

In The
Supreme Court of the United States

—◆—
GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., by his next friend and mother, DEIRDRE GRIMM,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

—◆—
**BRIEF OF MAJOR RELIGIOUS ORGANIZATIONS
AS AMICI CURIAE SUPPORTING PETITIONER**

—◆—
ALEXANDER DUSHKU
R. SHAWN GUNNARSON
Counsel of Record
JOSHUA D.K. FIGUEIRA
KIRTON MCCONKIE
Key Bank Tower
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Interpreting Gender Identity as a Protected Class Under Title IX Would Threaten Religious Liberty	4
A. Major religions teach that personal identity as male or female is a divinely created and immutable characteristic	4
1. Catholic Church.....	6
2. Judaism	9
3. National Association of Evangelicals	12
4. Southern Baptist Convention.....	14
5. The Church of Jesus Christ of Latter-day Saints (Mormon).....	16
6. The Lutheran Church–Missouri Synod	19
7. Orthodox Churches.....	22
8. Islam	24
9. Sikhism.....	26
B. Interpreting “sex” to include gender identity places not only Title IX but also Titles VII and VIII in conflict with major faith traditions	28

TABLE OF CONTENTS—Continued

	Page
C. Leaving the issue of gender identity to elected legislators will allow the democratic process to work out solutions that fully preserve religious liberty	32
CONCLUSION.....	35

TABLE OF AUTHORITIES

	Page
CASES	
<i>Auer v. Robbins</i> , 519 U.S. 452 (1997).....	1
<i>Bd. of Trustees of Univ. of Ala. v. Garrett</i> , 531 U.S. 356 (2001)	31
<i>Cnty. of Allegheny v. ACLU</i> , 492 U.S. 573 (1987)	33
<i>Corp. of Presiding Bishop v. Amos</i> , 483 U.S. 327 (1987).....	30
<i>Employment Div. v. Smith</i> , 494 U.S. 872 (1990).....	33
<i>Little v. Wuerl</i> , 929 F.2d 944 (3d Cir. 1991)	30
<i>Obergefell v. Hodges</i> , 576 U.S. ___, 135 S. Ct. 2584 (2015).....	2
<i>Quiban v. Veterans Admin.</i> , 928 F.2d 1154 (D.C. Cir. 1991)	28
<i>Schuette v. Coal. to Defend Affirmative Action</i> , 572 U.S. ___, 134 S. Ct. 1623 (2014)	34
<i>Schweiker v. Wilson</i> , 450 U.S. 221 (1981).....	28
<i>Spencer v. World Vision, Inc.</i> , 633 F.3d 723 (9th Cir. 2010)	30–31
STATUTES	
Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009)	33
Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011)	33–34

TABLE OF AUTHORITIES—Continued

	Page
Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013)	34
Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)	<i>passim</i>
20 U.S.C. § 1681(a)(3).....	30
42 U.S.C. § 2000e-1(a).....	30, 31
42 U.S.C. § 2000e-2(a)(1)	29
42 U.S.C. § 2000e-2(e)(2).....	30
42 U.S.C. § 3604	30
42 U.S.C. § 3604(a).....	29
42 U.S.C. § 3607(a).....	30
 OTHER AUTHORITIES	
ABDUL GHAFFAR HASAN, THE RIGHTS & DUTIES OF WOMEN IN ISLAM (1999)	25
AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).....	5
ANDREW R. FLORES ET AL., THE WILLIAMS INSTI- TUTE, HOW MANY ADULTS IDENTIFY AS TRANS- GENDER IN THE UNITED STATES? (June 2016).....	3
Benjamin Cerf Harris, <i>Likely Transgender Indi- viduals in U.S. Federal Administrative Rec- ords and the 2010 Census</i> (Ctr. for Admin. Records Research and Applications, Working Paper No. 2015–3).....	3
BENTI CHAUPAI SAHIB	26

TABLE OF AUTHORITIES—Continued

	Page
Br. for World Professional Assoc. for Transgender Health, Pediatric Endocrine Society et al. as Amici Curiae Supporting Appellant, G.G. v. Gloucester Cnty. Sch. Bd. (4th Cir.) (No. 15–2056)	5
CATECHISM OF THE CATHOLIC CHURCH (2d ed. 2016)	7, 8
COMMISSION ON THEOLOGY AND CHURCH RELATIONS, THE LUTHERAN CHURCH—MISSOURI SYNOD, THE CREATOR’S TAPESTRY: SCRIPTURAL PERSPECTIVES ON MAN-WOMAN RELATIONSHIPS IN MARRIAGE AND THE CHURCH (Dec. 2009)	20
DOCTRINE & COVENANTS	17
DOUGLAS LAYCOCK, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008).....	2
Dr. Aruna Saraswat et al., <i>Evidence Supporting the Biological Nature of Gender Identity</i> , 21 ENDOCRINE PRACTICE 199 (2015)	5
Dr. Diane Ehrensaft, <i>From Gender Identity Disorder to Gender Identity Creativity: True Gender Self Child Therapy</i> , 59 J. HOMOSEXUALITY 337 (2012)	5
Elder David A. Bednar, <i>Marriage Is Essential to His Eternal Plan</i> , Ensign, June 2006	18
ENCYCLOPEDIA OF RELIGION (Mircea Eliade ed., 1987)	27, 28

TABLE OF AUTHORITIES—Continued

	Page
<i>Frequently Asked Questions</i> , THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	19
GURU GRANTH SAHIB JI	26, 27
JAKOB SKOVGAARD-PETERSEN, DEFINING ISLAM FOR THE EGYPTIAN STATE (1997)	26
Jonathan Sacks, <i>The Role of Women in Judaism</i> , in MAN, WOMAN, AND PRIESTHOOD (Peter Moore ed., 1978)	11
JUDITH BUTLER, GENDER TROUBLE (2d ed. 1990)	5
KECIA ALI & OLIVER LEHMAN, ISLAM: THE KEY CONCEPTS (2008)	24, 25
Mark Yarhouse, <i>Understanding the Transgender Phenomenon</i> , CHRISTIANITY TODAY, July-Aug. 2015	13, 14
Pope Benedict XVI, Address of His Holiness Benedict XVI on the Occasion of Christmas Greetings to the Roman Curia (Dec. 21, 2012)	9
POPE FRANCIS, POST-SYNODAL APOSTOLIC EXHORTATION <i>AMORIS LAETITIA</i> (<i>THE JOY OF LOVE</i>) (March 19, 2016)	8
SAHIH AL-BUKHARI, AUTHENTIC TRADITIONS (1997)	25
SOUTHERN BAPTIST CONVENTION, RESOLUTION ON BIBLICAL SEXUALITY AND THE FREEDOM OF CONSCIENCE (2016)	15
SOUTHERN BAPTIST CONVENTION, RESOLUTION ON TRANSGENDER IDENTITY (2014)	15, 16

