gender identity, this Court should avoid reading into Title VII a term that raises such serious constitutional and statutory questions.

ARGUMENT

I. The Term "Sex" as Used in Title VII Does Not Mean "Gender Identity."

A. Title VII Says Nothing About Gender Identity.

No proposal to ban "gender identity" discrimination in the workplace was introduced in Congress until 2007, more than 40 years after enactment of the Civil Rights Act.[2] Since then, on at least 14 occasions, the people, through their elected representatives, have considered whether to make "gender identity" a protected class under Title VII.[3] None of these

---

[2] Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); To Prohibit Employment Discrimination Based on Gender Identity, H.R. 3685, 110th Cong. (2007).

[3] All the bills were named either the Employment Non-Discrimination Act ("ENDA") or the Equality Act ("EA"). ENDA, H.R. 2981, 111th Cong. (2009); ENDA, H.R. 3017, 111th Cong. (2009); ENDA, S. 1584, 111th Cong. (2009); ENDA, H.R. 1397, 112th Cong. (2011); ENDA, S. 811, 112th Cong. (2011); ENDA, H.R. 1755, 113th Cong. (2013); ENDA, S. 815, 113th Cong. (2013); EA, H.R. 3185, 114th Cong. (2015); EA, S. 1858, 114th Cong. (2015); EA, H.R. 2282, 115th Cong. (2017); EA, S. 1006, 115th

proposals has passed. Having failed to persuade their fellow citizens through Congress to enact a nationwide law making gender identity discrimination unlawful in the workplace, supporters of these measures have now turned to the courts, claiming that the original 1964 enactment already gives them what they wanted all along. It is not, however, the proper role of courts, through novel or creative interpretive leaps, to read into the law what advocates have recognized it does not cover and have tried and repeatedly failed to enact.

Title VII is modest in scope. It protects only five classes of persons: those who have been treated differently in the workplace due to their race, color, religion, sex, or national origin. All of these classes, with one exception (religion), are immutable.[4] All of them have been in Title VII since its enactment in 1964. In over 50 years, Congress has not added a protected class to Title VII and, apart from the clarifying definition of "religion," *see* note 4 *supra*, has only once clarified the meaning of such a class by specifying that "sex" includes "pregnancy, childbirth, and related medical conditions." 42 U.S.C. § 2000e(k). Thus, Congress has shown that it knows what Title VII covers, and knows how to add to or clarify the meaning and reach of the protected classes under Title VII when it wants to.[5] Title VII is not a free-ranging

---

Cong. (2017); EA, S. 788, 116th Cong. (2019); EA, H.R. 5, 116th Cong. (2019).

[4] 42 U.S.C. § 2000e(j) (defining "religion" to include "all aspects of religious observance and practice, as well as belief," unless the employer can show an inability to reasonably accommodate the observance or practice without undue hardship).

[5] Likewise, Congress knows how to forbid discrimination based

fairness code by which Congress has delegated to other branches the authority to define what is fair. Instead, Title VII is a durable work of legislative craftsmanship that expresses, balances, and implements a certain number of distinct principles of fairness, including some of our nation's highest—not principles that repeatedly fail to garner legislative majorities. However unwise, unjust, or even (under state or local law) illegal it may be for employers to discriminate on the basis of other factors, such as marital status, family size, socio-economic status, political affiliation, or a hundred other reasons, Title VII simply does not address those categories.

B. "Gender Identity Discrimination" Is Not "Sex Discrimination."

Congress's purpose in enacting the sex discrimination provisions of Title VII was to level the playing field between men and women in the workplace. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not exposed*."

---

on gender identity when it wants to and, when it does, it lists *both* "sex" (or "gender") *and* "gender identity" as protected classes, which would be unnecessary if laws prohibiting discrimination based on "sex" or "gender" already prohibited discrimination based on "gender identity." 34 U.S.C. § 12291(b)(13)(A) (forbidding discrimination on the basis of "sex" and "gender identity" in certain federally funded programs and activities); 18 U.S.C. § 249(a)(2)(A) (imposing enhanced punishment for causing or attempting to cause bodily injury because of "gender" or "gender identity"); 34 U.S.C. § 30503(a)(1)(C) (authorizing assistance in prosecuting crimes motivated by "gender" or "gender identity").

Oncale v. *Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (emphasis added), quoting *Harris* v. *Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring); *see also Int'l Union* v. *Johnson Controls*, 499 U.S. 187 (1991) (employer policy that applies only to women violates Title VII). Differential treatment based on gender identity, by contrast, does not expose women to disadvantageous terms or conditions to which men are not exposed (or vice versa). Therefore, it is not sex discrimination.

Nor is "gender identity" a protected class under the "conversion" theory endorsed by the Sixth Circuit in the decision below. Under this theory, the Court of Appeals reasoned, it is "religious" discrimination under Title VII to discriminate against an employee because he or she has converted to another faith, so it must be "sex" discrimination to discriminate against an employee who "changes" his or her sex. 884 F.3d 560, 575 (6th Cir. 2018). The analogy is unsound for two reasons. First, unlike religion, which by definition includes "all aspects of religious observance and practice, as well as belief," 42 U.S.C. § 2000e(j), sex is an immutable characteristic. *Frontiero* v. *Richardson*, 411 U.S. 677, 686 (1973). Sex cannot be changed even by surgical alteration of the genitals.[6] Second,

---

[6] The former Psychiatrist-in-Chief and current University Distinguished Service Professor of Psychiatry and Behavioral Sciences at Johns Hopkins Hospital states:

> "Sex change" is biologically impossible. People who undergo sex-reassignment surgery do not change from men to women or vice versa. Rather they become feminized men or masculinized women. Claiming that this is a civil-rights matter and encouraging surgical intervention is in reality to

application of Title VII's ban on religious discrimination makes perfect sense in the context of a religious conversion because the employer's unfavorable treatment of the employee is rooted in the very evil that Title VII's ban on religious discrimination was intended to prevent: adverse work conditions that flow from religious bigotry or hostility to the employee's religious views and practices. Unfavorable workplace treatment owing to what purports to be a "sex change," however, is not grounded in sexism or hostility to the employee's sex. In such cases the evil that Congress intended to prevent when it forbade sex discrimination in the workplace—treating women less favorably than men (or vice versa)—is simply not implicated.

