

Nos. 17-1618, 17-1623, 18-107

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,
v.

CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., AND RAY MAYNARD, *Petitioners*,
v.

MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA, *Respondents*.

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
AIMEE STEPHENS, *Respondents*.

**On Writs of Certiorari to the
United States Courts of Appeals
for the Eleventh, Second, and Sixth Circuits**

**BRIEF FOR AMICI CURIAE COUNCIL FOR
CHRISTIAN COLLEGES & UNIVERSITIES,
THE CATHOLIC UNIVERSITY OF AMERICA,
BRIGHAM YOUNG UNIVERSITY, AND
39 ADDITIONAL RELIGIOUS COLLEGES
AND UNIVERSITIES
IN SUPPORT OF THE EMPLOYERS**

STEVEN M. SANDBERG
General Counsel

HEATHER E. GUNNARSON
University Counsel

BRIGHAM YOUNG UNIVERSITY
A360 ASB
Provo, Utah 84602
(801) 422-4722

R. SHAWN GUNNARSON
Counsel of Record

KIRTON | MCCONKIE
Key Bank Tower
36 South State Street,
Suite 1900
Salt Lake City, UT 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

QUESTION PRESENTED

Amici will address the following question: Whether sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 extends to sexual orientation or gender identity.

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118 Cong. Rec. 5,807 (1972)	17
118 Cong. Rec. 5,808 (1972)	16
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OTHER AUTHORITIES	
American Heritage Dictionary (1976)	13
Brian J. Grim & Melissa E. Grim, <i>The Socio-economic Contribution of Religion to American Society</i> , 12 <i>Interdisc. J. Res. on Religion</i> 2 (2016)	21
Carl H. Esbeck, <i>Federal Contractors, Title VII, and LGBT Employment Discrimina- tion: Can Religious Organizations Continue to Staff on a Religious Basis?</i> , 4 <i>Oxford J. L. & Religion</i> 368 (2015)	9
Council for Christian Colls. & Univs., <i>Building the Economy and the Common Good: The National Impact of Christian Higher Education in the United States</i> (2017), at https://www.ccu.org/wp-conte nt/uploads/2018/03/CCCU-National-Imp act-FINAL-2.pdf	22
Daniel Frost, <i>Sexually Conservative Religious Universities and Tax Exemption</i> , 59 <i>J. Church & State</i> 566 (2017), https://acade mic.oup.com/jcs/article/59/4/566/2669488...	4

TABLE OF AUTHORITIES—Continued

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David Haig, <i>The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001</i> , Archives of Sexual Behav., Apr. 2004	13
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Higher Educ. Research Inst., Univ. of Cal. L.A., <i>The Spiritual Life of College Students</i> (2005), https://spirituality.ucla.edu/docs/reports/Spiritual_Life_College_Students_Full_Report.pdf	22
Joanne Meyerowitz, <i>A History of "Gender,"</i> 113 Am. Hist. Rev. 1346 (2008).....	13
Michael W. McConnell, <i>Academic Freedom in Religious Colleges and Universities</i> , 53 Law & Contemp. Probs. 303 (1990)	23
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Oxford English Dictionary (1961).....	13

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	Page(s)
Roger L. Geiger, <i>The History of American Higher Education</i> (2014)	20, 21
Samuel Eliot Morison, <i>The Founding of Harvard College</i> (1935).....	20
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Shirley V. Hoogstra et al., <i>Two Paths: Finding a Way Forward at Covenantal Universities, in Religious Freedom, LGBTQ Rights, and the Prospects for Common Ground</i> (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019).....	21, 22, 23
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INTEREST OF AMICI CURIAE¹

Religious colleges and universities from different faiths appear on this brief. *Amici* include more than 40 institutions with religious identities as varied as Baptist, Catholic, Evangelical, Latter-day Saint, Lutheran, Presbyterian, and Wesleyan. Despite our differences, we are united in affirming that the freedom of religion includes the freedom to operate a college or university without sacrificing distinctive religious beliefs or practices. We submit this brief out of a profound concern that altering the settled meaning of Title VII would negatively impact faith-based institutions of higher education in significant and far-reaching ways. Furthermore, statutory requirements that apply to institutions of higher education, including those under Title IX, would make little sense if this Court adopts the Employees' proposed interpretation of Title VII. In our view, Congress is far better suited to address issues concerning LGBTQ rights in employment, while protecting the ability of religious educational institutions to continue pursuing their unique religious missions. Individual statements of interest are in the attached appendix.

SUMMARY OF ARGUMENT

Our Nation is in the midst of an important democratic dialogue on questions of human sexuality and personal identity. One aspect of this dialogue has focused on whether and how to provide employment

¹ The parties have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

protections for LGBTQ individuals. The Employees² ask this Court to circumvent the democratic process and impose new social values through judicial fiat—to redefine discrimination “on the basis of sex” to extend beyond the publicly understood meaning of women or men as a class. Any suggestion that the Civil Rights Act of 1964 contains previously unacknowledged protection for LGBTQ employees is implausible. Congress does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

Reinterpreting Title VII as a charter of LGBTQ rights will have consequences for religious institutions of higher education ranging far beyond employment requirements. Student housing standards would face new pressure. Affiliated clinics and hospitals could be compelled to provide religiously objectionable medical procedures. A religious university’s tax-exempt status could be challenged or revoked. Accreditation agencies could rely on Title VII as justification to disregard a university’s religious mission. Redefining Title VII would negatively impact religious universities by upsetting the legislative balances struck by Congress in these critical areas.

But nowhere are the stakes higher for religious universities than with Title IX. Title IX was specifically crafted to extend sex discrimination prohibitions from Title VII to colleges and universities that receive federal funds, and those provisions have been uniformly interpreted and applied to be consistent with Title VII. This is true not only for Title IX employment

² The “Employees” are Petitioner Gerald Lynn Bostock and Respondents Melissa Zarda and William Moore, Jr.; the EEOC; and Aimee Stephens. The “Employers” are Respondent Clayton County, Georgia, and Petitioners Altitude Express, Inc.; Ray Maynard; and R.G. & G.R. Harris Funeral Homes, Inc.

discrimination claims, but also for every “program or activity” of these schools, each of which is governed by Title IX. The text and structure of Title IX confirm that its ban on sex discrimination refers only to women and men, not to other classes. The Employees’ proposed rewrite of Title VII would render many aspects of Title IX nonsensical and would undermine its basic purpose—the empowerment of women.

Religious educational institutions are a vibrant and critical part of the American educational ecosystem; these institutions remain vital to “transmitting the * * * faith to the next generation.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012). The Court should hew to the settled meaning of Title VII as a ban on the disparate treatment of women or men. Congress has protected religious higher education as it pursues important national goals, and it should remain free to continue doing so. The important task of deciding whether and how to address the issue of LGBTQ discrimination in employment properly belongs with Congress, not the courts.

