Nos. 24-38, 24-43

In the Supreme Court of the United States

BRADLEY LITTLE, Governor of Idaho, ET AL.,
Petitioners,

v.

LINDSAY HECOX, ET AL.,
Respondents.

WEST VIRGINIA, ET AL.,
Petitioners,

v.

B.P.J., by her next friend and mother, Heather Jackson,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

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BRIEF OF *AMICUS CURIAE* UNITED STATES CONFERENCE OF CATHOLIC BISHOPS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. Neither the Equal Protection Clause nor Title IX forbids sex-segregated athletic teams. 4

A. The Equal Protection Clause permits sex-segregated athletic teams. 5

1. Girls' and women's sports do not violate the Equal Protection Clause. 6

2. The lower courts' contrary reasoning does not withstand scrutiny. 10

B. Title IX does not require allowing males to participate in female sports. 15

1. Title IX permits schools to offer female-only sports. 16

2. The Fourth Circuit's contrary reasoning reflects an atextual re-writing of Title IX. 19

II. The Fourth Circuit's interpretation of Title IX would have far-reaching implications. 23

A. Catholic schools cannot allow males to compete on female-only teams. 23

B. The Fourth Circuit's interpretation of Title IX threatens both Catholic education and Catholic institutions generally. 27

1. Catholic organizations participate in many federal programs. 27

2. Catholic schools may have to decline this funding if Title IX is interpreted to require allowing males to compete in female sports. 30

3. Forcing Catholic schools out of federal programs will harm students nationwide. 32

4. Affirming the Fourth Circuit's decision could have catastrophic effects on religious hospitals. 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

Adams by & through Kasper v. School Bd. of St. Johns Cnty., 57 F.4th 791 (11th Cir. 2022) (*en banc*) 8, 9, 22

Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) 16

Barnes v. Gorman, 536 U.S. 181 (2002) 16

Bostock v. Clayton County, 590 U.S. 644 (2020) 20, 21, 22, 23

Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793 (6th Cir. 1977) (*per curiam*) 10

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 6, 15

Cummings v. Premier Rehab Keller, P.L.L.C., 596 U.S. 212 (2022) 34

Dep't of Ag. v. Moreno, 413 U.S. 528 (1973) 7

Doe v. Mercy Catholic Med. Ctr.,
850 F.3d 545 (3d Cir. 2017)..... 31, 35

Edwards' Lessee v. Darby,
12 Wheat. 206 (1827)..... 18

Goodman v. Archbishop Curley High School, Inc.,
149 F.Supp.3d 577 (D. Md. 2016) 31

Grimm v. Gloucester County School Board,
972 F.3d 586 (4th Cir. 2020) (*en banc*)..... 20

Grove City College v. Bell,
465 U.S. 555 (1984) 28

Hunter v. U.S. Dep't of Educ.,
115 F.4th 955 (9th Cir. 2024)..... 31, 32

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005) 16

Meriwether v. Hartop,
992 F.3d 492 (6th Cir. 2021) 21, 22

O'Connor v. Bd. of Ed. of School Dist. 23,
449 U.S. 1301 (1980) 9

Obergefell v. Hodges,
576 U.S. 644 (2015) 12, 32, 33

Tennessee v. Cardona,
2024 WL 3453880 (6th Cir. July 17, 2024)..... 22

Tuan Anh Nguyen v. INS,
533 U.S. 53 (2001) 15

United States v. Skrmetti,
145 S.Ct. 1816 (2025)
..... 6, 7, 10, 11, 12, 15

United States v. Virginia,
518 U.S. 515 (1996) 1, 4, 10

State ex rel. Webber v. Felton,
77 Ohio St. 554 (1908)..... 6

Constitutional Provisions, Statutes, and Regulations

34 C.F.R. §106.12..... 31

34 C.F.R. §106.33..... 18

45 Fed. Reg. 30955 (May 9, 1980) 2, 18

81 Fed. Reg. 31375 (May 18, 2016) 35

6 U.S.C. §609..... 29

20 U.S.C. 18

20 U.S.C. §1681..... 2, 3, 16, 17, 18, 19, 28, 30

20 U.S.C. §1686..... 18

42 U.S.C. §1758 29

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47 U.S.C. §254 29

Civil Rights Restoration Act, Pub. L. 100-259, §2(2), 102 Stat. 28 (Mar. 22, 1988) 28

Idaho Code §33-6203 ..... 5, 13

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W. Va. Code §18-2-25d 5

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Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 Notre Dame L. Rev. 67 (2021) 22

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Supreme Court Rule 37.6 1

USCCB Br., *United States v. Skrmetti*, No. 23-477 (U.S., Oct. 15, 2024). 12

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USCCB, et al., Comment on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams (May 15, 2023), https://perma.cc/C8XX-BGSY..... 24, 31, 32, 33

INTEREST OF *AMICUS CURIAE*[*]

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The USCCB provides a framework and a forum for the Bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. The USCCB submits this brief to address (1) the legal errors in the lower courts' decisions and (2) the disastrous practical effects those decisions could have on Catholic institutions.

SUMMARY OF ARGUMENT

These cases ask whether the Equal Protection Clause or Title IX forbids the States to create female-only athletic competitions. Neither does, and any other answer could prove catastrophic to Catholic institutions.