TABLE OF AUTHORITIES—Continued

	Page
SOUTHERN BAPTIST CONVENTION, THE BAPTIST FAITH & MESSAGE (2000).....	15
STANDING CONFERENCE OF THE CANONICAL ORTHODOX BISHOPS IN THE AMERICAS, 2013 ASSEMBLY STATEMENT ON MARRIAGE AND SEXUALITY (2013).....	23, 24
STANDING CONFERENCE OF THE CANONICAL ORTHODOX BISHOPS IN THE AMERICAS, STATEMENT ON MORAL CRISIS IN OUR NATION (May 16, 2012)	22, 23, 24
THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE FAMILY: A PROCLAMATION TO THE WORLD (Sept. 23, 1995)	17, 18
THE HOLY BIBLE	<i>passim</i>
THE HOLY QUR’AN (Abdullah Yusuf Ali trans., 2000)	24, 25
THE LUTHERAN CHURCH—MISSOURI SYNOD, GENDER IDENTITY DISORDER OR GENDER DYSPHORIA IN CHRISTIAN PERSPECTIVE (May 17, 2014)	20, 21, 22
THE VAARS OF BHAI GURDAS JI.....	26, 27
<i>Transcript of News Conference on Religious Freedom and Nondiscrimination</i> , NEWSROOM, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Jan. 27, 2015)	19

INTEREST OF *AMICI CURIAE*¹

Religious organizations and associations representing over 50 million Americans appear on this brief as a diverse coalition of faith communities. *Amici* are the United States Conference of Catholic Bishops; Union of Orthodox Jewish Congregations of America; National Association of Evangelicals; the Ethics and Religious Liberty Commission of the Southern Baptist Convention; The Church of Jesus Christ of Latter-day Saints; The Lutheran Church–Missouri Synod; and Christian Legal Society. Despite disagreements on many points of faith, we are united in supporting the vigorous free exercise of religion under the First Amendment. The religious liberty we cherish is threatened by the Fourth Circuit’s decision adopting the Department of Education’s expansion of Title IX beyond any plausible interpretation. We submit this brief to inform the Court about the sharp clashes with religious belief and practice that will arise if the Court interprets the term “sex” in Title IX to include gender identity.²



¹ All parties have consented to the filing of this brief. No counsel for any party authored the brief in whole or in part, and no person or entity besides *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of the brief.

² Although this brief does not address the question of agency deference under *Auer v. Robbins*, 519 U.S. 452 (1997), *amici* agree with Petitioner that agency deference in this case is unwarranted.

SUMMARY OF ARGUMENT

Interpreting “sex” to mean gender identity would generate conflicts with religious persons and institutions across a range of fronts. Major religious traditions—including those represented by *amici*—share the belief that a person’s identity as male or female is created by God and immutable. That belief is contradicted by the U.S. Department of Education’s interpretation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). The government’s view, accepted by the Fourth Circuit majority, is that “one’s internal, perceived sense of gender identity is *determinative* when it diverges from physiological sex.” Br. Pet. 26–27 (citation omitted).

In addition to Petitioner’s arguments, the contradictions between the Department’s interpretation of Title IX and religious beliefs shared by millions of Americans offer an additional reason to reverse. Affirming the Fourth Circuit’s decision would unleash conflicts over religious liberty resembling the conflicts over same-sex marriage. *Cf. Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (“Today’s decision . . . creates serious questions about religious liberty.”); *id.* at 2638 (Thomas, J., dissenting) (same); *id.* at 2642–43 (Alito, J., dissenting) (same). *See generally* DOUGLAS LAYCOCK, SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 189 (Douglas Laycock et al. eds., 2008) (“All six contributors—religious and secular, left, center, and right—agree that same-sex marriage is a threat to religious liberty.”). Interpreting Title IX’s prohibition on

sex discrimination as an implicit ban on gender-identity discrimination would undermine the ability of religious organizations to govern their own institutions consistent with their tenets. Maintaining religious schools, colleges, and universities that reflect the faith of their sponsoring religious organizations would be in jeopardy. But also, because federal civil rights laws for employment and housing contain the same prohibition on sex discrimination as Title IX, a misstep in this case could threaten religious liberty across a broad range of circumstances, including employment, housing, and public accommodations.

We acknowledge the serious challenges faced by a small number of people who experience gender dysphoria or other issues of gender identity.³ They are fellow citizens who deserve kindness and compassion; their concerns should be addressed. But meeting their needs, when voluntary solutions are unavailing, is a task for Congress and other legislators who can balance competing interests. An issue as delicate and complicated as gender identity should not be resolved through an ersatz interpretation of “sex”—especially

³ Estimates of the number of Americans who experience gender identity conflicts vary wildly. *See, e.g.*, Benjamin Cerf Harris, *Likely Transgender Individuals in U.S. Federal Administrative Records and the 2010 Census* 3 (Ctr. for Admin. Records Research and Applications, Working Paper No. 2015–3), available at https://www.census.gov/srd/carra/15_03_Likely_Transgender_Individuals_in_ARs_and_2010Census.pdf (estimating that 89,667 persons identify as transgender); ANDREW R. FLORES ET AL., THE WILLIAMS INSTITUTE, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (June 2016) (estimating that 1.4 million adults identify as transgender).

not when such a dramatic change in the law appears in an informal agency document that lacks the rudimentary elements of notice-and-comment rulemaking. Expanding Title IX through unilateral agency construction would deny religious institutions like *amici* any chance to mitigate or avoid the resulting loss of religious liberty through tailored legal protections.



ARGUMENT

I. Interpreting Gender Identity as a Protected Class Under Title IX Would Threaten Religious Liberty.

A. Major religions teach that personal identity as male or female is a divinely created and immutable characteristic.

For millions of Americans, the words “male” and “female” denote not only biological realities, but religious and moral concepts of personal identity and responsibility. Those beliefs are not the province of a narrow sect: they stand at the core of many faith traditions. Not surprisingly, then, interpreting “sex” to include gender identity would create thorny conflicts between federal civil rights law and widely held religious beliefs.

The Department’s reading of Title IX presupposes a settled clinical understanding of gender identity that does not exist. Some assert that gender identity consists of “the cultural meanings that the sexed body

assumes.”⁴ Others argue for “a fixed, biological basis for gender identity.”⁵ Still others say that “[a]lthough not all of the factors that contribute to the formation of one’s gender identity are fully understood, it is generally accepted that gender identity has an innate component.”⁶ The American Psychiatric Association characterizes gender identity as an aspect of “social identity” and defines it as “an individual’s identification as male, female, or, occasionally, some category other than male or female.”⁷ And then there are those who reject the APA’s guidelines on gender dysphoria in favor of “an inner sense of self as male, female, or other, based on body, on thoughts and feelings, and absorption of messages from the external world.”⁸

Amici see gender differently. Our core beliefs and practical experience hold that gender is a given, consisting of attributes intrinsically connected with one’s birth sex—not an individual choice. We and other

⁴ JUDITH BUTLER, *GENDER TROUBLE* 9 (2d ed. 1990).