ARGUMENT

I. This Court’s Ruling Will Have Far-Reaching Implications for Religious Universities.

A. Religious employment standards would face additional pressure under Title VII.

Title VII prohibits an employer from “classify[ing]” employees in ways that deprive or tend to deprive employment opportunities “because of * * * sex” and also prohibits an employment agency from “classify[ing] or refer[ring] for employment any individual on the basis of his * * * sex.” 42 U.S.C. § 2000e-2(a)(2), (b).

Refashioning the statute to equate “sex” with sexual orientation and gender identity would create new conflicts for many religious universities that hire employees whose beliefs and practices will advance their religious mission.³ *Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 & n.4 (1987). One scholar recently found that 286 religious universities, enrolling nearly 800,000 students, adhere to standards that prohibit sexual activity outside marriage between a woman and a man. See Daniel Frost, *Sexually Conservative Religious Universities and Tax Exemption*, 59 J. Church & State 566, 567 (2017), <https://academic.oup.com/jcs/article/59/4/566/2669488>. It should not be surprising that religious universities seek to hire employees who support their religious missions.

A religious university identifies itself and its community by religious teachings that “cover the gamut from moral conduct to metaphysical truth.” *Hosanna-Tabor*, 565 U.S. at 201 (Alito, J., concurring). Because “the content and credibility of a religion’s message depend vitally on the character and conduct of its teachers,” a religious university’s “right to self-governance must include the ability to select, and to be selective about” its employees. *Id.* For many religious universities, “the messenger matters,” *id.*—as do tenets of faith and standards of conduct, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting) (“Many good and decent people oppose same-sex marriage as a tenet of faith.”). Adopting the Employees’ proposed interpretation of Title VII would create additional obstacles for universities that seek to

³ “Religious universities” include all institutions of higher education operated in accordance with a religious mission.

select faculty, leadership, and staff whose lives align with the institution's religious mission.

To be sure, Title VII contains two exemptions that apply to religious universities.⁴ But the precise scope of Title VII's religious exemptions is contested among lower courts. Some courts interpret Section 702(a) as "permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts." *Little v. Wuerl*, 929 F.2d 944, 951 (3rd Cir. 1991); accord, e.g., *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 626 (6th Cir. 2000) (granting summary judgment to religious college that discharged a Student Services Specialist for "assum[ing] a leadership position in an organization that publicly supported homosexual lifestyles"). Other courts have interpreted the exemption narrowly, ruling that Title VII exempts religious employers from religious discrimination only when it does not adversely affect a member of a protected class. See, e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365–70 (9th Cir. 1986). Other decisions narrow the exemption still further by characterizing it as a limited authority to reserve employment based on nominal religious affiliation.

⁴ One exemption provides that Title VII "shall not apply * * * to a religious * * * educational institution * * * with respect to the employment of individuals of a particular religion to perform work connected with * * * its activities." 42 U.S.C. § 2000e-1(a). The other exemption specifically addresses religious educational institutions. Under it, a religious university may "hire and employ employees of a particular religion" if the university is owned or controlled by "a particular religion or by a particular religious corporation, association, or society" or if the university's curriculum "is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e)(2).

See *EEOC v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982).

Lack of a uniform national resolution breeds uncertainty and risk. Any uncertainty associated with the application of these statutory exemptions to sex-discrimination claims would be even greater if a religious university had to rely on a statutory exemption⁵ to protect its religious standards against a claim of LGBTQ discrimination.

B. Expanding Title VII's definition of sex discrimination would create risks beyond employment.

Title VII is not the only federal law that would affect religious universities if its definition of sex discrimination were expanded. Redefining the meaning of “sex” could distort other federal statutes because courts often look to Title VII as a lodestar of interpretation. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX.”); *Inclusive Cmty. Project, Inc. v. Tex. Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 283 (5th Cir. 2014), *aff'd*, 135 S. Ct. 2507 (2015) (“Many courts interpreting the [Fair Housing Act] recognize the similar purpose and language of the statutes and borrow from Title VII precedent to interpret the FHA.”). Title VII's far-reaching influence would affect federal statutes governing housing, healthcare, tax-exempt status, and accreditation.

⁵ Although the ministerial exception offers constitutional protection against nondiscrimination claims, *Hosanna-Tabor*, 565 U.S. at 196, that doctrine applies only to “ministers,” a class of employees left undefined by the Court.

1. Maintaining religious standards for student housing would inevitably lead to conflict. The Chief Justice predicted as much: “Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage.” *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting). In particular, he pointed to the disputes that would crop up if “a religious college provides married student housing only to opposite-sex married couples.” *Id.* at 2625–26; see also 42 U.S.C. § 3607 (providing housing exemption for “persons of the same religion”). Similar disputes would arise from the tensions between religious standards and a transgender person’s request for housing accommodations consistent with her gender identity rather than birth sex.

2. Another flashpoint is health care. The Affordable Care Act prohibits sex discrimination under “any health program or activity, any part of which is receiving Federal financial assistance.” 42 U.S.C. § 18116. The federal government has previously argued that the statute contains no exemption for religiously owned or affiliated clinics and hospitals. When HHS sought to redefine “sex” to include services related to gender transition or termination of pregnancy, disputes arose over services demanded of a religious educational institution, including through its insurance or health clinics. A federal court has since issued a nationwide stay on enforcement of those requirements. However, expanding the meaning of sex discrimination, as the Employees advocate, would almost surely revive that conflict for religious universities. See Amended Order Staying Enforcement, *Religious Sisters of Mercy v. Burwell*, No. 3:16-cv-386 (D.N.D. Jan. 23, 2017), ECF No. 36 (staying enforcement as to the named plaintiffs, including the University of Mary).

3. An institution's federal tax-exempt status could be challenged or even revoked. Religious universities have internalized the lesson that noncompliance with prevailing societal norms can mean the loss of tax-exempt status. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983). An institution's sincere religious opposition to same-sex marriage could raise the question whether the IRS can deny or revoke a religious university's tax-exempt status. In fact, a previous Solicitor General "candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage." *Obergefell*, 135 S. Ct. at 2625–26 (Roberts, C.J., dissenting) (citation omitted). Although federal law has always granted tax-exempt status to religious organizations, see *Walz v. Tax Comm'n*, 397 U.S. 664, 676 (1970), accepting the Employees' proposed interpretation of Title VII could lead to challenges to that status.

4. Embracing a new meaning of "sex" in Title VII could likewise negatively affect accrediting decisions. Under the Higher Education Act, an accrediting agency must "consistently appl[y] and enforce[] standards that respect the stated mission of the institution of higher education, *including religious missions*." 20 U.S.C. § 1099b(a)(4)(A) (emphasis added). Despite this mandate, accrediting agencies might adopt standards consistent with the Employees' proposed interpretation of Title VII and require that a religious university deviate from its "stated mission," *id.*, to comply with the agency's standards as the price of maintaining accreditation.⁶

⁶ Also, federal contracts with religious universities for research and development projects could be denied or revoked since a

II. Title IX’s Text and Structure Caution against Interpreting “Sex” in Title VII to Include Sexual Orientation or Gender Identity.