II. Construing Title VII's Ban on "Sex Discrimination" to Include "Gender Identity Discrimination" Will Create Conflicts with Many Religious Believers and with Religious Institutions in the Workplace.

When Congress creates a new right, it can fashion a comprehensive code that anticipates problems,

---

collaborate with and promote a mental disorder.

Paul R. McHugh, M.D., *Transgender Surgery Isn't the Solution: A Drastic Physical Change Doesn't Address Underlying Psycho-Social Troubles*, WALL STREET J. (May 13, 2016), https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120; *see also* Ryan Anderson, *Sex Change: Physically Impossible, Psychosocially Unhelpful, and Philosophically Misguided*, THE PUBLIC DISCOURSE (Mar. 5, 2018) (noting that it is biologically impossible to change one's sex), www.thepublicdiscourse.com/2018/03/21151/.

provides definitions, sets out important qualifications, articulates exceptions, and allows or requires accommodations for religious and other objectors. When, by contrast, courts announce a new or previously unrecognized right, it is only in the context of deciding a specific dispute and not through the sort of comprehensive treatment that is characteristic of a legislature.

The difference underscores the danger. Were this Court to declare that "sex" as used in Title VII includes "gender identity," it would open the floodgates to a host of problems, including for persons and institutions with religious and moral convictions about sexual identity and sexual difference. Those problems can be addressed in plenary fashion by Congress; they cannot be addressed by courts in anything but a case-by-case fashion.

Unlike courts, legislatures can anticipate at least some of these conflicts and enact exemptions to prevent or ameliorate them. Instructively, all 21 states that by statute ban gender identity discrimination in the private (i.e., non-governmental) workplace have a religious exemption of some type, and virtually all of these exemptions (19) are broadly crafted.[7] Likewise, most of the federal bills that would have outlawed employment discrimination based on gender identity—and all such bills introduced before

[7] Our characterization of the exemptions as "broad" is purely descriptive, not an endorsement or judgment as to their adequacy. For a list of the 19 states, with citations to the relevant statutes, *see* Addendum B. For a list of the two states with less rigorous religious exemptions, with citations to the relevant statutes, *see* Addendum C.

2015—had a religious exemption.[8] The danger of a judicial decision redefining "sex" to include "gender identity" is that courts cannot, in systematic fashion, anticipate, prevent, or ameliorate the serious religious and other burdens that such a redefinition can be expected to create.

A. Churches

To exist and operate effectively, any organization, religious or secular, must be free to hire persons who agree and act in accordance with its mission. A group devoted to furthering civil liberties or environmental protection, for example, should not be forced to hire or retain someone who does not take these causes seriously or who, by word or conduct, actively undermines them.[9]

Fittingly, this Court has held that a group formed for expressive purposes has the right to exclude those whose membership would undermine the group's message.[10]

---

[8] *See* notes 2 and 3 (listing the bills), *supra*.

[9] This even has application in the commercial context. No one, for example, would expect a company to hire or retain an employee who, even on his or her own time (through a blog, for example), criticized the company's products or urged consumers to buy those of a competitor.

[10] *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000) ("freedom of expressive association" prevents a state from enforcing its nondiscrimination law to require the Boy Scouts to accept a gay scoutmaster); *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995) (unanimously holding that organizers of a St. Patrick's Day parade had a First Amendment right to exclude a gay and lesbian group whose presence was

Churches[11] have an even stronger right than secular groups to create expressive associations to advance their religious message: they enjoy the additional protection of the Religion Clauses.[12] Even "[a]n interest as compelling as the avoidance of Communist infiltration [into the United States] at the height of the Cold War"[13] was insufficient to justify government interference with a church's right to govern itself and direct its mission,[14] and this right of self-governance has been reaffirmed by this Court time and again.[15]

---

thought to communicate a message about homosexual conduct with which the organizers disagreed).

[11] In this brief, we use the term "church" to refer to a broad class of houses of worship and religious institutions of varied faiths and denominations.

[12] *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171, 189 (2012) (rejecting, as "untenable" and contrary to the text of the Religion Clauses, the claim that religious organizations enjoy only the right to expressive association shared by religious and secular organizations alike).

[13] Mark E. Chopko & Michael F. Moses, *Freedom to be a Church: Confronting Challenges to the Right of Church Autonomy*, 3 GEORGETOWN J. OF L. & PUB. POL'Y 387, 410 (Summer 2005) (describing *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952)).

[14] *Kedroff*, 344 U.S. at 107-08 ("[l]egislation that regulates church administration, the operation of the churches, [or] the appointment of clergy … prohibits the free exercise of religion").

[15] *See, e.g.*, *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1872); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. 171 (2012). *See also Lynch* v. *Donnelly*, 465 U.S. 668, 672 (1984) (the Religion Clauses were designed "to prevent, as far as possible, the intrusion of either [the church or the state]

Thus, churches, even more so than their secular counterparts, must have the ability to organize themselves with volunteers and employees who agree with, or at least do not contradict or undermine, the churches' religious beliefs, and to decide for themselves what form such agreement should take. "All who unite themselves to such a body do so with an implied consent to this government…." *Watson v. Jones*, 80 U.S., at 729. "But it would be a vain consent and would lead to the total subversion of such religious bodies," *id.*, if churches and other faith-based organizations were required to hire or retain workers who reject or refuse to practice the church's faith.

Given its expressive mission, a church understandably and legitimately may wish to hire only those whose speech and conduct is consistent with its own teaching. It could sow confusion among the members of a church (and the public) if in contravention of the church's religious beliefs it were, for example, forced to hire or retain an individual who publicly violates the church's teaching on a significant moral issue.[16]

For many churches, this religious teaching includes acceptance of—indeed, celebration of and gratitude

---

into the precincts of the other").