⁵ Dr. Aruna Saraswat et al., *Evidence Supporting the Biological Nature of Gender Identity*, 21 *ENDOCRINE PRACTICE* 199, 199 (2015).

⁶ Br. for World Professional Assoc. for Transgender Health, Pediatric Endocrine Society et al. as *Amici Curiae* Supporting Appellant at 13, *G.G. v. Gloucester Cnty. Sch. Bd.* (4th Cir.) (No. 15–2056).

⁷ AMERICAN PSYCHIATRIC ASSOC., *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 451 (5th ed. 2013).

⁸ Dr. Diane Ehrensaft, *From Gender Identity Disorder to Gender Identity Creativity: True Gender Self Child Therapy*, 59 *J. HOMOSEXUALITY* 337, 339 (2012).

major religions agree that human beings are the creation of God; that He created them male and female; that to be male or female is an immutable characteristic; and that this characteristic carries certain attributes and responsibilities.

Below are statements of belief from the perspective of diverse religious traditions. Catholic and Evangelical, Christian and Jewish, Islamic and Sikh—all celebrate human identity as male or female as divinely created and immutable. Although the statements rely on authoritative sources, they do not purport to be definitive or comprehensive. Even a single faith tradition may encompass internal divisions on gender. But one thing is perfectly clear: sacred writings and official statements from several major religions—including those of *amici*—demonstrate remarkable unanimity on the origin and purpose of gender as immutable and divinely ordained.

1. Catholic Church

With a theological tradition stretching back over many centuries, the Catholic Church affirms the irreducible gift and immutability of each person's sexual identity as male or female as a truth accessible to reason and illuminated by faith.

The Catechism, quoting the first pages of the Bible, teaches that “God created man in his own image, in the image of God he created him, male and female

he created them.’”⁹ It further explains that “Man occupies a unique place in creation: (I) he is ‘in the image of God’; (II) in his own nature he unites the spiritual and material worlds; (III) he is created ‘male and female’; (IV) God established him in his friendship.”¹⁰ By this understanding, “Man and woman have been created, which is to say, willed by God. . . .”¹¹

The divinely created reality of sexual difference in no way implies inferiority of either sex. They have been created “in perfect equality as human persons.”¹² As the Catechism elaborates, “‘Being man’ or ‘being woman’ is a reality which is good and willed by God: man and woman possess an inalienable dignity which comes to them immediately from God their Creator.”¹³ In other words, “the respective ‘perfections’ of man and woman reflect something of the infinite perfection of God: those of a mother and those of a father and husband.”¹⁴ Or, as the Catechism says, “Man and woman were made ‘for each other’—not that God left them half-made and incomplete: he created them to be a communion of persons, in which each can be ‘helpmate’

⁹ CATECHISM OF THE CATHOLIC CHURCH § 355 (2d ed. 2016) (quoting *Genesis* 1:27 (RSV)); see also *id.* § 2332 (same).

¹⁰ *Id.* § 355.

¹¹ *Id.* § 369.

¹² *Id.* (footnote omitted).

¹³ *Id.*

¹⁴ *Id.* § 370 (footnote omitted).

to the other, for they are equal as persons . . . and complementary as masculine and feminine.”¹⁵

Marriage unites a man and a woman in a covenantal relationship that is “ordered to the procreation and education of the offspring and it is in them that it finds its crowning glory.”¹⁶ “By transmitting human life to their descendants, man and woman as spouses and parents cooperate in a unique way in the Creator’s work.”¹⁷ “Each of the two sexes is an image of the power and tenderness of God, with equal dignity though in a different way. The union of man and woman in marriage is a way of imitating in the flesh the Creator’s generosity and fecundity. . . .”¹⁸

Philosophies that deny human sexual identity as either male or female contradict both Catholic theology and right reason. Pope Francis has rightly rejected “an ideology of gender that ‘denies the difference and reciprocity in nature of a man and a woman and envisages a society without sexual differences, thereby eliminating the anthropological basis of the family.’”¹⁹ Pope Benedict XVI criticized gender ideology in similar terms: “People dispute the idea that they have a nature, given by their bodily identity, that serves as a defining

¹⁵ *Id.* § 373.

¹⁶ *Id.* § 1652 (footnote omitted).

¹⁷ *Id.* § 373 (footnote omitted).

¹⁸ *Id.* § 2335 (footnote omitted).

¹⁹ POPE FRANCIS, POST-SYNODAL APOSTOLIC EXHORTATION *AMORIS LAETITIA* (*THE JOY OF LOVE*) para. 56 (March 19, 2016) (quotation omitted).

element of the human being. They deny their nature and decide that it is not something previously given to them, but that they make it for themselves.”²⁰ But, as Pope Benedict explained, when personal autonomy “becomes the freedom to create oneself, then necessarily the Maker himself is denied and ultimately man too is stripped of his dignity as a creature of God, as the image of God at the core of his being.”²¹ For “being created by God as male and female pertains to the essence of the human creature. This duality is an essential aspect of what being human is all about, as ordained by God.”²² And the implications of overthrowing the biblical account of human nature are dire:

[I]f there is no pre-ordained duality of man and woman in creation, then neither is the family any longer a reality established by creation. Likewise, the child has lost the place he had occupied hitherto and the dignity pertaining to him.²³

2. Judaism

Judaism defines gender identity and gender roles clearly and distinctly. These definitions are rooted in

²⁰ Pope Benedict XVI, Address of His Holiness Benedict XVI on the Occasion of Christmas Greetings to the Roman Curia (Dec. 21, 2012) (transcript available at http://w2.vatican.va/content/benedict-xvi/en/speeches/2012/december/documents/hf_ben-xvi_spe_20121221_auguri-curia.html).

²¹ *Id.*

²² *Id.*

²³ *Id.*

numerous biblical texts and are codified in detail in the vast centuries-old corpus of rabbinic literature. These definitions reflect the fundamental conviction that a person's gender is God-given and unalterable by human intervention. Gender is identified at birth and is determined on the basis of physiological indicators, which are generally unambiguous. From birth on, males and females have specific religious roles and functions, duties and responsibilities, which differ from each other in various ways, and which endure throughout one's lifespan. The fact that men and women worship in separate sections of the synagogue exemplifies the emphasis that Jewish tradition places upon gender differences. Attempts to alter one's gender by means of artificial interventions, however sophisticated scientifically, are viewed negatively by Jewish law.