The text, structure, purpose, and history of Title IX’s prohibition on sex discrimination, which draws from the meaning of “sex” in Title VII and is often interpreted by courts against a Title VII backdrop,⁷ cautions against the interpretation that the Employees propose.

A. The meaning of discrimination “on the basis of sex” in Title IX heavily depends on the interpretation of Title VII.

In 1972, Congress enacted Title IX to prohibit sex discrimination in education:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

religious entity’s eligibility for federal contracting is governed by terms that closely follow Title VII. See Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 Oxford J. L. & Religion 368, 370 (2015).

⁷ Even though courts often look to Title VII when interpreting Title IX, the statutes differ in some ways. Title IX “was modeled after Title VI,” in that each statute “condition[s] an offer of federal funding on a promise by the recipient not to discriminate.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). As *Gebser* further explained, “[t]hat contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition.” *Id.*

20 U.S.C. § 1681(a). Members of that Congress described Title IX as extending Title VII's prohibition on sex discrimination to the realm of higher education.⁸ Moreover, this Court and lower courts have often interpreted Title IX's prohibition on sex discrimination by looking to precedents under Title VII.⁹

⁸ See, e.g., 117 Cong. Rec. 30,411 (1971) (statement of Sen. Cook) (quoting 117 Cong. Rec. 25,142)) (“Many assumed that in the Civil Rights Act of 1964, we had safeguarded against discrimination against women, at least as to their admission to professional schools. The truth is that we have not * * *. Title VII of the 1964 Civil Rights Act does not cover educational institutions although it does prohibit discrimination based upon sex.”); *id.* at 30,408 (statement of Sen. Bayh) (“We are saying that the power which now resides in the Federal Government over private institutions shall be extended.”); 118 Cong. Rec. 5,803 (1972) (statement of Sen. Bayh) (“Other important provisions in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions.”).

⁹ See, e.g., *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (quoting seminal Title VII sexual harassment case and stating, “We believe the same rule should apply when a teacher sexually harasses and abuses a student”); *Whitaker ex. rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048–50 (7th Cir. 2017) (discussing how sex discrimination based on sex-stereotyping under Title VII is relevant to analysis of sex discrimination under Title IX); *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (“[A] Title IX hostile education environment claim is ‘governed by traditional Title VII ‘hostile environment’ jurisprudence.’” (citations omitted)); *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011) (“[T]he Supreme Court’s interpretation of Title VII properly informs our examination of Title IX.”); *Lipsett v. Univ. of P.R.*, 864 F. 2d 881, 896–97 (1st Cir. 1988) (relying on EEOC guidelines and Title IX legislative history in holding that “the Title VII standard for proving discriminatory treatment should apply to claims of sex discrimination arising under Title IX”); *Mabry v. State Bd. of Cmty. Colls. &*

This effort by courts to interpret Title IX in a way that accords with Title VII is somewhat analogous to the canon of interpretation regarding statutes *in pari materia*. Under that canon, courts interpret a phrase in one statute consistently with how it is interpreted in other statutes with similar wording and covering similar subject matter. See *United States v. Ressam*, 553 U.S. 272, 274–77 (2008). For instance, Justice Scalia relied on this canon to interpret the meaning of the phrases in one statute by looking to accumulated law regarding similar phrases in other statutes. See, e.g., *Pierce v. Underwood*, 487 U.S. 552, 564–65 (1988); *Kungys v. United States*, 485 U.S. 759, 769–70 (1988). And in *United States v. Stewart*, 311 U.S. 60 (1940), this Court used a general revenue act passed in 1928 to interpret the taxability of a farm under a vague farm loan statute from 1916. This Court explained, “[t]he later act can therefore be regarded as a legislative interpretation of the earlier act” in the “sense that it aids in ascertaining the meaning of the words as used in their contemporary setting” and “is therefore entitled to great weight in resolving any ambiguities and doubts.” *Id.* at 64–65; see also *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (per curiam) (holding that the similarity of statutory text is a “strong indication that the two statutes should be interpreted *pari passu*”).

The considerable influence of Title VII over the interpretation of Title IX warrants caution. Revising the meaning of “sex” in Title VII to include sexual

Occupational Educ., 813 F.2d 311, 316–17 (10th Cir. 1987) (finding that the standard prohibiting sex discrimination under Title IX is the same as under Title VII).

orientation and gender identity would eventually distort the text and structure of Title IX.

B. The text and structure of Title IX underscore that discrimination “on the basis of sex” does not include discrimination based on sexual orientation or gender identity.

Like Title VII, Title IX does not define “sex,” so the term must “be interpreted as taking [its] ordinary, contemporary, common meaning.” *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). And as most courts have held, an interpretation of discrimination “on the basis of sex” that includes discrimination based on “sexual orientation” or “gender identity” is inconsistent with the text, structure, purpose, and history of Title IX.

1. Text and Structure. The Sixth Circuit below reasoned that “discrimination on the basis of transgender and transitioning status” constitutes sex discrimination because “it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex” or without engaging in “sex stereotyping.” *Stephens* Pet. App. 23a.

But Title IX’s reference to fixed and binary categories of “sex,” 20 U.S.C. § 1681(a), makes no sense if that term were read to include a person’s “internal, deeply held sense of gender.” *Stephens* Resp. Br. 5 (quoting Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric / Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869, 3875 (2017)). Applying that understanding of gender identity to Title IX cannot be reconciled with the statute’s binary

word choice to refer to students of either “one sex” or “the other sex.” 20 U.S.C. § 1681(a).

Indeed, when Congress enacted Title IX, virtually every dictionary definition of “sex” referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. See *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part); see also American Heritage Dictionary 1187 (1976); Webster’s Third New Int’l Dictionary 2081 (1971); 9 Oxford English Dictionary 578 (1961). The phrase “gender identity,” by contrast, was rarely used. Until the 1950s, the term “gender” was used primarily by linguists to refer to a form of grammatical classification. Joanne Meyerowitz, *A History of “Gender,”* 113 *Am. Hist. Rev.* 1346, 1353 (2008). But in the mid-1950s, the psychologist John Money appropriated the term “gender” to refer to culturally determined roles for men and women. *Id.* at 1354. In his view, “gender” was learned in early childhood and was distinct from, and not determined by, “biological sex.” *Id.* Other social scientists picked up on this new usage. In 1963, Robert Stoller, a UCLA psychoanalyst, coined the term “gender identity.” David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, *Archives of Sexual Behav.*, Apr. 2004, at 93. He likewise contrasted “sex” with “gender,” arguing that “sex was biological but gender was social.” *Id.* That usage was further advanced by feminist authors in the 1970s. Meyerowitz, 113 *Am. Hist. Rev.* at 1353.