[16] A related problem is that a church may be charged with "sex discrimination" under Title VII if it does not, contrary to its religious and moral convictions, cover gender-transition procedures in the health plans it offers to its employees. *See* our discussion, *infra* at 21-25, concerning the likely impact of such an interpretation on the exercise of professional judgment by health providers.

for—one's created nature as male or female and the moral norms associated with sexual identity and differentiation.[17] Men and women are often the beneficiaries of church ministries and outreach based on their distinctive needs as men and women. This includes programs and activities that are premised on or promote a theologically-shaped understanding of human sexual difference. A church would not be able to effectively minister to, or meet the distinctive needs of, men and women were it forced to hire and retain people who reject or, by word or conduct, contradict this vision of human sexual difference and its moral consequence even for themselves.

If, for argument's sake, a church *were* required to hire or retain a "gender-transitioning" employee under the theory that "sex" discrimination means "gender identity" discrimination, it would set the stage for associated "harassment" claims when the church—in salutations and use of pronouns, for example—refers to the employee in the workplace by his or her *actual*

---

[17] The views of the Catholic Church are illustrative. It opposes any effort to separate one's personal identity from his or her created bodily nature as male or female. Pope Francis, *Amoris Laetitia*, No. 56 (Mar. 19, 2016). Sacred Scripture underscores that, by divine design, sexual difference is an inherent or constitutive part of human nature. Genesis 1:27 ("Male and female He created them"); Matthew 19:4 ("Have you not read that from the beginning the Creator 'made them male and female'"); *see* Congregation for Catholic Education, *"Male and Female He Created Them": Towards a Path of Dialogue on the Question of Gender Identity in Catholic Education*, no. 4 (Vatican City 2019) (stating that the "Christian vision of anthropology sees sexuality as a fundamental component of one's personhood"); *id*. at no. 8 (criticizing the view that sexual identity is a social construct rather than a natural or biological fact).

sex, thus pitting the claim to be free of gender identity "harassment" against the free speech, free exercise, and associational rights of the church, its members, and other employees. In addition, if the church, adhering to its own religiously-held view of sexual difference, were to continue arranging restroom and locker room access based on biological sex, notwithstanding an employee's self-designated gender identity, it may find itself charged with gender identity discrimination. Alternatively, if the church were to allow access to restrooms and locker rooms on the basis of gender identity, it may precipitate competing claims by co-workers that *their* right to be free of unwelcome contact with members of the opposite sex in a state of undress has been compromised in violation of a more traditional understanding of sex discrimination.

In short, compelling a church by law to hire and retain employees who, by speech or conduct, do not espouse or have not integrated its mission and message into their own lives, or who by their speech or conduct contradict that message, would invariably bring harm to a church. It would also undercut the church's right to decide for itself what its mission and message are. And if churches were forced to hire and retain such employees, it would almost certainly bring in its wake the sorts of intractable harassment, privacy, free speech, religious liberty, and associational claims described above. There is no evidence that this is a result that Congress contemplated or even a subject it intended to address when it enacted Title VII.

B. Religious Schools

What we have said of churches applies in an especially compelling way to faith-based schools, institutions charged with educating and forming children and young adults in a religious tradition. This Court has recognized that faith-based schools are "an integral part of the religious mission" of many churches. *Lemon* v. *Kurtzman*, 403 U.S. 602, 616 (1971). Such schools are a "powerful vehicle" for transmitting the faith, and "involve substantial religious activity and purpose." *Id.* *See also NLRB* v. *Catholic Bishop*, 440 U.S. 490, 501 (1979) (noting the "critical and unique role of the teacher in fulfilling the mission of a church-operated school"). In recognition of this principle, this Court has, on more than one occasion, protected the freedom of religious institutions precisely to choose teachers at their religious schools. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 565 U.S. at 190-95; *NLRB* v. *Catholic Bishop*, 440 U.S. at 501-07.

To carry out their religious mission, faith-based schools must be able to hire and retain employees who agree with, or at least do not contradict, the tenets of the faith that it is the school's purpose to impart. Few things would undermine a faith-based school's religious message as much as speech or conduct on the part of school administrators and of teachers that contradict or reject that message.[18] Children and

[18] The necessity of good conduct, and not mere words, in sharing the Gospel is well attested in both Scripture and the preaching of the Church Fathers. *E.g.*, James 2:17 ("faith of itself, if it does not have works, is dead"); St. John Chrysostom, *In Epistolam I*

young adults will hardly find religious faith attractive or persuasive—quite the opposite—when those in positions of authority contradict the faith by their word or example. If this Court were to decide that Title VII forbids gender identity discrimination in the workplace, it could be read to require that religious schools hire and retain employees who, by their speech and conduct, violate the religious teaching, including teaching on sexual identity, that is an essential part of the school's faith. And that in turn will imperil the ability of the school to effectively teach its faith.

For teachers and other employees of such a school to openly espouse or to exemplify by their own actions that one can rightly reject his or her nature as male or female would contradict the religious tradition embraced by many such schools. It would also, at an early age, send a mixed message to children and young people whose psychological, spiritual, and educational formation is the faith-based school's predominant focus and mission. If a religious school is to teach effectively and persuasively that God created human beings as male and female, and that this is a reality of human nature to be lived with joyful acceptance and gratitude, the school may conclude that it is unable, without dramatically undercutting its own message, to hire or retain teachers (be they teachers of math, science, language, or any other subject) who *by their own conduct* convey to students that sexual difference is not a created reality, but only or primarily a social

---

ad Timotheum homiliae 10, 3 (PG 62, 551) ("Christ has appointed us … to be seed and to yield fruit. There would be no need of speaking if our lives shone in this way. Words would be superfluous if we had deeds to show for them.").

construct. If, to take a concrete example, *Mr.* Smith, a teacher in a religious school, were subsequently to present himself to his students as *Ms.* Smith, the school could conclude that this conveys a message to students about sexual difference and identity at odds with the one the school is trying to impart to its students.