Judaism understands identity as male or female through the lens of the creation story as recorded in the Torah.

And G-d said: "Let us make man in our image, after our likeness. . . ." And G-d created man in his own image, in the image of G-d created He him; male and female created He them. And G-d blessed them; and G-d said unto them: "Be fruitful, and multiply, and replenish the earth, and subdue it. . . ."

Bereishit (Genesis) 1:26–28. As former Chief Rabbi of England Rabbi Jonathan Sacks explains, "Man as such—and woman as such—was made in the image of God: 'And God created man in His own image . . . male and female He created them' Gen. 1.27. It was the

recognition of this that was to be the basis of the covenant between God and all humanity Gen. 9.1–17.”²⁴

“Judaism accepts the idea of roles in the religious life which may be of the utmost importance without their being chosen. It is only in this context that the distinct roles of men and women can be understood.”²⁵ For some, the idea of a gender role “sounds to the modern ear at best anachronistic, at worst reactionary.”²⁶ Rabbi Sacks points out that the sound is jarring only because “the moral revolution of the twentieth century” extended human freedom to include “the freedom to choose our commitments and obligations”—in other words, “the freedom to choose our roles.”²⁷ But equating a role with rights is a mistake. “Roles, in Judaism, mean obligations.”²⁸

“Judaism has believed, and continues to maintain, that within its religious life men and women have distinct and differentiated roles.”²⁹ Jewish law differentiates between men and women in several respects. Men owe the duty of wearing phylacteries and the tzitzit. And they must offer certain prayers at prescribed times and places and perform important rites. Similarly, Jewish law distinguishes between men and

²⁴ Jonathan Sacks, *The Role of Women in Judaism*, in *MAN, WOMAN, AND PRIESTHOOD* 29 (Peter Moore ed., 1978).

²⁵ *Id.* at 43.

²⁶ *Id.* at 27.

²⁷ *Id.*

²⁸ *Id.* at 29.

²⁹ *Id.* at 28.

women in prescribing how to conduct funeral services. Special religious responsibilities fall to the male descendants of Aaron. *Exodus* 29:9, 40:12–15.

The redefinition of gender identity by governmental agencies is experienced as disrespectful—and potentially intrusive—to Jewish tradition and is viewed as a serious threat to religious freedom in our cherished democratic society.

3. National Association of Evangelicals

Evangelicals understand the transgender experience as a condition where one's biological sex is different from one's emotional identity. Gender dysphoria is the term used in the professional literature of psychology and psychiatry, reflecting personal distress associated with gender incongruence. The evangelical approach to this issue is threefold: (1) Christian Ethics—evangelicals believe that God created humans in a binary way—male and female. *Genesis* 1:27; 2:23–24 (ESV). This was affirmed by Jesus as recorded in *Matthew* 19:4–5. (2) Pastoral Care—In a broken and fallen world that also affects one's sexuality, evangelicals are called to bring empathy, understanding, and compassion, while maintaining their own normative commitments. (3) Public Policy—In this pluralistic society evangelicals seek the common good of all people. That entails devising solutions that protect both the individual experiencing gender dysphoria and all others, with special attention to minors because of their vulnerability. This can be accomplished through

mutually negotiated accommodations rather than legal mandates.

Christian Ethics begins with the Bible. Genesis records that we are made in God’s image, male and female. Gender differentiation is part of the divine framework for human life as male or female, and the two sexes joined in marriage as the proper context for sexual intimacy and procreation. Indeed, marriage is instituted as a God-intended covenant—a place for deep relationship, happiness, and enjoyment of this mutual sexual commitment. Jesus affirms this creational paradigm in *Matthew* 19. It appears elsewhere in Scripture, which gives strong credence to the God-given nature of sexuality as male-female, sexual intercourse as a procreative act, and sexual intimacy as linked to the covenant of marriage. Our identity as either male or female was and is an essential, created *good*. We are relational and embodied beings, whose very natures bear the imprint of our Maker.

Some speak of “sexual fluidity,” thereby rejecting biological givens. This rejection of the creaturely constraints of one’s sex can exemplify a rebellious desire to remake ourselves as each thinks right in his own eyes. However, not every manifestation of gender non-conformity is a reflection of sin. Gender dysphoria, like any disability, may result from living in a broken and fallen world and not from personal immorality.³⁰ Those

³⁰ Mark Yarhouse, *Understanding the Transgender Phenomenon*, CHRISTIANITY TODAY, July-Aug. 2015, at 44, 49 (“[W]e should reject the teaching that gender identity conflicts are the result of willful disobedience or sinful choice. . .”).

who suffer from this condition deserve loving pastoral care. As Dr. Mark A. Yarhouse has written, “Most churches want to be a community where people suffering from any ‘dysphoria’ will feel they belong, for the church is, after all, a community of broken people saved by grace.”³¹ Further, redemption is found not by measuring the distance between a person’s sex and gender identity, but by drawing her “to the person and work of Jesus Christ, and to the power of the Holy Spirit to transform us into his image.”³²

Public policy can protect transgender people without violating biblical morality. No civil law can move the evangelical conviction that biology as male or female is a God-given aspect of human nature that should not be changed. In this pluralistic society, our beliefs—along with others’ beliefs—deserve respect and consideration. Lasting solutions to the problems that transgender people confront are best found through a free and open process that resolves differing interests through mutual accommodation rather than through inflexible rules unilaterally imposed by administrative agencies or civil courts.

4. Southern Baptist Convention

The Holy Bible records that “God created man in his own image, in the image of God he created him; male and female he created them.” *Genesis* 1:27 (ESV)

³¹ *Id.* at 49.

³² *Id.* at 50.

This “crowning act of Creation”³³ established “two distinct and complementary sexes, male and female . . . which designate the fundamental distinction that God has embedded in the very biology of the human race.”³⁴ Far from being arbitrary constructs of a particular society, “[d]istinctions in masculine and feminine roles as ordained by God are part of the created order and should find expression in every human heart.”³⁵

Marriage is founded on the complementarity and sexual differentiation of man and woman. Equal in dignity, men and women serve different but complementary purposes modeled on the way that God relates to His people.³⁶

“The gift of gender is thus part of the goodness of God’s creation.”³⁷ We “affirm God’s good design that gender identity is determined by biological sex and not by one’s self-perception—a perception which is often influenced by fallen human nature in ways contrary to

³³ SOUTHERN BAPTIST CONVENTION, RESOLUTION ON BIBLICAL SEXUALITY AND THE FREEDOM OF CONSCIENCE para. 1 (2016), *available at* <http://www.sbc.net/resolutions/2264/on-biblical-sexuality-and-the-freedom-of-conscience>.