To the extent the terms “gender” or “gender identity” were used at the time of Title VII’s passage or Title IX’s passage, they were used in contrast to “sex.” The word “gender” referred to socially constructed roles,

while “sex” referred to biological differences between men and women. That contrast remains common today.¹⁰

Regarding sexual orientation, at least one Employee has argued that discrimination based on sexual orientation is “sex” discrimination because “one simply cannot consider an individual’s sexual orientation without first considering his sex.” *Bostock* Pet. Br. 13. According to this argument, sex discrimination includes a determination that requires “taking [one’s] sex into account.” *Id.* at 14.

Yet Title IX anticipates, in many situations, that an individual’s biological sex must be taken into account in providing different sex-specific activities or accommodations. For example, Title IX states that if certain activities are provided for students of “one sex,” then comparable activities must be provided for students of “the other sex.” 20 U.S.C. § 1681(a)(8). It also provides that schools may transition from admitting students of “only one sex” to admitting students of “both sexes.” *Id.* § 1681(a)(2).

Likewise, another section of Title IX authorizes covered institutions to provide “separate living facilities for the different sexes.” 20 U.S.C. § 1686. The Supreme Court has recognized that these types of separate

¹⁰ See, e.g., Sari L. Reisner et al., “Counting” *Transgender and Gender-Nonconforming Adults in Health Research: Recommendations from the Gender Identity in US Surveillance Group*, *Transgender Stud. Q.*, Feb. 2015, at 37 (“Gender typically refers to cultural meanings ascribed to or associated with patterns of behavior, experience, and personality that are labeled as feminine or masculine”; “[s]ex refers to biological differences among females and males, such as genetics, hormones, secondary sex characteristics, and anatomy.” (emphasis omitted)); *New Oxford American Dictionary* 721–22, 1600 (3d ed. 2010) (defining “gender” in social and cultural terms and “sex” in biological terms).

facilities are “necessary to afford members of each sex privacy from the other sex in living arrangements” arising from “[p]hysical differences.” *United States v. Virginia*, 518 U.S. 515, 533, 550 n.19 (1996). And with respect to sports, Title IX’s regulations specifically allow institutions of higher education to provide teams that are explicitly sex-specific. “[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill.” 34 C.F.R. § 106.41(b).

These provisions of Title IX explain why Congress’s mandate to avoid discrimination “because of sex” should not be confused with discrimination because of sexual orientation or gender identity. Respondent Aimee Stephens argues, for instance, that “taking adverse action against an employee based on stereotypes about how men or women should look and act violates Title VII.” *Stephens Resp. Br.* 28 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). But *Price Waterhouse* held that “sex” discrimination includes “disparate treatment of men and women resulting from sex stereotypes.” 490 U.S. at 250–51 (citation omitted). As Judge Sykes has explained, “discrimination ‘because of sex’ is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex.” *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting). The same is true of gender identity. Although classifications related to gender identity or sexual orientation might sometimes involve distinctions that turn on knowledge of one’s sex, that does not equate to “discrimination” “on the basis of sex” any more than classifications between men and women for sports does. See 20 U.S.C. § 1681(a). On the other hand, if “taking [one’s] sex into account,” *Bostock Pet.*

Br. 13, for these separate activities or living facilities constitutes impermissible discrimination, then myriad sex-specific activities in higher education would be illegal under Title IX.

2. Purpose. “Congress enacted Title IX in 1972 with two principal objectives in mind: ‘[T]o avoid the use of federal resources to support discriminatory practices’ and ‘to provide individual citizens effective protection against those practices.’” *Gebser*, 524 U.S. at 286 (citation omitted). These purposes would be frustrated if Title VII’s definition of sex were redefined to include sexual orientation or gender identity in a way that flowed through to Title IX.

Title IX was enacted at a time of pervasive discrimination against women in education. Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413, 71,423 (Dec. 11, 1979). It grew out of a series of congressional hearings on discrimination against women. See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 523 n.13 (1982). A member of Congress noted that “one of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women.” 118 Cong. Rec. 5,803 (1972) (statement of Sen. Bayh). Title IX’s chief sponsor said the bill offered women “an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for work.” *Id.* at 5,808; see also *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999). Thus, another Senator noted that it was necessary to extend Title VII’s safeguards against “sex discrimination” to the context of “educational institutions.” 117 Cong. Rec. 30,411 (1971) (statement of Sen. Cook) (quoting 117 Cong. Rec.

25,142)); see also 118 Cong. Rec. 5,807 (1972) (statement of Sen. Bayh) (“Title VII of the 1964 Civil Rights Act has been extremely effective in helping to eliminate sex discrimination in employment. Unfortunately it has been of no use in the educational field.”). There is no hint of any congressional purpose to address matters of sexual orientation or gender identity. In fact, the opposite is true.

Redefining “sex” under Title VII in a way that could alter the meaning of Title IX would frustrate one of Title IX’s overriding purposes. Before the enactment of Title IX in 1972, schools often emphasized boys’ athletic programs “to the exclusion of girls’ athletic programs,” *Williams v. Sch. Dist. of Bethlehem, PA*, 998 F.2d 168, 175 (3rd Cir. 1993), and vastly fewer girls participated in competitive interscholastic athletics than did boys. The Department (and Congress) “well understood” that “[m]ale athletes had been given an enormous head start in the race against their female counterparts for athletic resources.” *Neal*, 198 F.3d at 767. So Congress enacted Title IX to “prompt [high schools and] universities to level the proverbial playing field.” *Id.* As multiple female athletes have recently written, allowing schools “to provide separate programs and opportunities for females based on sex * * * is necessary because sex segregation is the only way to achieve equality for girls and women in competitive athletics.” Doriane Coleman et al., *Pass the Equality Act, but don’t abandon Title IX*, Wash. Post (Apr. 29, 2019), <https://wapo.st/2VKINN1>.

Courts and women athletes alike have credited Title IX with remarkable success on this score. A government report concluded that “between 1972 and 2011, girls’ participation in high school athletics increased

from approximately 250,000 to 3.25 million students.” OCR, U.S. Dept. of Educ., *Protecting Civil Rights, Advancing Equity* 33 (2015), <https://bit.ly/2VF516Q>. Following the United States’ 1999 Women’s World Cup win, the Ninth Circuit wrote that “[t]he victory sparked a national celebration and a realization by many that women’s sports could be just as exciting, competitive, and lucrative as men’s sports.” *Neal*, 198 F.3d at 773. And the “victorious athletes understood as well as anyone the connection between [Title IX] and tangible progress in women’s athletics.” *Id.* Adopting a definition of sex discrimination that could essentially prohibit making distinctions between biological men and biological women would undermine this purpose of Title IX.