Government actions that infringe upon the exercise of the faith-based *school's* right to convey its religious message would also infringe upon the rights of *parents* who want their children to be reared in that faith.[19] Parents naturally and reasonably expect that the faith-based school will be led by administrators, and their children will be taught by faculty, who agree with and model that tradition for their children. A school could legitimately conclude that this objective is hindered when a school employee openly violates the school's religious convictions about sexual difference and sexual identity.

It would be a serious misreading of Title VII, and a distortion of what Congress intended when it enacted that statute (and rejected subsequent proposals to amend it to address gender identity), to hold that Title VII requires a religious school to hire or retain those who by word or conduct reject or contradict the school's religious convictions.

C. Religious Charities

Like religious schools, faith-based charities need

[19] *See Troxel* v. *Granville*, 530 U.S. 57 (2000) (reaffirming the constitutional right of parents to direct the upbringing of their children).

the freedom to employ workers who believe in, and carry out—or at least do not, by their own speech or conduct, undermine—the charity's mission and the religious beliefs animating it.

Faith-based charities in many instances provide services and activities that are inextricably connected with the charity's religious and moral views about human sexual difference. Many religious nonprofits, for example, provide services related to the good of individuals in terms of sexual health or of marriage and the family in the form of pre-marital, marital, and family counseling and related services. These services are premised on the notion, embraced by many religious traditions, that individuals are created by God as male and female and, because of this inalterable reality, should live that out and can form what those traditions regard as marital relationships. To perform this work in a manner consistent with their mission, faith-based charities must be able to hire and retain employees who represent, agree with, and live out the religious tradition that animates these efforts.

D. Individual Religious Believers

A holding that Title VII bans gender identity discrimination as part of the definition of sex can be expected, in several ways, to have adverse consequences for ordinary religious believers in the broader commercial workplace.

First, rules currently applicable to sexual harassment[20] will likely be applied to "unwelcome"

[20] *See Burlington Indus.* v. *Ellerth*, 524 U.S. 742 (1998); *Faragher*

speech relating to gender identity. "Transitioning" employees will insist upon being identified by their self-designated "gender identity," and will claim harassment if their supervisors and co-workers refuse to comply. Wanting to avoid, and to retain the affirmative defenses to, such claims, employers will take prophylactic measures to deter even temperate speech that is critical of the notion of gender transitioning, or that simply refers to employees by their actual biological sex if that is deemed "unwelcome." The workplace policies and training that employers implement will almost certainly convey the message that expressions of religious and moral views critical of gender transitioning will result in workplace discipline, while the opposite viewpoint will most likely be freely allowed.[21] Employees would face this risk whether their views were expressed on the job or off.

In this way, construing Title VII to forbid discrimination based on gender identity would move that law in the direction of a speech code and, in the

---

v. *City of Boca Raton*, 524 U.S. 775 (1998).

[21] To be sure, religious believers are protected under Title VII's ban on religious discrimination, but that ban only requires a reasonable accommodation, and then only if it does not create an undue hardship for the employer, 42 U.S.C. § 2000e(j), a standard that, as construed by this Court, gives only anemic protection to employees. *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977) (concluding that Title VII's prohibition on religious discrimination does not require an employer to make any accommodation that imposes more than a *de minimis* burden). Thus, in any contest with persons claiming gender identity discrimination, religious believers will likely come out on the losing side.

guise of workplace training on "harassment," become a trigger for "re-educating" employees in a value system that contradicts their lifelong understanding of human sexual difference or their deeply-held religious beliefs on this subject (or both). Employees who question the prevalent societal view on the difference between men and women will be placed on a par with those who espouse racial and sexual bigotry. Again, we submit that this is not what Congress intended when it enacted Title VII.

Second, individually- or family-owned businesses that have no religious affiliation but whose owners have sincerely-held religious views about sexual identity, like the Petitioner in this case, will be either forced to violate their religious convictions or be penalized or driven out of business.

III. The Creation of a Workplace Ban on "Gender Identity Discrimination" by a Judicial Reinterpretation of the Meaning of "Sex Discrimination" Will Have a Ripple Effect in the Law, Creating Burdens on the Exercise of Professional Judgment, Expectations of Privacy, and Religious Liberty Even Outside the Employment Context.

Federal courts often rely on precedent construing and applying Title VII's ban on sex discrimination to interpret other federal statutes that bar sex discrimination.[22] If, therefore, this Court were to

[22] *See, e.g.*, *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) ("This Court has … looked to its Title VII interpretations of discrimination in illuminating Title

interpret "sex" in Title VII to include "gender identity," that interpretation would almost certainly "migrate" to other parts of the U.S. Code. Thus, other federal laws that bar sex discrimination would, on the basis of this Court's holding in the Title VII context but similarly without basis in legislative text of history, be construed by lower courts (and perhaps ultimately by this Court) to forbid gender identity discrimination.

This in turn will create innumerable burdens on the exercise of professional judgment, expectations of privacy, and religious liberty. Two examples illustrate the problem.

A. Health Care Services

Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116, forbids sex discrimination in health programs and activities that receive federal financial assistance. If sex includes gender identity, then section 1557 could be read to condition the availability of federal funding on the performance of health care services that may conflict with the health care provider's professional judgment as well as its religious and moral convictions.

On the basis of lower court decisions construing Title VII to protect "gender identity," the claim is already being made that section 1557 makes "gender

---

IX") (collecting cases); *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (applying Title VII principles in a Title IX case); *Texas Dep't of Housing & Cmty. Affairs* v. *Inclusive Communities Project*, 135 S. Ct. 2507, 2519 (2015) (citing the Court's Title VII precedent in interpreting analogous provisions of the Fair Housing Act).

identity" a protected class and thereby requires a health care provider to provide, and a health plan to cover, gender-transitioning hormonal and surgical treatment. *E.g.*, *Tovar* v. *Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018) (holding that section 1557 forbids discrimination based on gender identity and requires a health plan to cover gender reassignment treatment). Such an interpretation threatens to make courts a battlefield for deciding what are essentially contested medical and ethical questions.