³⁴ SOUTHERN BAPTIST CONVENTION, RESOLUTION ON TRANSGENDER IDENTITY para. 2 (2014) [hereinafter ON TRANSGENDER IDENTITY], *available at* <http://www.sbc.net/resolutions/2250/on-transgender-identity>.

³⁵ *Id.* at para. 3.

³⁶ SOUTHERN BAPTIST CONVENTION, THE BAPTIST FAITH & MESSAGE § 18 (2000), *available at* <http://www.sbc.net/bfm2000/bfm2000.asp>.

³⁷ *Id.* § 3.

God’s design.”³⁸ Disconnecting gender identity from natal sex harmfully “engender[s] an understanding of sexuality and personhood that is fluid.”³⁹ That is why we oppose practices such as cross-sex hormone therapy and gender reassignment surgery as means of altering one’s body “to conform with one’s perceived gender identity.”⁴⁰ And “we continue to oppose steadfastly all efforts by any governing official or body to validate transgender identity as morally praiseworthy.”⁴¹

Although we reject an understanding of gender that would frustrate God’s design, “we love our transgender neighbors, seek their good always, welcome them to our churches, and, as they repent and believe in Christ, receive them into church membership.”⁴² Transgender persons bear the image of Almighty God, and we “therefore condemn acts of abuse or bullying committed against them.”⁴³

5. The Church of Jesus Christ of Latter-day Saints (Mormon)

Gender as a divinely ordained characteristic is central to the doctrine and beliefs of The Church of Jesus Christ of Latter-day Saints. The Bible records that God created human beings in His image—“male and

³⁸ ON TRANSGENDER IDENTITY, *supra* note 34, at para. 16.

³⁹ *Id.* at para. 11.

⁴⁰ *Id.* at para. 22.

⁴¹ *Id.* at para. 23.

⁴² *Id.* at para. 20.

⁴³ *Id.* at para. 21.

female created he them.” *Genesis* 1:27 (KJV). Jesus Christ recalled the creation account when instructing his disciples about the nature and purpose of marriage. “But from the beginning of the creation God made them male and female. For this cause shall a man leave his father and mother, and cleave to his wife; [a]nd they twain shall be one flesh: so then they are no more twain but one flesh.” *Mark* 10:6–9.

Modern scripture confirms the biblical doctrines that human life is a product of divine creation and that each person is a son or daughter of God. “[W]e know that there is a God in heaven . . . [a]nd that he created man, male and female, after his own image and in his own likeness, created he them.”⁴⁴ All members of the human family “are begotten sons and daughters unto God.”⁴⁵

In 1995, the Church’s apostolic leadership issued *The Family: A Proclamation to the World*, which reaffirms the Church’s long-standing doctrinal position on marriage, family, gender, and sexuality.⁴⁶ It teaches, “All human beings—male and female—are created in the image of God. Each is a beloved spirit son or daughter of heavenly parents, and, as such, each has a divine

⁴⁴ DOCTRINE & COVENANTS 20:17–18.

⁴⁵ DOCTRINE & COVENANTS 76:24.

⁴⁶ THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *THE FAMILY: A PROCLAMATION TO THE WORLD* (Sept. 23, 1995), available at <http://www.lds.org/topics/family-proclamation>.

nature and destiny.”⁴⁷ The *Proclamation* then underscores the profound religious significance of gender: “*Gender is an essential characteristic of individual pre-mortal, mortal, and eternal identity and purpose.*”⁴⁸ Drawing on ancient and modern scriptures, the *Proclamation* explains that “[i]n the premortal realm, spirit sons and daughters knew and worshipped God as their Eternal Father and accepted His plan by which His children could obtain a physical body and gain earthly experience to progress toward perfection and ultimately realize their divine destiny as heirs of eternal life.”⁴⁹ And the *Proclamation* teaches that men and women serve equal and complementary purposes.⁵⁰

Latter-day Saints believe that birth as a male or female carries spiritual meaning. Gender identity “in large measure defines who we are, why we are here upon the earth, and what we are to do and become.”⁵¹ From an LDS perspective, “[t]he unique combination of spiritual, physical, mental, and emotional capacities of both males and females were needed to implement [God’s] plan of happiness.”⁵² Men and women are not interchangeable. A person’s gender is to be embraced,

⁴⁷ *Id.* at para. 2.

⁴⁸ *Id.* (emphasis added).

⁴⁹ *Id.* at para. 3.

⁵⁰ *Id.*

⁵¹ Elder David A. Bednar, *Marriage Is Essential to His Eternal Plan*, *ENSIGN*, June 2006, at 83 (statement by member of the Church’s Quorum of Twelve Apostles).

⁵² *Id.*

along with the complementary but distinct paths that God ordains for men and women.

While gender is an essential and eternal attribute of personal identity, the Church acknowledges the reality of gender dysphoria and related conditions.⁵³ They impose heavy burdens, and those who bear them deserve compassion and respect. The Church welcomes efforts by responsible officials to seek mutually respectful solutions that reasonably accommodate transgender concerns while fully preserving religious liberty.⁵⁴

6. The Lutheran Church–Missouri Synod

The Bible declares that “God created man in his own image, in the image of God he created him; male and female he created them. And God blessed them.” *Genesis* 1:27–28 (ESV). The creation of human beings as male and female is a “fundamental distinction [that] precedes all other distinctions of ethnicity, nationality,

⁵³ See *Frequently Asked Questions*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://mormonandgay.lds.org/articles/frequently-asked-questions> (acknowledging the reality of gender dysphoria and persons who identify as transgender).

⁵⁴ See *Transcript of News Conference on Religious Freedom and Nondiscrimination*, NEWSROOM, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (Jan. 27, 2015), <http://www.mormonnewsroom.org/article/publicstatement-on-religious-freedom-and-nondiscrimination> (expressing official Church support for “legislation that protects vital religious freedoms for individuals, families, churches and other faith groups while also protecting the rights of our LGBT citizens”).

language, culture, and customs.”⁵⁵ Identity as male or female “is a given and not a matter of human choice. It is not simply a social construct or the invention of society. A human being is not an independent soul or mind that just happens to be encased in a male or female body.”⁵⁶ Our embodiment as male or female furnishes “a God-given identity that is either masculine or feminine. One is a man or a woman because that is what the body given by God indicates.”⁵⁷ We affirm that the complementarity of man and woman and human identity as male and female “are wonderful gifts of God established at creation.”⁵⁸

Founded on Holy Scripture, the Lutheran understanding of sexual identity confusion or dysphoria is clear. We cannot affirm that one’s identity as male or female (“gender”) is self-chosen or determined by human will.