3. Legislative history. This biological understanding of “sex” is also consistent with Title IX’s legislative history. Of course, the terms “sexual orientation” or “gender identity,” and even those concepts, appear nowhere in the legislative history of Title VII or Title IX. Rather, “[t]he legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions.” 44 Fed. Reg. at 71,423. That is also how Title IX has been interpreted by the courts for decades. See, e.g., *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650–51 (1999) (stating that an example of student-on-student sexual harassment would be “male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance”); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 n.2 (1979) (describing the claimant’s argument that a medical school discriminated based on sex by excluding older applicants “[b]ecause the incidence

of interrupted higher education is higher among women than among men”).

Since the enactment of Title IX, Congress has treated “sex,” “gender identity,” and “sexual orientation” as distinct concepts. In the 1970s, Congress rejected several proposals to amend the Civil Rights Act to add the category of “sexual orientation.”¹¹ Similarly, in 1994, Congress rejected the Employment Non-Discrimination Act (“ENDA”), which sought to prohibit employment discrimination on the basis of “sexual orientation.”¹² In 2007, 2009, and 2011, Congress rejected a broader version of ENDA, which, for the first time, sought to add protections for “gender identity.”¹³ In 2013 and 2015, Congress rejected proposals to amend Title IX to add protections for “gender identity.”¹⁴ And Congress has so far rejected a proposal to prohibit discrimination in federally funded programs on the basis of “gender identity.”¹⁵ None of these proposals makes sense if Title IX and Title VII already prohibited such discrimination.

But not every proposal to add protections for “gender identity” failed. In 2010, Congress enacted hate crimes legislation providing enhanced penalties for crimes motivated by “gender identity.” 18 U.S.C. § 249(a)(2). And in 2013, Congress reauthorized the Violence Against Women Act, prohibiting discrimination in certain funding programs on the basis of both “sex” and “gender

¹¹ H.R. 14752, 93rd Cong. (1974); H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979).

¹² H.R. 4636, 103rd Cong. (1994).

¹³ H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011).

¹⁴ H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015).

¹⁵ H.R. 3185, 114th Cong. (2015); S. 1858, 114th Cong. (2015).

identity.” 34 U.S.C. § 12291(b)(13)(A). These Congressional actions—both those rejecting new protections for “gender identity” and those expressly adding new protections for “gender identity” alongside “sex”—show that Congress has always understood “sex” and “gender identity” to be distinct concepts and that it is fully capable of including both concepts when it wants to.

In short, the text, structure, purpose, and history of Title IX make clear that the term “sex” is not ambiguous. It refers to the biological differences between males and females and does not include discrimination “on the basis of” sexual orientation or gender identity.

III. Congress Is Best Positioned to Address the Role of Religious Universities.

A. Religious universities represent a vibrant part of American higher education.

Religious universities preserve a legacy of faith and learning that characterized the historical basis of American higher education. The first published reference to Harvard College affirms its religious origins. Its Puritan founders later proclaimed that “[a]fter God had carried [them] safe to New England” and they had established houses, the necessities of life, “convenient places for God’s worship,” and “the civill government,” faithful leaders of Massachusetts Bay Colony sought “to advance learning and perpetuate it to posterity.” *New England’s First Fruits* (1643), reprinted in 1 *Collections of the Massachusetts Historical Society* 242 (1792). Indeed, “but for the passionately sincere religion of these puritans, there would have been no Harvard.” Samuel Eliot Morison, *The Founding of Harvard College* 8 (1935). Similar religious convictions led to the founding of Yale. See Roger L. Geiger, *The History of American Higher Education* 8 (2014). Indeed,

religion exercised a formative influence in all three colonial colleges—Harvard, Yale, and the College of William & Mary. “Teaching was under the supervision of members of the clergy, and all learning was placed in a religious context. Representatives of the established church provided some or all of the external governance of the institution.” *Id.* at 15.

Religious higher education is no less a vibrant part of American life today. Although many historically religious institutions have chosen to chart a secular course, others choose to maintain their religious identity. Faith-based institutions are part of the “diversity of institutions and educational missions [that] is one of the key strengths of American higher education.” 20 U.S.C. § 1011a(a)(2). They provide many students with unparalleled opportunities and provide the entire Nation with important social benefits.

Two million students attend faith-based colleges and universities. See Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society*, 12 *Interdisc. J. Res. on Religion* 2, 5 (2016). *Amicus* Council of Christian Colleges & Universities (“CCCU”) offers an illuminating snapshot of religious higher education. Its members “comprise about 15 percent of all religiously affiliated institutions in the United States, represent just under 5 percent of all private degree-granting institutions, and educate about 450,000 students each year.” Shirley V. Hoogstra et al., *Two Paths: Finding a Way Forward at Covenantal Universities, in Religious Freedom, LGBTQ Rights, and the Prospects for Common Ground* 334 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019). Students attending CCCU-member institutions “are more likely to be first-generation college students and to receive federal loans, and are less

likely to come from high earning families.” Council for Christian Colls. & Univs., *Building the Economy and the Common Good: The National Impact of Christian Higher Education in the United States* vii (2017), at <https://www.cccu.org/wp-content/uploads/2018/03/CCCU-National-Impact-FINAL-2.pdf>. And they are “overrepresented in professions such as education and human services which may not maximize earnings but which are of great social benefit to local communities and the nation as a whole.” *Id.* at 31.

But students are not merely statistics. Many of them come to religious universities with a hunger to learn how to live a life of faithful commitment. See Higher Educ. Research Inst., Univ. of Cal. L.A., *The Spiritual Life of College Students* 4 (2005), https://spirituality.ucla.edu/docs/reports/Spiritual_Life_College_Students_Full_Report.pdf. Motivated by their convictions, students and families spend almost \$43 billion each year on faith-based higher education. Hoogstra et al., *Two Paths* at 330.

Religious universities add diversity to higher education by responding to spiritual as well as educational needs. They offer a setting where students can safely explore and more deeply ground their own faith. By offering an education in a community of faith, religious universities further the personal choice of millions of students—a choice that ought to be respected within a genuinely pluralistic system of higher education. *Id.* at 341.

B. Religious universities are engaged in the exercise of religion.

It should be evident, then, that *amici* and other religious universities, in all their multi-faceted activities, are engaged in an inherently religious enterprise.

The religious character of each university touches every corner of the campus in a unique way, consistent with its distinctive institutional religious mission and approach to fostering a community of faith. A religious university exists, and warrants considerable investments of time and money (much of it donated), to “preserve and transmit [religious] teachings from one generation to the next.” Michael W. McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 *Law & Contemp. Probs.* 303, 316 (1990). And “[t]he right to develop and pass on religious teachings is at the very heart of the first amendment.” *Id.* In other words, “[t]o build and run a religious university is an exercise of religion.” Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 *Tex. L. Rev.* 1455, 1466 (1988).