Sex reassignment surgery, for example, has not been proven to consistently produce good outcomes in the long term. Tracking patients over a 30-year period, a study by the Karolinska Institute in Sweden "revealed that beginning about 10 years after having the surgery, the transgendered began to experience increasing mental difficulties. Most shockingly, their suicide mortality rose almost 20-fold above the comparable nontransgender population." McHugh, *Transgender Surgery Isn't the Solution*, citing Cecilia Dhejne, *et al.*, *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden* (Feb. 22, 2011) ("Persons with transsexualism, after sex reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population"), www.ncbi.nlm.nih.gov/pmc/articles/PMC3043071/. Based on a review of more than 100 international medical studies of post-operative transsexual individuals, one researcher writes that "[t]here is no conclusive evidence that sex change operations improve the lives of transsexuals, with many people remaining severely distressed and even

suicidal after the operation." David Batty, *Sex Changes Are Not Effective, Say Researchers*, THE GUARDIAN (July 30, 2004), www.theguardian.com/society/2004/jul/30/health.mentalhealth.

Hormonal treatment also poses risks. Puberty-delaying hormones administered to children to facilitate later sex-change surgery (an off-label use that has not been fully tested and approved by the Food and Drug Administration for that purpose) "stunt[s] [their] growth and risk[s] causing sterility." *Transgender Surgery Isn't the Solution*; *see also* American College of Pediatricians, *Gender Ideology Harms Children* (Sept 2017) ("puberty-blocking hormones … inhibit growth and fertility in a previously biologically healthy child"; "cross-sex hormones … are associated with dangerous health risks including but not limited to cardiac disease, high blood pressure, blood clots, stroke, diabetes, and cancer"), www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children.

By contrast, decisions *not* to provide hormonal or surgical interventions have yielded positive results. Vanderbilt University and London's Portman Clinic report, for example, that a large percentage of children (70 to 80%) who reported transgender feelings but received no hormonal or surgical intervention ultimately lost those feelings. McHugh, *Transgender Surgery Isn't the Solution*. Some authorities report an even higher percentage of patients whose gender confusion is resolved without hormonal or surgical intervention. American College of Pediatricians, *Gender Ideology Harms Children*, *supra* (noting that "as many as 98% of gender confused boys and 88% of

gender confused girls eventually accept their biological sex after naturally passing through puberty").

In light of this evidence, a health care provider could reasonably conclude that hormonal or surgical treatment for gender dysphoria is bad or ineffective medicine. In addition, a provider, whether secular or religious, could conclude that such treatment is unethical or immoral because it involves disruption, amputation or mutilation of a healthy reproductive system as a response to what is a treatable psychological problem. *See Franciscan All.* v. *Burwell*, 227 F. Supp. 2d 660 (N.D. Tex. 2016) (enjoining regulations that would have required health care providers, over their professional and religious objections, to perform gender-transitioning procedures).

Applying section 1557 to gender identity would also create problems for mental health providers. Many therapists may have professional, ethical, religious, and moral objections to affirming—rather than respectfully and professionally challenging—a patient's contention that he or she is a sex other than his or her biological sex. A therapist may conclude that affirming a patient's attempt to "choose" a gender at variance with his or her biological sex would be harmful to the patient.[23] Reading section 1557 to require such therapy, in derogation of the therapist's

[23] Challenging a patient's self-identification as being of the opposite sex has been compared to challenging an anorexic patient's self-identification as overweight. *See* McHugh, *Transgender Surgery Isn't the Solution* (making the comparison). In each case, the therapist is challenging the patient's self-image with the aim of helping the patient.

own judgment on these questions, would undermine, if not make it impossible to practice, his or her profession, could harm patients, and would raise serious questions implicating rights of free exercise, association, and speech.

If sex is construed to include gender identity under Title VII, patients can be expected to assert claims of sex discrimination under section 1557 whenever therapists decline to provide gender-affirming treatment, physicians decide against a hormonal or surgical intervention, or insurers decline to pay for such interventions.

B. Education

Title IX of the Education Amendments of 1972 forbids educational programs and activities that receive federal assistance from discriminating on the basis of sex. 20 U.S.C. § 1681. This Court and lower courts look to Title VII in construing the sex discrimination prohibition of Title IX. *See* note 22 *supra*.

The challenge of gender dysphoria in schools—public, private, or religious—is complex, and there is no single solution to every manifestation of this problem. Faith-based schools, in particular, have to balance a number of prudential and doctrinal concerns, including respect and care for the student who is uncomfortable with his or her biological sex, concern about and care for other students, and maintaining an environment in which religious faith can be explained and growth in that faith supported and nurtured.

The law, unfortunately, is a rather blunt instrument. If Title IX is construed as forbidding discrimination based on gender identity, that holding will turn a complex pastoral and educational problem deserving of nuanced, individualized solutions into a legal problem, one that Congress has never addressed and that local communities are still grappling with. Because Title IX has nationwide applicability, and because so many schools (including some private K-12 schools) are deemed recipients of federal financial assistance, transgender-identifying students nationwide may be able to wield Title IX as a sword to require shared locker room and bathroom access. Males identifying as females would insist upon access to girls' and women's sports, something that is already having a marginalizing effect on the athletic opportunities of girls and women in both public and private school systems.[24] In addition, students will demand that, regardless of their biological sex, they be referred to by their preferred names and pronouns, to the confusion of other students, to the detriment of the school's educational and (in the case of faith-based schools)

---

[24] *See*, *e.g.*, News Release, *Female Athletes Challenge Connecticut Policy That Abolishes Girls-Only Sports* (June 18, 2019) (alleging that Connecticut Interscholastic Athletic Conference policy, which allowed males claiming a female identity to compete in girls' athletic competitions, "consistently deprived the female athletes … of dozens of medals, opportunities to compete at a higher level, and the public recognition critical to college recruiting and scholarship opportunities"), https://www.adflegal.org/detailspages/press-release-details/female-athletes-challenge-connecticut-policy-that-abolishes-girls-only-sports; *see also* Victor Morton, *Transgender Hurdler Easily Wins NCAA Women's National Championship*, THE WASHINGTON TIMES (June 3, 2019), https://www.washingtontimes.com/news/2019/jun/3/cece-telfer-franklin-pierce-transgender-hurdler-wi/.

religious mission and message, and in derogation of rights of free speech.[25] And students who do not identify with their biological sex may demand access to single-sex student housing based on the sex with which they identify, infringing upon the privacy interests of other students.