Because Christianity takes our created bodies seriously, it is compelled to view it as a disorder of creation if a man or woman feels discomfort with his or her body and desires

⁵⁵ COMMISSION ON THEOLOGY AND CHURCH RELATIONS, THE LUTHERAN CHURCH–MISSOURI SYNOD, *THE CREATOR’S TAPESTRY: SCRIPTURAL PERSPECTIVES ON MAN-WOMAN RELATIONSHIPS IN MARRIAGE AND THE CHURCH* 10 (Dec. 2009) [hereinafter *CREATOR’S TAPESTRY*], available at www.lcms.org/Document.fdoc?src=lcm&id=310.

⁵⁶ *Id.*

⁵⁷ THE LUTHERAN CHURCH–MISSOURI SYNOD, *GENDER IDENTITY DISORDER OR GENDER DYSPHORIA IN CHRISTIAN PERSPECTIVE* 5 (May 17, 2014) [hereinafter *GENDER IDENTITY DISORDER*], available at <https://www.lcms.org/Document.fdoc?src=lcm&id=3012>.

⁵⁸ *CREATOR’S TAPESTRY*, *supra* note 55, at 10.

either to dress and act in the manner of the opposite sex or to “change” his or her sex by means of hormones or surgery.⁵⁹

Experiences and desires that run counter to God’s created order are distortions effected by sin, part of human nature in a fallen world.⁶⁰

Lutheran theology is required to be faithful to the Holy Scriptures, where God’s truth is revealed in unmistakable ways, including prohibitions and commands. We intend to follow such teaching even if it “conflicts with societal or professional opinions, such as that of psychology or psychiatry.”⁶¹ On this basis, we do not support such invasive procedures as sex-change surgery, which deny one’s created sexual identity and, moreover, “will not change the individual’s chromosomal makeup, but will only mutilate the body God has given.”⁶²

None of this denies the reality of genuine hermaphroditism or “intersex ambiguity” and the potential need for surgical correction in such extremely rare circumstances.⁶³ Moreover, the LCMS position on sexual identity dysphoria should not be misunderstood as a lack of concern for those who suffer from such dysphoria and confusion. Our Lord Jesus Christ invites all of us with all our faults, confusion, and pain—every

⁵⁹ GENDER IDENTITY DISORDER, *supra* note 57, at 7.

⁶⁰ *Id.* at 5.

⁶¹ *Id.*

⁶² *Id.* at 7.

⁶³ *See id.* at 7–8 (section on “Excursus”).

human being—to come to Him in faith, for new life and salvation, grounded in His forgiveness and love for the world. The LCMS therefore welcomes to its churches individuals who are struggling against desires that run counter to God’s created intention and encourages “treatment of [transgender] condition[s] in a way that” affirms the love of God in Christ Jesus for all His human creatures in this fallen world—a love that “allows the greatest possible fullness of service to Christ and others by the individual.”⁶⁴

7. Orthodox Churches

Orthodox Christian teaching on sexuality and marriage is “firmly grounded in Holy Scripture, 2000 years of church tradition, and canon law” that is unchanging.⁶⁵ Holy Scripture attests that God created man and woman in His own image and likeness. *Genesis* 1:27–31 (EOB). Man and woman were created so that those called to do so might marry and “enjoy a conjugal union that ideally leads to procreation.”⁶⁶ The union between one man and one woman is a Sacrament of the Church, and although not every marriage is blessed by children, every union of man and woman “exists to create of a man and a woman a new reality”

⁶⁴ *Id.* at 8.

⁶⁵ STANDING CONFERENCE OF THE CANONICAL ORTHODOX BISHOPS IN THE AMERICAS, STATEMENT ON MORAL CRISIS IN OUR NATION para. 2 (May 16, 2012) [hereinafter STATEMENT ON MORAL CRISIS], available at <http://assemblyofbishops.org/news/scoba/2003-08-13-moral-crisis>.

⁶⁶ *Id.* at para. 3.

of one flesh.⁶⁷ “God made them male and female. . . . So they are no longer two but one flesh.” *Mark* 10:6–8. This new reality can only be achieved through “a relationship based on gender complementarity”⁶⁸ and intercommunion.

Men and women complement each other in numerous ways. They are by nature different, and have unique roles in the family. The complementarity and union of man and woman is reflective of “the sacred unity that exists between Christ and his Bride, the Church.”⁶⁹ Men and women, husbands and wives, are interdependent but distinct, and must be recognized and treated as such. *Ephesians* 5:21–33.

One’s gender and sexuality are neither subjective nor inconsequential. Proper sexual expression is part of “God’s plan for His human creatures from the very beginning.”⁷⁰ Gender confusion is not in and of itself sinful.⁷¹ It is the result of a fallen humanity that requires healing through Jesus Christ.⁷² All men and

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ STANDING CONFERENCE OF THE CANONICAL ORTHODOX BISHOPS IN THE AMERICAS, 2013 ASSEMBLY STATEMENT ON MARRIAGE AND SEXUALITY para. 2 (2013) [hereinafter STATEMENT ON MARRIAGE AND SEXUALITY], available at <http://assemblyofbishops.org/about/documents/2013-assembly-statement-on-marriage-and-sexuality>.

⁷⁰ STATEMENT ON MORAL CRISIS, *supra* note 65, at para. 4.

⁷¹ STATEMENT ON MARRIAGE AND SEXUALITY, *supra* note 69, at para. 3.

⁷² *Id.*

women struggle with sinful passions,⁷³ but it is only acting on those passions by exceeding the bounds of sacramental marriage that alienates us from God.⁷⁴ Orthodox tradition rejects and condemns “gender transitioning” and other conduct that denies the givenness of one’s identity as male or female. But that tradition also stresses that people with gender identity conflicts “are to be cared for with the same mercy and love that is bestowed by our Lord Jesus Christ upon all of humanity.”⁷⁵

8. Islam

“The notion that humanity is divided into male and female and that sex or gender is a defining characteristic of human experience is firmly embedded into the Muslim worldview.”⁷⁶ As with other religious traditions, this worldview is rooted in the creation story related in sacred text.

Allah declares in the Qur’an that “I have only created jinns [women] and men, that they may serve Me”⁷⁷ and He commands all people to “[a]dore your Guardian-Lord, Who created you and those who came before you.”⁷⁸ The Qur’an affirms that Allah intended to

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ STATEMENT ON MORAL CRISIS, *supra* note 65, at para. 5.

⁷⁶ KECIA ALI & OLIVER LEHMAN, ISLAM: THE KEY CONCEPTS 42 (2008).

⁷⁷ THE HOLY QUR’AN 51:56 (Abdullah Yusuf Ali trans., 2000).