I. The challenged laws prohibit males—including males who "identify" as females—from participating on female-only teams.

These laws comply with the Equal Protection Clause. While both laws draw sex-based distinctions, the Equal Protection Clause permits sex-based distinctions that serve, and are "substantially related to," "important governmental objectives." *United States v. Virginia*, 518 U.S. 515, 533

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[*] No counsel for any party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. *See* Rule 37.6.

(1996) (quotation omitted). Laws creating female-only sports pass muster. Because of the valuable lessons that sports impart, States advance an important governmental objective when they ensure that girls and women can compete. These laws serve, and are substantially related to, that objective: given the inherent athletic advantages that males possess, creating female-only teams ensures that girls and women can safely and fairly compete.

The laws satisfy Title IX, also. Title IX says that no one, "on the basis of sex," may 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." 20 U.S.C. §1681(a). This language has long been understood to guarantee equal opportunity: neither sex can be denied opportunities open to the other or treated differently in contexts where the sexes are similarly situated. Precisely *because* the sexes are not similarly situated when it comes to athletics, Title IX is best read to allow female-only teams. Indeed, for decades after the law's enactment, enforcement authorities interpreted the law as allowing schools to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 45 Fed. Reg. 30955, 30962 (May 9, 1980). The lower courts offered no sound basis for abandoning this original understanding.

II. It should come as a relief that Title IX permits female-only teams, as it would otherwise significantly undermine Catholic institutions.

Catholic schools are a longstanding and highly successful component of American education. These schools routinely outperform their public- and private-school peers on metrics ranging from test scores to graduation rates. And they provide an education in many areas, including poorer areas, where public schools have long failed their students.

If Catholic schools were forced to allow males to compete on or against their female-only teams, they would need to abandon athletics programs or stop accepting federal funding. That is because allowing such competition would undermine fundamental Catholic teachings regarding the immutable, God-given differences between the sexes. To be sure, Title IX contains an exemption for religious schools that are "controlled by a religious organization"; the exemption applies to requirements that are inconsistent with the organization's "religious tenets." 20 U.S.C. §1681(a)(3). But that exemption is underdeveloped. And forcing schools to rely upon it would impose significant litigation costs, wasting money that would be better spent on students.

Establishing that Title IX does not prohibit gender-identity discrimination is imperative if Catholic hospitals are to continue serving their communities at current levels. Section 1557 of the Affordable Care Act prohibits discrimination by healthcare entities that accept federal funding, including through Medicare and Medicaid. And §1557 incorporates Title IX's prohibition on sex discrimination. If that prohibition extends to gender-identity, §1557 may be read—and has been

read by previous administrations—to mandate the provision of "gender-affirming care." Catholic hospitals are not permitted to provide such care. Thus, they would have to stop accepting Medicare and Medicaid—to their communities' detriment—if not exempted from any such mandate. But it is uncertain whether any religious exemption applies to hospitals otherwise bound by §1557.

ARGUMENT

I. Neither the Equal Protection Clause nor Title IX forbids sex-segregated athletic teams.

"Physical differences between men and women … are enduring: The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both." *Virginia*, 518 U.S. at 533 (quotation and alterations omitted).

These differences are especially apparent in athletics; males are generally larger, faster, stronger, and more aggressive. Yet both sexes benefit from athletic competition, especially as children; sports are among the most effective tools for instilling discipline, self-sacrifice, and work ethic. *See* Homily of the Holy Father Leo XIV, *Jubilee of Sport* (June 15, 2025), https://perma.cc/9EFQ-49XU. Lest girls and women be denied these benefits—and lest society be denied the benefits of women who have learned the lessons sports impart—schools have long created female-only teams.

These cases present the question whether female-only teams violate the Equal Protection Clause or Title IX. The courts below answered that question in the affirmative, holding that males—at least those who "identify" as females—are legally entitled to compete on girls' and women's teams. Those courts erred. This Court must reverse.

A. The Equal Protection Clause permits sex-segregated athletic teams.

These cases implicate two laws designed to protect women's sports.

Idaho's "Fairness in Women's Sports Act" requires any school whose teams compete in Idaho to designate their teams as male-only, female-only, or co-ed. Idaho Code §33-6203(1). Female-only teams "shall not be open to students of the male sex." *Id.*, §33-6203(2). Any "dispute regarding a student's sex shall be resolved by the school or institution by requesting that the student provide a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex." *Id.*, §33-6203(3).

West Virginia's "Save Women's Sports Act" operates similarly. It requires schools to designate their sports offerings as male-only, female-only, or co-ed. W. Va. Code §18-2-25d(c)(1). The law prohibits "students of the male sex" from participating on female-only teams. *Id.*, §18-2-25d(c)(2).

The Ninth Circuit held that Idaho's law violates the Equal Protection Clause. The Fourth Circuit

held that West Virginia's law *might* violate the Equal Protection Clause in at least some cases. Both courts erred.

1. Girls' and women's sports do not violate the Equal Protection Clause.

a. The Equal Protection Clause prohibits States from "deny[ing] to any person within [their] jurisdiction[s] the equal protection of the laws." U.S. Const., am. XIV. This Clause does not prohibit all legislative classifications. Nor could it. "As a 'practical necessity,' 'most legislation classifies for one purpose or another.'" *United States v. Skrmetti*, 145 S. Ct. 1816, 1850 (2025) (Barrett, J., concurring) (quotation omitted). "Laws distribute benefits that advantage particular groups (like in-state tuition for residents), draw lines that might seem arbitrary (like income thresholds for means-tested benefits), and set rules for specific categories of people (like a particular profession or age group)." *Id.* To "say that a law is invalid because every individual does not receive the same amount of protection or benefit from its operation would make legislation impossible, and would be as wise as to try to shut off the gentle rain from heaven because every man does not get the same quantity of water." *State ex rel. Webber v. Felton*, 77 Ohio St. 554, 572 (1908).