There is no reason to believe that Congress intended such a tangled web of problematic outcomes when it forbade sex discrimination in Title IX over 40 years ago. Yet such is the scenario that will almost certainly unfold, in case after case, if this Court decides that gender identity is a protected class under Title VII.

IV. If This Court Holds That "Sex Discrimination" Includes "Gender Identity Discrimination," Courts Will Be Forced to Decide, Without Legislative Text or History to Guide Them, the Scope of That Ruling in Relation to Existing Constitutional and Statutory Rights.

Interpreting Title VII's ban on sex discrimination to reach gender identity would entangle the Judiciary in a constitutional and statutory thicket. Federal

---

[25] See, e.g., Associated Press, *Teacher Fired for Refusing to Use Transgender Student's Pronouns* (Dec. 10, 2018), https://www.nbcnews.com/feature/nbc-out/teacher-fired-refusing-use-transgender-student-s-pronouns-n946006; Nicole Russell, *Professor Wanted to Use a Student's Name Instead of Transgender Pronoun—Now He's Suing the School For Forcing Him to Use It*, WASH. EXAMINER (Nov. 24, 2018), https://www.washingtonexaminer.com/opinion/professor-wanted-to-use-a-students-name-instead-of-transgender-pronoun-now-hes-suing-the-school-for-forcing-him-to-use-it.

courts (and ultimately this Court) will be called upon to decide, potentially in case after case and with no legislative text or history to guide them, how this newly-declared right should be applied and enforced in the face of competing constitutional and statutory values.

A. Constitutional Protections for Religious Liberty, Speech, Association, and Choice of a Livelihood

"When a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018) (internal quotation marks omitted). Construing Title VII not to embrace gender identity discrimination is not only "fairly possible" but compelling in light of the text of the statute and Congress's repeated refusal to adopt any such view. A contrary holding would open a Pandora's box of constitutional problems. Indeed, when presented with a far more plausible construction of another federal employment statute, which would have generated far fewer potential religious freedom issues than the construction here, this Court followed the principle of constitutional avoidance. *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 507 (1979) (rejecting an interpretation of the National Labor Relations Act that would have raised a serious constitutional question by requiring church-operated schools to collectively bargain with their faculty).

We have already noted some of the anticipated constitutional issues above. Churches and faith-based

schools would be impeded or even outright barred from hiring and retaining a workforce that agrees with, or at least does not openly contradict, their religious views about the human person being made male or female, and the need to respond to those differences with acceptance and gratitude. This raises very difficult constitutional questions as to rights of church-governance, free exercise, association, and speech. A ruling that gender identity is a protected class under Title VII would tee up those questions in scores of cases with varying fact patterns.

Insofar as health care providers are exposed to liability or forced out of their professions because of their professional judgment and religious views on bodily integrity and sexual identity, rights of free exercise and speech, and perhaps even the liberty to pursue a livelihood,[26] are also implicated.

B. Statutory Protections for Religious Organizations

Two existing exemptions in Title VII apply to religious organizations.[27] Though they have been

---

[26] *Conn* v. *Gabbert*, 526 U.S. 286, 291-92 (1999) (describing, but reaching no conclusion as to the continued viability of, an earlier line of Supreme Court cases that found a "due process right to choose one's field of private employment"); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (constitutionally protected liberty includes "the right of the individual … to engage in any of the common occupations of life"). *See* David E. Bernstein, *The Due Process Right to Pursue an Occupation: A Brighter Future Ahead?*, 126 YALE L.J. FORUM 287 (Dec. 2016).

[27] 42 U.S.C. § 2000e-1 ("This subchapter shall not apply to an employer with respect … to a religious corporation, association, educational institution, or society with respect to the employment

provided for by statute for some time, there is an as-yet-unresolved division among courts—sometimes among judges on the same circuit court—as to the appropriate criteria for determining which organizations are eligible for them.[28] There is also disagreement among scholars as to whether the exemptions are a defense to religious discrimination claims alone or have wider application.[29] Congress has

---

of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."); 42 U.S.C. § 2000e-2(e) ("Notwithstanding any other provision of this subchapter, … it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.").

[28] *Compare LeBoon* v. *Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (setting out nine criteria that various circuit courts have considered in deciding whether the exemption set out in 42 U.S.C. § 2000e-1 is applicable), *with Spencer* v. *World Vision*, 633 F.3d 723 (9th Cir. 2011) (reflecting a three-way split among three circuit judges regarding the appropriate criteria for determining whether an organization is eligible for the religious exemption set out in 42 U.S.C. § 2000e-1).

[29] *Compare* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OXFORD J. OF L. & RELIGION 368 (Sept. 2015) (arguing that Title VII's religious exemptions are a shield against not only religious discrimination claims but other Title VII claims that implicate the faith-based employer's religious convictions), *with* Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated*

not resolved these questions, and in recent years they have remained dormant. But a ruling by this Court that Title VII bars gender identity discrimination would force lower courts, not Congress, to answer them.

There is a related problem. If we suppose—contrary to statutory text, contemporaneous legislative history, and the subsequent and consistent refusal of Congress to enact a ban on gender identity discrimination—that Congress *implicitly* put such a ban in place when it forbade sex discrimination in 1964, then the religious exemptions that Congress *expressly* enacted as part of Title VII would yield anomalous, even absurd, results. For example, religious employers, under the existing religious exemptions and without running afoul of Title VII, may decline to hire or retain those who are not *members* of their church. But if construed as proposed in this case, that same statute would compel those same employers to hire and retain those who, by their speech or conduct, publicly contradict the church's deeply-held religious *convictions*.[30] The only way to avoid these interpretive dilemmas is to hold that Title

---

Contractors to Discriminate Against Their LGBT Employees, RELIGIOUS FREEDOM INSTITUTE (June 30, 2016) (arguing that Title VII's religious exemptions protect employers only from religious discrimination claims).