⁷⁸ *Id.* at 2:21.

divide mankind into male and female even as it highlights “the complementarity of humankind in creation, and the importance of procreation for the continued development of human life on earth.”⁷⁹ Men and women are partners in marriage. “Men are the protectors and maintainers of women,” but “righteous women” are tasked with “guard[ing] in (the husband’s) absence what Allah would have them guard.”⁸⁰ Faithful Muslims, “whether man or woman,” will enter paradise and “have abundance without measure.”⁸¹

Notwithstanding fundamental equality and partnership, the Qur’an distinguishes between men and women in the assignment of rights, roles, and obligations in marriage and family life.⁸² Muslim men and women are also often (but not always) separated in worship services, public squares, and other social settings.⁸³

Transgender practices are generally condemned by Islam. The Prophet Muhammed “cursed female-impersonators who are males, and male-impersonators who are women.”⁸⁴ While permitting surgery to correct

⁷⁹ ALI & LEHMAN, *supra* note 76, at 23.

⁸⁰ THE HOLY QUR’AN, *supra* note 77, at 4:34.

⁸¹ *Id.* at 40:40.

⁸² *See, e.g., id.* at 2:228, 4:34.

⁸³ ABDUL GHAFAR HASAN, THE RIGHTS & DUTIES OF WOMEN IN ISLAM 14 (1999).

⁸⁴ SAHIH AL-BUKHARI, 72 AUTHENTIC TRADITIONS 62:773 (1997).

hermaphroditism, Islam opposes sex-change surgery.⁸⁵

9. Sikhism

Sikhism embraces the equality of all regardless of age, race, class, caste, or gender.⁸⁶ But Sikhism makes important distinctions between male and female. The Sikh understanding of gender is tied to physical creation and informs Sikh teachings on proper relationships, roles, and practices.

Sikhism teaches that God created all living things, and all living things merge in God.⁸⁷ God is genderless and before God “there was no female or male.”⁸⁸ Sikhism holds that the human soul is also genderless, but teaches that God created gendered bodies for the soul. “Women and men, all by God are created, All this is God’s play,”⁸⁹ and “[i]n all beings is the Lord pervasive, The Lord pervades all forms male and female.”⁹⁰

Gendered bodies are central to Sikh teachings about progress toward the ultimate aim of becoming in

⁸⁵ See Letter from Sayyid Ahmad Tantawi, Grand Mufti of Azhar, to the General Secretary of the Doctors’ General Syndicate (May 14, 1988), in JAKOB SKOVGAARD-PETERSEN, DEFINING ISLAM FOR THE EGYPTIAN STATE 329 (1997).

⁸⁶ GURU GRANTH SAHIB Ji 314, 319, 349, 425; THE VAARS OF BHAI GURDAS Ji vaar 1.

⁸⁷ BENTI CHAUPAI SAHIB pauri 13.

⁸⁸ GURU GRANTH SAHIB Ji 1035.

⁸⁹ *Id.* at 304.

⁹⁰ *Id.* at 605.

harmony with the Divine. Men and women are equal and complementary. Sikhs believe that woman “is one half of the complete personality of man,”⁹¹ and that “without woman there would be no one at all.”⁹² Men and women are encouraged to come together in marriage for the purpose of procreation and dedication to God.

Gender transitioning is in tension with the principles taught by the living Guru.⁹³ Sikhism also encourages its followers to love and respect all others as creations of God, and to strive for unity within marriage and with the Divine.⁹⁴

* * *

As these statements show, many religions share a common understanding of gender. From the religious perspective, humans are created by God. Personal identity as male or female is an immutable aspect of

⁹¹ THE VAARS OF BHAI GURDAS JI vaar 5, pauri 16:59.

⁹² See GURU GRANTH SAHIB JI 473.

⁹³ Voluntary transgender transitioning clashes with Sikhism’s fundamental teaching that the male-female dichotomy was created by God. See *id.* at 304 (“Women and men, all by God are created”). It also stands in tension with Sikh teachings on marriage and procreation. See, e.g., *id.* at 1013. And transitioning contradicts the Sikh doctrine of the genderless soul. A genderless soul cannot be “assigned” the “wrong” gender at birth, and God does not make mistakes in creation. *Id.* at 463 (“true are the forms Thou creates”).

⁹⁴ Khushwant Singh, *Sikhism*, in 13 ENCYCLOPEDIA OF RELIGION 315 (Mircea Eliade ed., 1987).

human nature that reflects divine design.⁹⁵ Such identity denotes a divine purpose and cannot be altered (absent medical necessity) without offending deity. For many faiths, “[r]eligious sanctions, along with other rules and regulations, define and control behavior and attitudes attached to gender assignments based on anatomy at birth.”⁹⁶ Belief in gender as immutable and religiously significant has persisted despite massive upheavals in the history of religion. The rise of Islam, the growth and spread of Christianity, the Great Schism, the Protestant Reformation, the explosion of Evangelical Christianity, and the emergence of non-Trinitarian Christianity—none has unsettled the widespread conviction that identity as male or female is a given, not a choice.

B. Interpreting “sex” to include gender identity places not only Title IX but also Titles VII and VIII in conflict with major faith traditions.

Religious beliefs and commitments held by *amici* and other major faiths contradict the Department’s

⁹⁵ The religious belief in the immutability of being male or female is consistent with the rationale behind requiring heightened scrutiny for laws discriminating based on sex. See *Quiban v. Veterans Admin.*, 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (Ginsburg, J.) (explaining that “the ‘immutable characteristic’ notion, as it appears in Supreme Court decisions, . . . is a trait ‘determined solely by accident of birth’”) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 229 n.11 (1981))).

⁹⁶ Priscilla Rachun Linn, *Gender Roles*, in 5 ENCYCLOPEDIA OF RELIGION, *supra* note 94, at 496.

premise that gender identity is not determined by one's birth sex. Denying the intrinsic connection between physiology and gender runs counter to the religious conviction that gender is God-given and immutable.

Even if limited to Title IX, the Department's interpretation would provoke serious religious conflicts. Schoolchildren would be taught that gender is not determined by one's birth sex, contrary to their parents' faith. Religious colleges and universities would find it difficult to maintain sex-specific dormitories and other residences. The modesty and privacy of sex-specific facilities, such as showers and changing rooms, could be compromised.

A dramatic expansion of Title IX could not remain confined to the educational setting for long. Interpreting Title IX to proscribe gender-identity discrimination would exert pressure to expand Title VII and Title VIII. Like Title IX, each of these provisions forbids discrimination because of sex. *See* 42 U.S.C. § 2000e-2(a)(1) (proscribing employment discrimination "because of . . . sex"); *id.* at § 3604(a) (proscribing housing discrimination "because of . . . sex"). Given identical statutory language, it is improbable that the reinterpretation of Title IX would leave Title VII and Title VIII unaffected.