Rather than banning classifications, the Equal Protection Clause requires "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Accordingly, courts generally uphold

classifications that are "rationally related to a legitimate governmental interest." *Dep't of Ag. v. Moreno*, 413 U.S. 528, 533 (1973).

A small number of classifications, however, are inherently "suspect." History teaches that these classifications often reflect bigotry or irrationality rather than reasoned judgment. These classifications thus receive heightened scrutiny. "For example, laws that classify on the basis of race, alienage, or national origin trigger strict scrutiny and will pass constitutional muster 'only if they are suitably tailored to serve a compelling state interest.'" *Skrmetti*, 145 U.S. at 1828 (majority op.) (quoting *Cleburne*, 473 U.S. at 440).

Relevant here, this Court has held that "sex-based classifications warrant heightened scrutiny." *Id.* Of course, genuine differences between the sexes mean that males and females are not always similarly situated. So, laws that draw sex-based distinctions are subject to "intermediate scrutiny" as opposed to "strict scrutiny." This lesser form of heightened scrutiny requires "the State [to] show that" its sex-based "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Id.* at 1182–29 (quotation omitted).

b. Laws that segregate the sexes in athletic competitions—including the laws at issue here—survive intermediate scrutiny. No doubt, these laws draw sex-based distinctions. But they relate "substantially" to the achievement of an "important governmental objective[]," *id.* at 1829—

namely, ensuring that girls and women can safely and fairly compete in sports.

Begin with the States' important interest in creating athletic opportunities for all athletes, regardless of sex. To succeed in athletics, students must pursue "a regular and structured program" of the sort that demands discipline and self-sacrifice—virtues integral to lifelong success. Dicastery for Laity, Family, and Life, *Giving the best of yourself: a Document on the Christian perspective on sport and the human person* §3.4, (Jan. 6, 2018), https://perma.cc/8HD2-XYFN. Athletic success thus demands "training and habituation" that prepare children to lead a virtuous life. Aristotle, Politics bk. VIII, ch.1, in II *The Complete Works of Aristotle* 2121 (Barnes, ed., 1995). That is why Aristotle placed "gymnastic exercises" among the four "customary" components of a quality education. *Id.* at ch.3.

Girls and women would be denied equal access to the benefits of athletic competition if forced to compete with males.

"[I]t is neither myth nor outdated stereotype that there are inherent differences between those born male and those born female and that those born male, including transgender women and girls, have physiological advantages in many sports." *Adams by & through Kasper v. School Bd. of St. Johns Cnty.*, 57 F.4th 791, 819 (*en banc*) (11th Cir. 2022) (Lagoa, J., specially concurring). "For example, in comparison to biological females, biological males have: 'greater lean body mass,' i.e., 'more skeletal muscle and less fat'; 'larger hearts,' 'both

in absolute terms and scaled to lean body mass'; 'higher cardiac outputs'; 'larger hemoglobin mass'; larger maximal oxygen consumption (VO2 max), 'both in absolute terms and scaled to lean body mass'; 'greater glycogen utilization'; 'higher anaerobic capacity'; and 'different economy of motion.'" *Id.* at 819 (quoting *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Poly's 1 (Jan. 2019)). "These physical differences cut directly to the 'main physical attributes that contribute to elite athletic performance.'" *Id.* (quoting *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Poly's 1 at 1).

These advantages are neither transient nor reversible. "[S]cientific studies indicate that transgender females, even those who have undergone testosterone suppression to lower their testosterone levels to within that of an average biological female, retain most of the puberty-related advantages of muscle mass and strength seen in biological males." *Id.* at 820. And evidence confirms what human experience makes obvious: these inherent advantages exist "even before puberty." *B.P.J.* Pet.App.48a (Agee, J., concurring in part and dissenting in part).

Given these differences, girls and women will be denied "an equal opportunity to compete in interscholastic events" unless schools offer sex-segregated athletics. *O'Connor v. Bd. of Ed. of School Dist. 23*, 449 U.S. 1301, 1307 (1980) (Stevens, J., in chambers). If "play and competition [were] not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for

athletic involvement." *Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (*per curiam*).

It follows that laws creating female-only athletic competitions are "substantially related to the achievement of" the State's "important" interest in ensuring that girls and women have equal access to athletic opportunities. *Virginia*, 518 U.S. at 533.

2. The lower courts' contrary reasoning does not withstand scrutiny.

The Fourth and Ninth Circuits accepted that States may create separate competitions for females. Yet the Ninth Circuit struck down Idaho's law, while the Fourth Circuit held that West Virginia's law might be unconstitutional as applied. Both erred.

a. The courts wrongly held that the challenged laws are subject to "heightened scrutiny" because they "classif[y] based on transgender status." *Hecox* Pet.App.25a; *see also B.P.J.* Pet.App.24a.

Initially, neither law draws transgender-based distinctions: both forbid males to compete in girls' and women's sports *without regard* to whether they "identify" as men, women, or neither. Because the laws "do[] not exclude any individual from" joining a sports team "on the basis of transgender status," they do not draw a transgender-based distinction. *Skrmetti*, 145 S. Ct. at 1833.