A religious university expresses its religious character, in part, through its employment and student conduct standards. They reflect the conviction that shared religious standards for a university’s faculty and staff help to “communicate a particular way of life to its students and that violation by the faculty of those precepts would undermine the moral teaching.” McConnell, 53 *Law & Contemp. Probs.* at 322. For some religious universities, standards for employees must also apply to students. “If a covenantal institution is to be a place where faith-based commitments are upheld and expressed by the community, then all members of the community must make this commitment to one another.” Hoogstra et al., *Two Paths* at 335. Upholding religious standards is a crucial part of the “process of self-definition” for a religious university as it forms and preserves a community of faith. *Amos*, 483 U.S. at 342 (Brennan, J., concurring).

Because a religious university is exercising religion in its everyday operations, an adverse decision in this case could raise troubling questions. Earlier this year, four members of the Court acknowledged that *Employment Division v. Smith*, 494 U.S. 872 (1990), “drastically cut back on the protection provided by the Free Exercise Clause” and suggested that the decision might need to be revisited. See *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, J.J., concurring in denial of certiorari). If *Smith* offers insufficient protection against a claim that Title VII requires a religious university to employ someone who does not comply with the institution’s religious standards, the consequences could prompt serious questions about *Smith*’s correctness.¹⁶

C. Congress is better suited to determine the contours of employment protections for LGBTQ individuals and liberty protections for religious universities.

Congress has routinely pursued important policies while simultaneously acknowledging the significant interests of religious institutions like *amici*. Evidence of that approach is clear on the face of Title VII, which includes two separate exemptions protecting religious educational institutions. See 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2). Title VIII has a religious exemption for religious institutions to own or operate housing, for other than a commercial purpose, that is limited to

¹⁶ The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, does not change the analysis. Revising Title VII to cover sexual orientation and gender identity could raise constitutional concerns even if RFRA offered a potential defense against *some* claims.

“persons of the same religion.” 42 U.S.C. § 3607. Title IX contains an exemption allowing a religious university to discriminate based on sex when compliance with the statute would be inconsistent with the university’s “religious tenets.” 20 U.S.C. § 1681(a)(3). The Higher Education Act requires federally recognized accreditation agencies to respect a university’s “religious mission[].” 20 U.S.C. § 1099b(a)(4)(A). And Congress exempted religious universities from financial consequences that generally arise from preventing military access where such a university has a long-standing policy of religious pacifism. 10 U.S.C. § 983(c)(2).

Each of these statutes embodies a vital national policy, and Congress might have pursued these policies with single-minded fervor. But it did not. Instead, Congress enacted legislation that balances these interests against a long-acknowledged need to protect important aspects of religious education.

Embracing the Employees’ reading of Title VII would seriously distort Congress’s handiwork. In effect, interpreting “sex” to include sexual orientation and gender identity would grant LGBTQ employees protected-class status without carefully balancing that protection against liberty-protecting provisions tailored to fit the risks and conflicts that arise for religious universities and their exercise of religion.

As Judge Posner has acknowledged, the term “sex” in Title VII “when enacted in 1964, undoubtedly meant ‘man or woman,’ and so at the time people would have thought that a woman who was fired for being a lesbian was not being fired for being a woman unless her employer” would have treated a gay man differently. *Hively*, 853 F.3d at 353 (Posner, J., concurring). But he also candidly expressed in his concurrence the view that courts should revise Title VII through

“judicial interpretive updating.” *Id.* That is not, however, the role of the courts. The Constitution places the power of “updating” statutes squarely with Congress.

Courts must read statutes—not write them. Adhering to “that restrained conception of the judicial role,” *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting), not only serves the separation of powers, see *The Federalist* No. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961), it acknowledges the constraints of institutional capacity. “Federal courts are blunt instruments when it comes to creating rights.” *Obergefell*, 135 S. Ct. at 2625 (Roberts, C.J., dissenting).

Rather than revise Title VII through judicial updating, the far better course is for courts to “respect the choices made by Congress about which social problems to address, and how to address them.” See *Zarda* Pet. App. 135 (Lynch, J., dissenting). Only Congress can properly address the issue of LGBTQ rights in employment. “It took an act of Congress to prohibit race and sex discrimination in private employment nationwide—a landmark achievement in our nation’s history. So too it will take an act of Congress if the people wish to prohibit transgender and sexual orientation discrimination across the country as well.” *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 340 (5th Cir. 2019) (Ho, J., concurring).

CONCLUSION

For these reasons, the Court should affirm the Eleventh Circuit and reverse the Second and Sixth Circuits.

Respectfully submitted,

STEVEN M. SANDBERG

General Counsel

HEATHER E. GUNNARSON

University Counsel

BRIGHAM YOUNG UNIVERSITY

A360 ASB

Provo, Utah 84602

(801) 422-4722

R. SHAWN GUNNARSON

Counsel of Record

KIRTON | MCCONKIE

Key Bank Tower

36 South State Street,

Suite 1900

Salt Lake City, UT 84111

(801) 328-3600

sgunnarson@kmclaw.com

Counsel for Amici Curiae

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APPENDIX

STATEMENTS OF INTEREST

Arizona Christian University (ACU) was founded in 1960 as a conservative Bible college. Today it is an award-winning non-denominational Christian liberal arts university with nearly 1,000 students from 32 states and 23 foreign countries. All ACU faculty, staff and students annually sign a statement committing to Christian faith and practice. ACU students provide more than 55,000 hours of volunteer service at homeless shelters, food pantries and other social service and community ministries every academic year.

Belmont Abbey College is a private Catholic liberal-arts college founded in 1876 by Benedictine monks, which continues to celebrate the 1,500-year-old Benedictine monastic tradition of prayer and learning. Located just 10 miles west of Charlotte, NC, Belmont Abbey College provides an education that enables its students to live lives of integrity, to succeed professionally, to become responsible citizens, and to be a blessing to themselves and others.

Founded in 1858, **Benedictine College** is a Catholic, liberal arts college of over 1,900 full-time undergraduates located in Atchison, Kansas, whose mission is to educate students within a community of faith and scholarship. Named one of “America’s Best Colleges” by *U.S.N.W.R.* and one of the top Catholic colleges in the nation by *First Things* magazine and the Newman Guide, it prides itself on outstanding academics, extraordinary faith life, strong athletic programs, and an exceptional sense of community and belonging.

Located in the central Appalachian Mountains of southwestern Virginia, for nearly 100 years **Bluefield College** has sought to teach men and women in a Christ-centered learning environment and develop

servant leaders who graduate in order to transform the world through their vocations and service. Bluefield College boasts 40+ academic offerings at the undergraduate level, along with four master's level programs. Bluefield College is touted for its classroom technology, affordability, personalized instruction, and learning settings.

Brigham Young University (BYU) is a religious institution of higher education in Provo, Utah, that is founded, supported, and guided by The Church of Jesus Christ of Latter-day Saints (Church of Jesus Christ). BYU aims to provide an education that is spiritually strengthening, intellectually enlarging, and character building, leading to lifelong learning and service. BYU's 33,000 undergraduate and graduate students pursue bachelor's degrees in more than 181 academic programs, master's degrees in 62 programs, and doctorates in 26 programs.