[30] Such a reading would seem to disfavor religious organizations that are ecumenical in their hiring practices and create a legal incentive for them to reject job applicants of other faiths. Alternatively, it would seem to create a government incentive for churches to excommunicate dissenting members. Obviously, the government has no constitutionally legitimate interest in either of these outcomes.

VII simply means what it says, so that "sex" is a protected class under the statute and "gender identity" is not.

It may be claimed that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*., will come to the rescue of faith-based institutions, but as this Court knows from nearly a decade of litigation on the federal contraceptive mandate, circuit courts are not uniform in their interpretation of RFRA. Moreover, RFRA requires the use of a balancing test, not an absolute exemption, which increases the likelihood that different courts will come to different conclusions when presented with similar facts.

In sum, there is already uncertainty regarding the scope of application of the existing Title VII religious exemptions and RFRA. These vexing questions will be multiplied and amplified—and ultimately land on this Court's doorstep—if it decides that gender identity is a protected class under Title VII.

CONCLUSION

For all these reasons, we urge this Court to reverse the judgment of the Court of Appeals and to hold that "sex" as used in Title VII does not include "gender identity."

Respectfully submitted,

ANTHONY R. PICARELLO, JR.*
General Counsel
JEFFREY HUNTER MOON
Solicitor
MICHAEL F. MOSES
Associate General Counsel
HILLARY E. BYRNES
Associate General Counsel
UNITED STATES CONFERENCE
OF CATHOLIC BISHOPS
3211 Fourth Street, N.E.
Washington, D.C. 20017
apicarello@usccb.org
(202) 541-3300

August 23, 2019

**Counsel of Record*

Addendum A

Individual statements of interest

The Anglican Church in North America ("ACNA") unites some 100,000 Anglicans in more than 1,000 congregations across the United States and Canada into a single Church. The ACNA is a Province in the Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference ("GAFCon") and formally recognized by the GAFCon Primates—leaders of Anglican Churches representing 70 percent of active Anglicans globally. The ACNA is determined with God's help to maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them and to defend the God-given inalienable human right to free exercise of religion.

The Association of Christian Schools International ("ACSI") is a nonprofit association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 2,700 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world. ACSI accredits Protestant pre-K-through-grade-12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. ACSI's calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in

ensuring expansive religious liberty with strong protection from government attempts to restrict it.

The Cardinal Newman Society ("The Society") is a nonprofit organization established in 1993 for religious and educational purposes to promote and defend faithful Catholic education. The Society fulfills its mission in numerous ways, including supporting education that is faithful to the teaching and tradition of the Catholic Church; producing and disseminating research and publications on developments and best practices in Catholic education; and keeping Catholic leaders and families informed. The Society serves many Catholic schools and colleges and their employees by helping them consistently teach and witness to the Catholic faith. The Society requires a commitment by its own employees to ensure fidelity to the Magisterium of the Catholic Church in all Society-related activities and commitments and to ensure that employees' public statements and actions, whether as part of their official duties or not, are consistent with the Society's dedication to Catholic values and the promotion of strong Catholic identity.

The Catholic Bar Association ("CBA") is a community of legal professionals that educates, organizes, and inspires its members to faithfully uphold and bear witness to the Catholic faith in the study and practice of law. The CBA's mission and purpose include upholding the principles of the Catholic faith in the practice of law, and assisting the Church in the work of communicating Catholic legal principles to the legal profession and society at large. This includes the principles of religious liberty and

rights of conscience with respect to religious beliefs as reflected in this nation's founding documents.

The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 churches and 15.2 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

International Church of the Foursquare Gospel ("The Foursquare Church") seeks to declare the unchanging ministry of Jesus Christ worldwide. To that end, The Foursquare Church has congregations in nearly 150 countries, totaling approximately nine million global members. The Foursquare Church believes that all human beings are created in the image of God, and therefore should be treated with love and grace. The religious freedom of The Foursquare Church and its members, and the ability to carry out its mission, will be profoundly threatened if the Court construes "sex" in Title VII to encompass gender identity.

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the active Catholic Bishops

of the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference, and implicated in these cases, include the protection of the religious freedom and other rights of faith-based organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

Addendum B

Nineteen states with broad religious exemptions from statutory bans on gender identity discrimination in the workplace

California. Cal. Gov't Code §§ 12940(a) (barring gender identity discrimination in employment) & 12926(d) (exempting "a religious association or corporation not organized for private profit").

Colorado. Colo. Rev. Stat. Ann. §§ 24-34-402(1)(a) (barring sexual orientation discrimination in employment), 24-34-301(7) (defining sexual orientation to include "transgender status or another individual's perception thereof"), & 24-34-402(7) (exempting religious organizations and associations not supported, in whole or in part, by money raised by taxation or public borrowing).

Connecticut. Conn. Gen. Stat. Ann. §§ 46a-60(b) (barring gender identity discrimination in employment) & 46a-81aa (exempting religious corporations, entities, associations, and educational institutions or societies "with respect to the employment of individuals to perform work connected with the carrying on" of the organization's activities, or "with respect to matters of discipline, faith, internal organization or ecclesiastical rule, custom or law").

Delaware. Del. Code Ann. tit. 19, §§ 711(a) (barring gender identity discrimination in employment) & 710(7) (exempting religious corporations, associations, or societies except where the duties of

employment pertain solely to activities that generate unrelated business taxable income).

Hawaii. Haw. Rev. Stat. Ann. §§ 378-2(a)(1) (barring gender identity discrimination in employment) & 378-3(5) (stating that nothing in this part shall be deemed to prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, that is operated, supervised, or controlled by or in connection with a religious organization, from "giving preference to individuals of the same religion or denomination" or from "making a selection calculated to promote the religious principles for which the organization is established or maintained").

Iowa. Iowa Code Ann. §§ 216.6(1) (barring gender identity discrimination in employment) & 216.6(6)(d) (exempting religious institutions and their educational facilities, associations, corporations and societies with respect to qualifications based on gender identity when such qualifications are "related to a bona fide religious purpose").