The Ninth Circuit tried but failed to evade this conclusion by suggesting that Idaho's law was

motivated by hostility toward "transgender" students. *Hecox* Pet.App.26a–38a. But the evidence of discriminatory purpose consists entirely of legislators' concerns about the fairness and safety of males competing in female sports. The Ninth Circuit identified no evidence suggesting that Idaho adopted its law solely to target *transgender* students. Nothing, for example, indicates that Idaho's legislature believed *non*-transgender men should be able to compete in women's sports. Thus, the Ninth Circuit identified nothing indicating that the Act's "prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals." *Skrmetti*, 145 S. Ct. at 1833.

Regardless, "transgender individuals do not constitute a suspect class." *Id.* at 1852 (Barret, J., concurring); *accord id.* at 1861 (Alito, J., concurring in part and concurring in the judgment). Thus, the laws would not be subject to heightened scrutiny *even if* they classified based on transgender status.

The Equal Protection Clause forbids only *arbitrary* distinctions. Heightened scrutiny is thus reserved for the few classifications—race being the primary example—that history and logic suggest are often attributable to bigotry. *See id.* at 1860–61 (Alito, J., concurring in the judgment and concurring in part); 1851–55 (Barrett, J. concurring). Laws drawing distinctions based on gender identity do not fit the bill; they often reflect entirely rational policy concerns. Across the country—indeed, across the world—legislators have enacted policies that distinguish based on gender identity

for reasons having no basis in bigotry. (Although the USCCB rejects the idea of "gender identity" as wholly separate from sex, this brief uses the phrase as a term of art referring to an individual's *conception* of his or her sex.) Consider laws regulating whether and when transgender individuals may obtain medical treatments, obtain new birth certificates, or access restrooms designated for the opposite sex. Such laws may distinguish based on gender identity. Laws like these cannot plausibly be attributed to bigotry; they rest on the sort of policy tradeoffs "normally committed to legislative discretion." *Id.* at 1852 (Barrett, J., concurring). As such, there is no sound basis to presume such classifications reflect a flaw in, rather than the sound operation of, the democratic process.

Moreover, the application of heightened scrutiny to gender-identity classifications would "assault[] … the character of fairminded people" across our Nation. *Obergefell v. Hodges*, 576 U.S. 644, 712 (2015) (Roberts, C.J., dissenting). If distinctions based on gender identity presumptively reflect irrationality or bigotry, then "everyone who" dissents from modern gender ideology is presumptively "bigoted." *Id.*; *accord* USCCB Br.11–23, *United States v. Skrmetti*, No. 23-477 (U.S., Oct. 15, 2024). That is a dim and inaccurate view of the world. Transgender individuals "bear the full measure of human dignity we each have received through our Creator, and they must therefore be treated with kindness and respect." USCCB, Comment on The Proposed Rule Governing Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal

Financial Assistance at 2 (Sept. 12, 2022), https://perma.cc/4TKE-R75T. But tens of millions of Americans believe that these individuals—for their own good and the good of society—should be "helped to accept their own body as it was created." Pope Francis, Amoris Laetitia, no. 285 at 214 (2016), https://perma.cc/M43R-3AEJ. This view reflects not bigotry, but compassion.

b. The lower courts additionally held that the challenged laws either do or might draw impermissible sex-based classifications. Because their reasoning differs, this brief considers the opinions in turn.

Ninth Circuit. Idaho's law bars males from competing on girls' and women's teams but allows females to compete on boys' and men's teams. *Hecox* Pet.App.38a. Thus, only athletes wishing to compete on women's teams can be made to "verify" their sexes by "provid[ing] a health examination and consent form or other statement signed by the student's personal health care provider that shall verify the student's biological sex." Idaho Code §33-6203(3).

The Ninth Circuit erroneously concluded that this disparate treatment caused Idaho's law to fail intermediate scrutiny.

As an initial matter, the verification process, by itself, draws no sex-based distinctions. *Any* athlete who competes on a women's team can be asked to undergo the verification process without regard to his or her sex. Indeed, the whole point of the verification process is to determine the athlete's sex.

Idaho's law passes constitutional muster regardless. To be sure, the law as a whole does draw a sex-based distinction: it bans males from competing on girls' and women's teams but permits females to compete on boys' and men's teams. But that distinction easily survives intermediate scrutiny because it "serves" and is "substantially related" to the same "important governmental" objectives" as laws *strictly* segregating males and females: it ensures that there are fora in which girls and women are able to compete. The verification process serves and is substantially related to the same interest, since it provides a mechanism for excluding males from these female-only fora. While Idaho *could have* advanced the same interest by imposing a similar restriction on boys' and men's sports, it did not need to: the inherent physical advantages that boys and men possess ensure adequate athletic opportunities for men without the need for government intervention. Idaho's law simply ensures that the rare female athlete able to safely and fairly compete with boys and men can do so. It cannot be that Idaho's sex-based classification fails only because Idaho did not segregate the sexes as much as it could have.

Fourth Circuit. The Fourth Circuit held that the validity of West Virgina's laws turned on questions of fact. It reasoned that, because the plaintiff ("B.P.J.") brought an as-applied challenge, the law was subject to intermediate scrutiny *in its application to B.P.J.* B.P.J., a biological male, had "never gone through" advanced stages of puberty. Therefore, the court reasoned, West Virginia needed to show that its law "serves important governmental

objectives and that the discriminatory means employed are substantially related to the achievement of those objectives," *Skrmetti*, 145 U.S. at 1829 (quoting *Virginia*, 518 U.S. at 533), as applied to males at B.P.J.'s stage of development. *See B.P.J.* Pet.App.30a–38a.