Brigham Young University-Hawaii (BYU-Hawaii) is an undergraduate university in Laie, Hawaii, with 2,700 students who represent over 70 different countries and cultures from the Pacific Rim, the U.S. mainland, and other parts of the world. BYU-Hawaii is part of the Church of Jesus Christ's educational system. Its mission is to prepare students with character and integrity who can provide leadership in their families, their communities, their chosen fields, and in building the kingdom of God.

Brigham Young University-Idaho (BYU-Idaho) is an undergraduate university in Rexburg, Idaho, that offers an array of certificates, associate, and bachelor degrees to an on-campus enrollment of 30,000 students each year, with another 9,900 students participating in its online degree program. BYU-Idaho is part of the Church of Jesus Christ's educational system. Its

mission is to develop disciples of Jesus Christ who are leaders in their homes, the Church of Jesus Christ, and their communities.

As the national university of the Catholic Church in the United States, founded and sponsored with the approval of the Holy See, ***The Catholic University of America*** is committed to being a comprehensive Catholic and American institution of higher learning, faithful to the teachings of Jesus Christ, as handed on by the Church. The University seeks to discover and impart the truth through excellence in teaching and research, in service to Church, nation and world.

College of the Ozarks' historic mission is to provide an intentionally Christian education for students found worthy but without the means to afford it. The College includes a 1,500-student undergraduate program and a 300-student K-12 classical Christian school. All full-time students work to help cover part of the cost of their education. The College is committed to traditional, biblical understandings of sex/gender in hiring, and all employees and students agree to live by this commitment.

Colorado Christian University is a non-profit institution of higher education with its main campus in Lakewood, Colorado. CCU traces its origins to the founding of Denver Bible Institute in 1914. Today, it remains a Christ-centered learning community committed to developing each student in mind, faith, and character for a lifetime of meaningful work and service in a constantly changing world. Over 7,000 students attend CCU's College of Undergraduate Studies and its College of Adult and Graduate Studies.

Columbia International University is a fully accredited multid denominational, evangelical, co-edu-

cational Christian university, graduate school, and seminary located in Columbia, South Carolina. The amicus brief addresses key issues that directly impact CIU's faith-based mission of educating students from a biblical worldview. CIU integrates religious doctrine into every course and provides numerous programs, activities, and opportunities that enhance the personal religious devotion of students and faculty. CIU seeks to preserve the First Amendment's protection of religious freedom.

Concordia University, Nebraska, located just west of Lincoln, Nebraska, offers 100 undergraduate and graduate academic programs to 2,500 students. Since its founding in 1894, Concordia has equipped students to learn, serve and lead in church and world. Today, its 22,000 living alumni serve in fifty states and on six continents. A member institution of The Lutheran Church—Missouri Synod's Concordia University System, it has a nationwide presence within the system that serves 45,000 students.

Council for Christian Colleges & Universities (CCCU) is a higher education association of more than 180 Christian institutions around the world, including more than 150 in the U.S. and Canada and more than 30 from an additional 18 countries. The CCCU's mission is to advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth.

Crown College provides more than 50 degree programs to 1,500 students from 40 States and a dozen nations. Since its humble beginnings in 1916 with just 5 students, Crown's mission has been to provide a biblically-based education for Christian leadership in the church and for the world. Our graduates live out

their calling in every time zone in the world--serving their families, their professions, and their communities with love and grace.

Dordt University is a Christian university in Sioux Center, Iowa and serves 1,600+ students annually. We understand God's creational intent for both gender and sexuality as described in the Bible and affirm that living in that manner has been a foundational building block of civilization and societal thriving throughout history. Dordt University has been ranked by the *Wall Street Journal* as the foremost educational institution in America for student engagement for three consecutive years.

Emmanuel College is a Christ-centered liberal arts institution that strives to prepare students to become Christlike disciples. We believe in the worth of every person, in Biblical truth, and in a life of Christian service. We affirm the values that form the foundation of Western civilization including the centrality of the family, love and respect as the hallmarks of human relationships, compassion for the poor, religious freedom, traditional sexual morality, and the sanctity of life.

Founded in Ohio in 1946 by friars of the Third Order Regular of St. Francis of Penance, **Franciscan University of Steubenville** offers 70 academically excellent and passionately Catholic programs of study that engage its 2,400 on-campus students and 600-plus online students. Franciscan University takes to heart the divine call to "rebuild my Church" by educating and forming men and women empowered by the Holy Spirit to transform the Church and the world in Jesus Christ.

Houghton College, Houghton College, a Christian liberal arts college in Western New York sponsored by the Wesleyan Church, has been committed since its founding in 1883 to serving students from diverse social, economic and cultural backgrounds, by providing them with an affordable and high quality education in the arts and sciences, and preparing them for global engagement as “scholar-servants” in the ever-changing circumstances of the 21st century.

Houston Baptist University was founded in 1960 as a Christian university. HBU is one of the most diverse universities in America. HBU has historic theological and policy convictions and practices regarding sex and gender. HBU believes that the biological gender with which one is born defines one’s sex and gender.

Indiana Wesleyan University (“IWU”) is a comprehensive Christian university of The Wesleyan Church. Founded in 1920 as Marion College, IWU is committed to changing the world by developing students in character, scholarship and leadership. IWU enrolls nearly 3,000 students on its residential campus in Marion, Indiana and approximately 9,000 adult learners in degree programs at regional education centers throughout Indiana, Kentucky and Ohio, and online.

John Paul the Great Catholic University, located in Escondido, CA, was created in 2003 as the Catholic University for Creative Arts and Business Innovation. We believe in the power of beauty to transform culture — that’s why we’re shaping the next generation of artists and innovators with academic excellence, unparalleled creativity, and an authentic community centered on Jesus Christ.

Judson College, founded in 1838, remains committed to faith-based education of women. As an entity of the Alabama Baptist Convention, Judson College is dedicated to the transmission of knowledge, the refinement of intellect, the nurturing of Christian faith, the promotion of service, and the development of character. Judson is a community of students and employees who live, work, serve, and learn together, and who are united by faith in God and adherence to Christian traditions.

LDS Business College (LDSBC) is a faith-based institution of higher education in Salt Lake City, Utah. Established in 1886, and part of the Church of Jesus Christ's educational system, LDSBC offers professional certificates and associate degrees in various business, health, information, software, marketing, and applied technology programs. Student enrollment is approximately 2,200, representing all 50 U.S. states and over 50 different countries. International students comprise 25 percent of the student body.

Lee University is a comprehensive university of 5000+ students in Cleveland, Tennessee. Alongside its College of Arts and Sciences, Lee serves students in five nationally accredited schools – Nursing, Education, Music, Business, and Religion. Lee students come from diverse religious backgrounds; its faculty represents 22 Christian denominations. The largest member of the Appalachian College Association, Lee draws students from fifty states and forty countries. Lee is ranked in the USNews&World Report's "top tier" of regional masters-level universities.