Maine. Me. Rev. Stat. tit. 5, §§ 4572 (barring sexual orientation discrimination in employment), 4553(9-C) (defining sexual orientation to include gender identity), & 4573-A(2) (stating that a religious corporation, association, educational institution or society may give preference in employment to individuals of its same religion, and that religious organizations "may require that all applicants and employees conform to the religious tenets of that organization").

Maryland. Md. Code Ann., State Gov't §§ 20-606 (barring gender identity discrimination in employment) & 20-604 (stating that this subtitle does not apply to religious corporations, associations, educational institutions, or societies, with respect to the employment of persons of a particular religion or gender identity to perform work connected with the activities of the religious entity).

Massachusetts. Mass. Gen. Laws Ann. ch. 151B, §§ 4(1) (barring gender identity discrimination in employment), 4(18) (stating that the law shall not be construed to prevent religious or denominational institutions or organizations, or organizations operated for charitable or educational purposes which are operated, supervised or controlled by or in connection with a religious organization, from "giving preference to persons of the same religion or denomination" or from "taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained"), & 1(5) (same).

Minnesota. Minn. Stat. Ann. §§ 363A.08 (barring sexual orientation discrimination in employment), 363A.03 (defining sexual orientation to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"), & 363A.26 (stating that nothing in this chapter prohibits any nonprofit religious association, corporation, or society, or any educational institution operated, supervised, or controlled by such an association,

corporation, or society, from, "in matters relating to sexual orientation, taking any action with respect to … employment").

Nevada. Nev. Rev. Stat. Ann. §§ 613.330(1)(a) (barring gender identity discrimination in employment) & 613.320 (exempting religious corporations, associations, and societies with respect to the employment of persons of a particular religion to perform work connected with the carrying on of its religious activities, and exempting nonprofit employers from any provisions concerning unlawful employment practices related to gender identity).

New Hampshire. N.H. Rev. Stat. Ann. §§ 354-A:7(I) (barring gender identity discrimination in employment) & 354-A:18 (stating that nothing in this chapter shall be construed to bar religious or denominational institutions or organizations, or organizations operated for charitable or educational purposes, which are operated, supervised, or controlled by or in connection with a religious organization, from "giving preference to persons of the same religion" or from "making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained").

New Jersey. N.J. Stat. Ann. § 10:5-12 (barring gender identity discrimination in employment, but stating that it shall not be an unlawful employment practice for a religious association or organization to use religious affiliation as a uniform qualification in the employment of persons engaged in the association's or organization's religious activities, or

to follow "the tenets of its religion in establishing and utilizing criteria for employment of an employee").

New Mexico. N.M. Stat. Ann. §§ 28-1-7 (barring gender identity discrimination in employment) & 28-1-9 (providing that nothing in the Human Rights Act shall bar any religious or denominational institution or organization that is operated, supervised, or controlled by, or that is operated in connection with, a religious or denominational organization from giving preferences to persons of the same religion or "imposing discriminatory employment … practices that are based upon … gender identity," provided that the provisions of the Act relating to gender identity shall apply to any other for-profit or nonprofit activities of a religious or denominational institution or organization).

New York. N.Y. Exec. Law §§ 296(1)(a) (barring gender identity discrimination in employment) & 296(11) (providing that nothing in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment or giving preference to persons of the same religion or denomination or "from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained").

Oregon. Or. Rev. Stat. Ann. §§ 659A.030(1)(a) (barring sexual orientation discrimination in employment), 174.100(7) (defining sexual orientation

to include gender identity), 659A.006(5) (providing that it is not an unlawful employment practice for a bona fide church or other religious institution "to take any employment action based on a bona fide religious belief about sexual orientation" in employment positions directly related to the operation of a church or other place of worship, in nonprofit religious schools, camps, day care centers, thrift stores, bookstores, radio stations, or shelters, or in other employment positions that involve religious activities so long as not connected with a commercial or business activity), 659A.006(4) (providing that it is not an unlawful employment practice for a bona fide church or other religious institution to prefer a co-religionist for employment if, in the institution's opinion, the preference will best serve its purposes, and the employment is closely connected with or related to the primary purposes of the church or institution and is not connected with commercial activities that have no necessary relationship to the church or institution).

Utah. Utah Code Ann. §§ 34A-5-106 (barring gender identity discrimination by employers) & 34A-5-102(1)(i)(ii) (stating that "employer" does not include religious organizations, religious corporations sole, religious associations, religious societies, religious educational institutions, or religious leaders acting in that capacity, or any corporation or association constituting an affiliate, wholly-owned subsidiary, or agency of any religious organization, religious corporation sole, religious association, or religious society).

Vermont. Vt. Stat. Ann. tit. 21, §§ 495(a) (barring

gender identity discrimination in employment) & 495(e) (stating that the prohibition of gender identity discrimination shall not be construed to prohibit or prevent any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from giving preferences to persons of the same religion or denomination, or "from taking any action with respect to matters of employment which is calculated by the organization to promote the religious principles for which it is established or maintained").

Washington. Wash. Rev. Code §§ 49.60.180 (barring sexual orientation discrimination by employers), 49.60.040(26) (defining sexual orientation to include gender identity), & 49.60.040(11) (stating that the term "employer" does not include "any religious or sectarian organization not organized for private profit").

Addendum C

Two states with statutory bans on gender identity discrimination in the workplace that have less rigorous religious exemptions

Illinois. 775 Ill. Comp. Stat. Ann. §§ 5/2-102 & 5/1-103(Q) (barring gender identity discrimination in employment) & 5/2-101(B)(2) (providing that employer does not include any religious corporation, association, educational institution, society or nonprofit nursing institutions with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society, or nonprofit nursing institution of its activities).

Rhode Island. R.I. Gen. Laws Ann. §§ 28-5-7(1) (barring gender identity discrimination in employment) & 28-5-6(8) (providing that nothing in this subdivision shall be construed to apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of its religion to perform work connected with the carrying on of its activities).