The Fourth Circuit erred. States need not justify sex-based classifications with such precision. The Equal Protection Clause confers a right to be free of impermissible classifications. And the answer to the question of *whether* a classification is impermissible depends on how it operates "as a general matter," not on how it operates in "specific[]" cases. *Cleburne*, 473 U.S. at 446. Thus, none of this Court's "gender-based classification equal protection cases have required that the statute under consideration be capable of achieving its ultimate objective in every instance." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70 (2001).

Because the classifications in West Virginia's law are substantially related to the State's important interest in ensuring opportunities for female athletes, it passes constitutional muster. Whether an exception for B.P.J specifically (or for males at a similar stage of puberty) would undermine that interest makes no difference.

B. Title IX does not require allowing males to participate in female sports.

The Fourth Circuit further erred by holding that West Virginia's law violates Title IX.

1. Title IX permits schools to offer female-only sports.

a. Title IX guarantees that no one, "*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." 20 U.S.C. §1681(a) (emphasis added). Do schools exclude, deny, or discriminate "on the basis of sex" when they create female-only sports teams? No, they do not.

As an initial matter, Title IX prohibits only that which it prohibits *unambiguously*. That is because "Title IX was enacted as an exercise of Congress' powers under the Spending Clause." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). "Legislation enacted pursuant to the spending power is much in the nature of a contract[.]" *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quotation and brackets omitted). "Just as a valid contract requires offer and acceptance of its terms, the legitimacy of Congress' power to legislate under the spending power ... rests on whether the recipient voluntarily and knowingly accepts the terms of the 'contract.'" *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (brackets and quotation marks omitted). "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* (quotation marks omitted).

Title IX does not unambiguously prohibit sex-segregated sports teams—it unambiguously permits them.

Begin with the text. Title IX says that no one may be "excluded from participation in, denied the benefits of, or subjected to discrimination under any education program or activity" "on the basis of sex." 20 U.S.C. §1681(a). To an ordinary English speaker, this language guarantees equal opportunities for the sexes. The exclusion and denial bars mean that neither sex may receive opportunities or benefits the other does not. And the bar on "discrimination" naturally means that neither sex can be treated differently in contexts where the sexes are similarly situated—after all, if the sexes are *not* similarly situated, then a law distinguishing them would not typically be described as "discriminatory." Therefore, to an ordinary English speaker, sex-based distinctions that accommodate genuine differences between the sexes—distinctions that *assure* equal opportunity—do not qualify as exclusions, denials, or discrimination "on the basis of sex."

Rather than prohibiting sex-based distinctions, Title IX could be read to occasionally *require* such distinctions. Schools that fail to offer *separate* women's restrooms, for example, might fairly be described as excluding women or denying benefits to women "on the basis of sex." And one could argue that if "teams theoretically open to all on a competitive basis result in exclusion of women from athletic participation, separate teams for women … are certainly required by the statute itself." Comment, *Implementing Title IX: The New Regulations*, 124 U. Pa. L. Rev. 806, 840 (1976).

Consistent with this, Title IX allows schools to draw sex-based distinctions as necessary to afford

equal opportunity to both sexes. Schools are statutorily entitled to "maintain[] separate living facilities for the different sexes." 20 U.S.C. §1686. Title IX also empowers schools to host "father-son or mother-daughter activities," provided "reasonably comparable activities" are open to students of both sexes. 20 U.S.C. §1681(a)(8). This ensures that both sexes have equal ability to participate in events—mother-son and father-daughter dances—that inherently account for sex.

The permissibility of such distinctions accords with all available evidence of Title IX's original understanding. Consider, for example, "the contemporaneous construction of those who were called upon to act under the law" and "appointed to carry its provisions into effect." *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210 (1827). For years after Title IX's enactment, the Department of Education interpreted the law as allowing schools to segregate the sexes to protect equal opportunity. For example, schools were allowed to "operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 45 Fed. Reg. at 30962 (adopting 34 C.F.R. §106.41(b)). To this day, schools take great efforts to balance their men's and women's athletic offerings, knowing that they risk *violating* Title IX if they fail to do so. The Department has also long allowed schools to "provide separate toilet, locker room, and shower facilities on the basis of sex," provided that the separate facilities are "comparable" in quality. *Id*. at 30960 (adopting 34 C.F.R. §106.33). This further shows that the Department did not

understand Title IX to prohibit sex-based distinctions.

All told, there is no doubt that Title IX was originally understood to permit sex-based distinctions in contexts, like athletics, where the sexes are not similarly situated.

b. It follows that West Virginia's "Save Women's Sports Act" accords with Title IX. The law *protects* the equal opportunity that Title IX guarantees; the Act keeps girls and women from being "excluded" from "participation" in interscholastic sports by prohibiting males from taking their spots. 20 U.S.C. §1681(a).

2. The Fourth Circuit's contrary reasoning reflects an atextual re-writing of Title IX.

The Fourth Circuit's contrary arguments all fail.

First, the court concluded that the challenged law "discriminates based on sex assigned at birth by forbidding transgender girls [biological males]—but not transgender boys [biological girls]—from participating in teams consistent with their gender identity." *B.P.J.* Pet.App.39a. That just restates the untroubling fact that West Virginia's law forbids males to compete in female sports. It makes no difference that the law permits *females* to compete in male sports. Given the biological differences between males and females, allowing the rare female capable of competing with males to do so will not deny males the equal opportunity that Title IX protects. And because males

and females are not similarly situated in their ability to compete with one another, this allowance for female athletes does not qualify as "discrimination" in the relevant sense.