Liberty University is an evangelical Christian institution of higher education in Lynchburg, Virginia. Liberty maintains the vision of its founder, Dr. Jerry Falwell, by developing Christ-centered men and women

with the values, knowledge and skills essential for impacting tomorrow's world. With its residential and online programs offering more than 600 programs that enroll more than 100,000, Liberty is the nation's second largest private, nonprofit university. Liberty has 20 NCAA Division I athletic programs, including FBS football.

Mid-Atlantic Christian University has provided Christian higher education from its campus in Elizabeth City, North Carolina, since 1948. We work to transform ordinary people into extraordinary Christian leaders who serve in Christian organizations, and in the marketplace of business, education, health services, and community needs. We meet a crucial need for higher education as Eastern North Carolina is economically depressed and many of our students cannot afford the expense of a larger and distant school

North Greenville University, primarily serving the Carolinas, includes 2500 students, 300 full-time employees, and tens of thousands of alumni in our community. Since 1892, NGU has offered Christ-first education as an extension of the South Carolina Baptist Convention. Since its inception as a boarding academy for poor mountain children, NGU has prioritized first-generation students with transformational education rooted squarely and unapologetically within the great Christian Intellectual Tradition, which is the overflow of our faith foundations.

Oklahoma Christian University (OC) began in 1950 as Central Christian College (with an enrollment of 97). OC has grown into a comprehensive Christian university serving more than 2200 students. Affiliated with the Churches of Christ, the university is committed to academic and spiritual excellence. OC's close-knit community creates a culture where students,

faculty and staff go the extra mile for each other. OC's professors teach from a Christian worldview and are fiercely dedicated to high standards of scholarship.

Oklahoma Wesleyan University is an evangelical Christian university of The Wesleyan Church, with its main campus in Bartlesville, Oklahoma. The University educates nearly 1,600 students in a faith-based atmosphere of serious study, honest questions, and critical engagement. It is a vibrant liberal arts community that honors the Primacy of Christ, the Priority of Scripture, the Pursuit of Truth, and the Practice of Wisdom in every activity and program it undertakes.

Oral Roberts University (ORU) is a private Christian university with a mission to build Holy Spirit-empowered leaders through whole person education to impact the world. ORU provides a "whole person education" which develops students in spirit, mind, and body, to prepare them to be professionally competent leaders who are spiritually alive, physically disciplined, socially adept, and intellectually alert. ORU offers more than 130 undergraduate programs, 25 masters' programs and 6 doctoral programs.

Patrick Henry College (PHC) provides a broad-based baccalaureate education stressing content, the imitation of excellence and the pursuit of both wisdom and knowledge. The College is committed to three core principles: high academic rigor; fidelity to the spirit of America's founding; and an unwavering biblical worldview. The prescribed classical liberal arts curriculum equips students to think deeply, write persuasively and speak articulately. Internship opportunities allow students to gain experience in their fields prior to graduation.

Point University, founded in 1937, is committed to educating students for Christ-centered leadership and service. Offering over 60 programs under the oversight of six colleges, our goal for students is that they will model personal, community, and organizational transformation in ways that seek to redeem the world. Point seeks to model faith that is consistent with orthodox Christian thinking. We seek to model servant-leadership that discovers the best for every person, community, and organization in our culture.

Regent University (Regent) strives to serve as a leading center of Christian thought and action to provide excellent education through a Biblical perspective and global context, thereby equipping Christian leaders to change the world. Classes at Regent are taught from a Biblical perspective, and all employees—from Regent’s Chief Executive Officer and Trustees to its grounds-keepers and custodians—are required to be Christians and to affirm in writing their agreement with the University’s Statement of Faith.

Southeastern University is a Christ-Centered, Student focused institute of Higher Education dedicated to helping students discover their divine. Southeastern University is committed to providing an education to students who want to be a part of a welcoming and faith-based community. Our innovative approach to education is rooted in our religious foundation, and our desire is for the protection of our rights to build a community in accordance with our religious beliefs.

Southern Virginia University (SVU) is an independent private college located in Buena Vista, Virginia. Founded in 1867 and renewed in 1996, Southern Virginia is dedicated to an exceptional liberal arts education in a faith-supportive environment in harmony with the values of The Church of Jesus Christ of

Latter-day Saints. Southern Virginia is open to students of all faiths and backgrounds who are seeking academic excellence in a Latter-day Saint environment of high moral and ethical standards.

Southern Wesleyan University (SWU), in South Carolina, offers over 40 majors. Since its founding as a ministerial preparation college in 1906, SWU empowers graduates to impact the world for Christ. First generation, low income or disabled students find SWU home. Our mission is student success focused and Christ-centered; every employee is approved by our cabinet based on mission, with those that have significant contact with our students consistently interviewed by our president.

Southwest Baptist University comprises four campuses, both rural and urban, (Bolivar, Springfield, Mountain View, and Salem, Missouri), and two instructional sites (Cuba and St Louis, Missouri). Founded in 1878, the University is a Christ-centered, caring academic community preparing students to be servant leaders in a global society, and is affiliated with the Missouri Baptist Convention.

Trevecca Nazarene University is a fully accredited, comprehensive institution of higher education that began in 1901 and is located one mile from downtown Nashville, Tennessee. As a faith-based institution following Wesleyan theology and educational practice, Trevecca's educational programs are based on Christian values that promote scholarship, critical thinking, and meaningful worship in preparation for lives of leadership and service in the church, the community, and the world at large.

Union University is an academic community, affiliated with the Tennessee Baptist Convention,

equipping persons to think Christianly and serve faithfully in ways consistent with its core values of being excellence-driven, Christ-centered, people-focused, and future-directed. As the oldest institution affiliated with Southern Baptist life, Union's mission is to provide Christ-centered education that promotes excellence and character development in service to Church and society. Led by outstanding Christian scholars, students pursue undergraduate, master's, and doctoral degrees.

Since 1902, the ***University of Northwestern in St. Paul***, Minnesota operates as a comprehensive university offering more than seventy undergraduate programs in the arts, sciences, social sciences, and professional studies. The university also offers eight graduate programs in the areas of leadership, business, theology, and education. Northwestern seeks to educate students from a biblical worldview so they may grow intellectually and spiritually in order to provide God-honoring leadership in the home, church, community, and world.

Wheaton College is an explicitly Christian, academically rigorous, fully residential liberal arts college and graduate school located in Wheaton, Illinois. Established in 1860, Wheaton is guided by its original mission to provide excellence in Christian higher education, and offers more than 40 undergraduate degree programs in the liberal arts and sciences, and 18 graduate degree programs.

William Jessup University, at home in Sacramento, San Jose and around the world, offers over 50 programs and 20 majors. Since its founding in 1939, Jessup continues to transform students into graduates who redeem world culture through notable servant leadership; the enrichment of family, church and community

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life; and distinctive service in their chosen careers. Jessup is a regionally and nationally distinguished, Christ-centered University.