Extended to Title VII, the Department's construction would cast doubt on the authority of religious employers to govern their workplaces—even at a denomination's headquarters. Religious organizations often establish religious standards as conditions of

employment. *See, e.g., Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 330 & n.4 (1987); *Little v. Wuerl*, 929 F.2d 944, 946 (3d Cir. 1991). Making gender identity a protected class without addressing the unique needs of religious organizations would expose them to litigation and potential liability. An employee asserting a nonconforming gender identity could bring a claim challenging an employer's enforcement of moral conduct standards regarding gender. Even unsound claims concerning religious employment standards would chill a religious organization's decisions concerning internal governance. *See Amos*, 483 U.S. at 343–44 (Brennan, J., concurring).

Expanding Title VIII's prohibition on housing discrimination would likewise clash with religious liberty. Housing applicants or tenants with gender identity issues could sue religious schools and colleges even if refusing to admit a person to single-sex housing were required by long-held religious standards. *See* 42 U.S.C. § 3604.

Existing statutory exemptions would not avert these religious liberty conflicts. To be sure, Title IX, Title VII, and Title VIII each contain a religious exemption. *See* 20 U.S.C. § 1681(a)(3) (educational institutions controlled by a religious organization); 42 U.S.C. §§ 2000e-1(a) (employees of religious organizations), 2000e-2(e)(2) (employees of religious educational institutions), 3607(a) (church-owned noncommercial housing). But the scope of these exemptions is deeply contested. *See, e.g., Spencer v. World Vision, Inc.*, 633

F.3d 723, 727 (9th Cir. 2010) (O’Scannlain, J., concurring) (describing circuit split over when a religious employer is entitled to assert § 2000e-1(a)). These exemptions were designed to protect religious organizations from different conflicts than would arise if gender identity were added as a protected class. And even if these statutory exemptions ultimately protect religious organizations, making gender identity a protected class will expose religious organizations to fresh litigation risks. Novel claims of gender-identity discrimination will be brought. Such litigation, even if largely unsuccessful, would place religious liberty under the federal civil rights laws in a state of uncertainty. None of the current statutory exemptions would be robust enough to relieve religious organizations of the looming threat of litigation and the need to expend scarce resources to defend the freedom of religion.

Accepting the Department’s reading of Title IX would also take a long step toward delegitimizing traditional religions. In our culture, law can be a moral teacher. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). Making gender identity a protected class under Title IX implies that traditional attitudes toward gender identity are discriminatory. That implication, enshrined in federal civil rights law, would impose a stigma on religious people and institutions whose faith dictates that gender identity is determined by one’s birth sex. Increasing solicitude toward LGBT concerns would intensify that stigma. Religious schools and colleges could be targeted and, ultimately, ostracized for

remaining true to their faith-based understanding of gender. Religious denominations and their members could come under attack for selecting leaders who reflect their religious beliefs about gender. And religious Americans could find themselves increasingly marginalized for believing that gender is immutable and divinely ordained.

C. Leaving the issue of gender identity to elected legislators will allow the democratic process to work out solutions that fully preserve religious liberty.

Informal policy-making by an executive agency, *see* Br. Pet. 13–14, is the wrong tool for addressing the complicated and sensitive task of protecting religious liberty while addressing the needs of persons with gender identity confusion. And such policy-making is especially objectionable when, as here, it skirts public scrutiny by flouting the notice-and-comment provisions of the Administrative Procedure Act. *See id.* at 24.

Neither the executive nor the judiciary can address the issue of gender identity as effectively as elected legislators. Only they have the institutional capacity to protect religious liberty while addressing the interests and concerns of those with gender identity conflicts. Democratic lawmaking allows all stakeholders to work together to reach a consensus through persuasion. That process informs lawmakers of the competing interests at stake—including the interests of religious organizations and Americans of faith. And

legislation can reconcile those competing interests through compromises, however conceptually untidy. Allowing Congress to protect religious liberty while advancing the rights of others is consistent with this Court's decision in *Employment Division v. Smith*, which encourages lawmakers to express the value of religious liberty through exemptions and other accommodations. 494 U.S. 872, 879, 890 (1990).

Leaving the issue of gender identity to elected legislators would also avoid an affront to traditional religions. Because *amici* and other major religious groups understand gender identity as God-given and immutable, accepting the Department's statutory interpretation would denounce that religious understanding as "discrimination"—and thus illegitimate. A single mid-level bureaucrat will have succeeded in giving a thoroughly contested understanding of gender the force of law, contrary to the religious beliefs of millions of Americans. Unintentionally or not, such a result would convey "hostility toward religion . . . inconsistent with our history and our precedents." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 655 (1987) (Kennedy, J., dissenting in part).

Congress has not amended Title IX to add gender identity as a protected class, and it has repeatedly rejected legislation adding gender identity as a protected class under Title VII.⁹⁷ Yet public opinion on gender

⁹⁷ See, e.g., Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009) (proposing to add gender identity to Title VII); Employment Non-Discrimination Act of 2011, S. 811, 112th

identity and related matters has shifted over the past decade. State and federal lawmakers are engaged with stakeholders in examining models for addressing gender identity. Adding it as a protected class through statutory construction would disparage this process and Congress’s constitutional authority as the Nation’s lawmaker. And it would demean the “fundamental right . . . to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.” *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. ___, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J.) (plurality op.).

Students with gender identity issues, including gender dysphoria, can have their needs met without endorsing an interpretation of Title IX that is at war with its text and history. Prompted by good will and a sense of duty toward all students in their care, school officials will often devise reasonable solutions on their own—as Petitioner did in this case. *See* Pet. App. 144a (quoting from a school board resolution stating that “students with gender identity issues shall be provided an alternative appropriate private facility”). Legislators and local authorities can step in where reasonable solutions are not offered voluntarily. But if bureaucratic fiat supplants the democratic process, gender identity will become yet another flashpoint for social tension and conflict. Tearing further at the fabric of civil society by imposing a one-size-fits-all gender-identity policy on the country would serve no one’s

Cong. (2011) (same); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (same).

interests. Sustainable results will be more likely achieved if citizens and lawmakers are left free to address gender identity in ways that preserve the Nation's priceless heritage of religious freedom.

◆

CONCLUSION

Unilaterally declaring “sex” to mean “gender identity” would create serious conflicts with religious liberty. Working through the proper channels of democratic self-government offers a more sustainable answer to the problem of preserving religious liberty while protecting the essential interests of those with gender identity issues. By giving effect to the Department's faulty reinterpretation of Title IX, the court of appeals erred. Its decision should be reversed.

Respectfully submitted,

ALEXANDER DUSHKU

R. SHAWN GUNNARSON

Counsel of Record

JOSHUA D.K. FIGUEIRA

KIRTON McCONKIE

Key Bank Tower

36 South State Street

Suite 1900

Salt Lake City, Utah 84111

(801) 328-3600

sgunnarson@kmclaw.com

Counsel for Amici Curiae

January 10, 2017