Second, and relying on its own precedent, the Fourth Circuit held that West Virginia's law impermissibly discriminates "on the basis of sex" by discriminating based on gender identity. *B.P.J.* Pet.App.39a.

This argument fares no better than the first. The law does not discriminate based on gender identity: it prohibits males from participating in women's sports *regardless* of whether they are transgender. *See above* 10. In any event, it is not true that "discrimination based on gender identity is discrimination 'on the basis of sex' under Title IX." *B.P.J.* Pet.App.39a. Sex and gender identity are not the same thing—if they were the same thing, no one would be transgender. The precedent on which the Fourth Circuit relied, *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020) (*en banc*), does not claim otherwise. Instead, it concludes that discrimination based on gender identity *entails* discrimination on the basis of sex. *Id.* at 616–17. *Grimm* reached this conclusion in reliance on *Bostock v. Clayton County*, 590 U.S. 644 (2020), which held that Title VII's prohibition on discriminating "because of … sex" extends to gender-identity discrimination. *Id.* at 652. *Grimm* extended that logic to Title IX via the following syllogistic argument:

> *Premise 1:* "'it is impossible to discriminate against a person for being … transgender

> without discriminating against that individual based on sex' … because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions." *Grimm*, 972 F.3d at 616 (quoting *Bostock*, 590 U.S. at 660).
>
> *Premise 2:* Title IX prohibits disparate treatment for which sex is a "but-for cause." *Id*.
>
> *Conclusion:* Title IX prohibits discrimination based on gender identity. *Id*. at 616–17.

Both premises are false.

Begin with the second premise. Title IX *does not* prohibit all disparate treatment with a but-for relation to sex. To the contrary, the law's equal-opportunity guarantee has long been understood to *permit* different treatment between the sexes in contexts—including sports—where the sexes are not similarly situated. *See above* 17–19; *accord Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). True enough, *Bostock* applied a but-for test. But *Bostock* adopted this test based on its interpretation of precedent applying a different statute (Title VII of the Civil Rights Act of 1964), with different language ("because of … sex," not "on the basis of sex"). And *Bostock* specifically cabined its holding to the precise question before it: whether an employer violates Title VII by firing an employee for being transgender or homosexual. *See*

590 U.S. at 681. That makes all the difference. "Title VII's definition of discrimination, together with the employment-specific defenses that come with it, do not neatly map onto other areas of discrimination." *Tennessee v. Cardona*, 2024 WL 3453880, *2 (6th Cir. July 17, 2024) (per Sutton, C.J.). Title IX is one such area. Thus, *Bostock* does not justify reading Title IX to prohibit all distinctions with a but-for connection to sex. *Id.*; *accord Meriwether*, 992 F.3d at 510 n.4; *Adams*, 57 F.4th at 808.

The first premise of *Grimm*'s argument is equally flawed: there is no but-for connection between sex and gender identity. True, *Bostock* said otherwise in the Title VII context. *See* 590 U.S. at 660. But *Bostock* reached this conclusion based on flawed counterfactual reasoning. It claimed that firing an employee for being transgender *necessarily means* firing that employee based on traits the employer would tolerate in a counterfactual world where the same employee is of the opposite sex. *Id.* The problem with this argument is that the counterfactual does not hold constant the employee's gender identity: once the same employee is assumed to be a man or woman, he ceases to be transgender. As such, the counterfactual does not shed any light on the causal role played by sex. *See id.*, at 695–96 (Alito, J., dissenting); *accord* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 Notre Dame L. Rev. 67, 98–120 (2021).

Moreover, *Bostock*'s counterfactual reasoning breaks down on its own terms as applied to gender identities other than "male" and "female."

Consider "non-binary" individuals (who identify as neither male nor female) or "gender-fluid" people (who identify as different genders at different times). Neither group is defined by traits or actions associated with either biological sex. This means that, when an employer takes an adverse action because an employee claims these gender identities, that employer does not take the adverse action based on "traits or actions" that it would "tolerate[] in an employee" of the opposite sex. *Bostock*, 590 U.S. at 660. Rather, the employer takes the adverse action based on traits it does not tolerate in either sex. This further negates the supposed causal relation between sex discrimination and gender identity.

In short, *Bostock* should not be permitted to metastasize to other areas of law, including Title IX.

II. The Fourth Circuit's interpretation of Title IX would have far-reaching implications.

It should come as a relief that the Fourth Circuit erred, because its interpretation of Title IX would prove disastrous for Catholic institutions.

A. Catholic schools cannot allow males to compete on female-only teams.

"Catholic schools teach the Catholic faith." USCCB, et al., Comment on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams at 4 (May 15, 2023) ("May 2023

Comment"), https://perma.cc/C8XX-BGSY. "Instruction in the faith is not limited to textbooks, tests, and homework." *Id.* It "extends to the school modeling for its students a community that strives, in word and action, to be faithful." *Id.* "The whole school community is responsible for implementing the school's Catholic educational project as an expression of its ecclesiality and its being a part of the community of the Church." Congregation for Catholic Education, *The Identity of the Catholic School for a Culture of Dialogue* ¶38 (2022), https://perma.cc/E57Y-L3JA. "The fact that in their own individual ways all members of the school community share this Christian vision, makes the school 'Catholic'; principles of the Gospel in this manner become the educational norms since the school then has them as its internal motivation and final goal." *Id.* (quotation marks and citation omitted).

By allowing males to compete *as girls and women* on female-only athletic teams, the school would communicate a message at odds with Catholic doctrine.

Begin with the Catholic belief that this world is both divinely created and divinely ordered. The natural world enshrines an "inbuilt order" that "sets forth ends and criteria for its wise use." Pope Benedict XVI, Encyclical Caritas in Veritate, no. 48 (2009), https://perma.cc/GF8M-3JVT.

Human nature is part of the natural order. And human nature is fundamentally a body-soul union: spirit and matter "are not two natures united, but rather their union forms a single nature."

Catechism of the Catholic Church §365, p.93 (2d ed. 2019). Another fundamental aspect of human nature is sexual differentiation. "God created mankind in his image; in the image of God he created them; *male and female* he created them." Gen. 1:27 (The New American Bible) (emphasis added). And "'[b]eing man' or 'being woman' is a reality which is good and willed by God." Catechism at §369, p.94. "Sexuality characterizes man and woman not only on the physical level, but also on the psychological and spiritual, making its mark on each of their expressions." Congregation for the Doctrine of the Faith, *Letter on the Collaboration of Men and Woman in the Church and in the World* no. 8 (2004), https://perma.cc/8CGQ-2TZZ (quotation omitted). "It cannot be reduced to a pure and insignificant biological fact, but rather is a fundamental component of personality, one of its modes of being, of manifestation, of communication with others, of feeling, of expressing and of living human love." *Id.* (quotations omitted).

Gender ideology contradicts these teachings. In gender ideology, human sexual identity is socially constructed and "dependent upon the subjective mindset of each person, who can choose a gender not corresponding to his or her biological sex, and therefore with the way others see that person (*transgenderism*)." Congregation for Catholic Education, "*Male And Female He Created Them," Towards A Path of Dialogue on the Question of Gender Theory in Education* ¶11 (2019), https://perma.cc/R5CK-ZZCR. In this view, sexual identity is plastic and, if an individual's maleness or femaleness is undesirable, that can be ameliorated by

altering the body. That contradicts Church teachings on the soul-body union: because the soul comes into existence with the body and forms a unified nature with it, no one can be "trapped" in the wrong body. *See* Catechism at §365, p.93.

Transgenderism also falsely treats maleness and femaleness as "pure and insignificant biological fact[s]," rather than essential and unchanging qualities "fundamental" to our personality and existence. *Letter on the Collaboration of Men and Women*, no.8. "We do not create our nature"; therefore, "we hold it as a gift." *Declaration "Dignitas Infinita" on Human Dignity*, ¶9 (Aug. 4, 2024), https://perma.cc/AF6M-LVEK. Because we did not create our nature, we do not "own" it; God does. USCCB, Comm. on Doctrine, *Doctrinal Note on the Moral Limits to Technological Manipulation of the Human Body* ¶3 (Mar. 20, 2023), https://perma.cc/3TJ3-68AZ. And because we do not own our human nature, we are not "free to make use of [it] in any way we please." *Id.*

Those who "experience gender discordance … are equally loved by God," and equally entitled to respect. May 2023 Comment at 2. But love and respect do not require affirmation and approval of an individual's choices, actions, or subjective identifications. As every parent knows, we owe those we love a duty to *disapprove of* and *reject* actions or beliefs that harm them. Thus, precisely *because* these people are entitled to love and support, they should be "helped to accept their own body as it was created." Pope Francis, Amoris Laetitia, no. 285 at 214.

The Fourth Circuit's decision, applied to Catholic schools, would require them to act contrary to these teachings. To say that a male can compete *as a girl or women* on a female-only team is to communicate that males *can be* girls or women. That is not true. And communicating this message would undermine the primary function that Catholic schools exist to serve: imparting the faith. True, Catholic schools could still articulate the principles laid out above. But what students see is often more powerful than what they hear. And what they see, day after day, on the field and in the locker room, will shape their view of reality. Allowing males to compete as girls and women on female-only teams imparts a false view of reality, in which sex can be rejected or altered to suit individual preference. That message contravenes Catholic teaching. So, Catholic schools cannot assist in promoting that message.

B. The Fourth Circuit's interpretation of Title IX threatens both Catholic education and Catholic institutions generally.

The Fourth Circuit's interpretation of Title IX threatens to exclude Catholic organizations from participating in federal programs or interscholastic athletics. Their exclusion would inflict incalculable social harm.

1. Catholic organizations participate in many federal programs.

Recall that Title IX prohibits "*any education program or activity receiving Federal financial*

assistance" to discriminate "on the basis of sex." 20 U.S.C. §1681(a) (emphasis added). While this naturally implicates Catholic schools, it is on its face not limited to schools, nor is the scope of its application limited to the specific program receiving federal financial assistance. Civil Rights Restoration Act, Pub. L. 100-259, §2(2), 102 Stat. 28 (Mar. 22, 1988) (expressing intent to "restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application" of Title IX after *Grove City College v. Bell*, 465 U.S. 555 (1984)).

Catholic dioceses and parishes run educational programs other than schools, such as adult and youth faith-formation classes, which may involve scenarios where distinctions are drawn on the basis of sex (for example, a parish-sponsored men's Bible study). And Catholic dioceses use various corporate structures, some of which do not silo each parish and school into separate corporate entities.

Holdings such as the Fourth Circuit's, then, are relevant to many Catholic entities, which receive funding through numerous federal programs. Though case-specific factors determine whether any given outlay of federal funds constitutes "Federal financial assistance" for purposes of Title IX, Catholic schools participate in numerous programs that may quality. This section provides some examples.

a. The Department of Agriculture administers the National School Lunch Program, which provides free or reduced-price lunch to students with

a family income below a certain threshold. 42 U.S.C. §1758(b). Over 2,000 Catholic elementary and secondary schools participate in the federal school-lunch program, with over 185,000 students receiving services. *See* National Catholic Education Association, *U.S. Catholic Elementary and Secondary Schools 2024–2025: The Annual Statistical Report on Schools, Enrollment and Staffing* 35 (2025) ("NCEA Statistical Report"). In percentages, 34.5 percent of schools reported having a free and reduced-price lunch program, with 14.7 percent of enrolled students reported as eligible for the program. *Id.*

b. Under the FCC's E-Rate program, elementary and secondary schools can receive discounted telecommunications services and internet access. *See* 47 U.S.C. §254(h). In the 2023–2024 academic year, over 2,300 Catholic elementary and secondary schools benefited from federal E-Rate services. NCEA Statistical Report at 36.

c. The Nonprofit Security Grant Program (NSGP) administered by FEMA provides grants to religious organizations, among other nonprofits, for target-hardening and other security enhancements to protect against terrorist attacks or other threats. 6 U.S.C. §609(a). Multiple Catholic organizations have received NSGP funding, and interest in the program has skyrocketed in the wake of the recent mass shooting at a back-to-school Mass at Annunciation Church in Minneapolis.

d. When natural disasters strike, Catholic organizations regularly receive assistance from FEMA, not only to help those in need, but also to

recover and rebuild themselves. Examples of such programs include the Emergency Food and Shelter Program, the Disaster Case Management Program, and the Public Assistance Program.

2. Catholic schools may have to decline this funding if Title IX is interpreted to require allowing males to compete in female sports.

Because Catholic schools cannot host sports programs in which males compete on female-only teams—and because Catholic entities more generally cannot affirm what they sincerely believe to be false—upholding the Fourth Circuit's interpretation of Title IX could force Catholic entities to either reject federal funding like that discussed above, or else cancel their athletics programs and other sex-separate educational activities.

That is true notwithstanding Title IX's religious exemption. That exemption provides that Title IX's prohibition on sex-based discrimination "shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." 20 U.S.C. §1681(a)(3).

The exemption is inadequate for two reasons.

First, the exemption would *at most* allow Catholic schools to segregate their own teams by sex. Other schools, however, would still be required to let males compete on female-only teams. This would dramatically limit Catholic schools' ability

to compete with secular institutions: for the same reasons that Catholic schools cannot host female-only teams open to males, they cannot allow their own female-only teams to compete against males. *See* May 2023 Comment at 8.

Second, the religious exemption's scope is unclear and inadequate. Caselaw interpreting this provision is sparse relative to the importance of the exemption. *See Goodman v. Archbishop Curley High School, Inc.*, 149 F.Supp.3d 577, 584 (D. Md. 2016) ("Few courts have addressed the breadth of Title IX's religious exemption ...."). And some of what little caselaw exists suggests the exemption, which applies only to "educational institution[s]," would not provide *any* cover for other institutions (including hospitals) subject to Title IX. *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 554 (3d Cir. 2017). Given the dearth and nature of the caselaw, Catholic institutions cannot be confident about how the exemption will operate. And that is especially so because, were this Court to affirm the Fourth Circuit, follow-on precedents regarding the meaning of Title IX's prohibition on sex-based discrimination will have a ripple effect on caselaw interpreting the scope of Title IX's religious exemption.

Agency interpretations of the religious exemption provide more uncertainty, not less. The Department of Education, "the agency responsible for providing federal financial assistance pursuant to Title IX, promulgates implementing regulations that describe appropriate methods for invoking this religious exemption." *Hunter v. U.S. Dep't of Educ.*, 115 F.4th 955, 961 (9th Cir. 2024); *see* 34

C.F.R. §106.12. But the Department has a history of inconsistency even on the basic question of what a religious school must do to invoke the religious exemption. *See Hunter*, 115 F.4th at 961.

3. Forcing Catholic schools out of federal programs will harm students nationwide.

Affirming the Fourth Circuit would mean that Catholic schools that field sports teams will be forced to either lean on the thin reed of Title IX's religious exemption, leave the field altogether, or forgo participating in federally funded programs. That would be most unfortunate. "The landscape of interscholastic athletics will be much less rich if religious schools begin to be eliminated from it simply because of their adherence to beliefs that require them to field sports teams based on biological sex." May 2023 Comment at 8. Of potential greater importance, the nation will be worse off if Catholic schools cannot continue providing the same level of educational services.

"Catholic schools are among the oldest educational institutions in the United States." Anthony S. Bryk, et al., *Catholic Schools and the Common Good* 15 (1993). And while their past is impressive, "[i]t's not even past." *Obergefell*, 576 U.S. at 706 (Roberts, C.J., dissenting) (quoting W. Faulkner, *Requiem for a Nun* 92 (1951)). Today, the National Catholic Educational Association is "the largest private professional association in the world, representing more than 150,000 educators serving nearly 1.7 million students in preschool, elementary and secondary schools." NCEA

Statistical Report at vii. There are over 5,800 Catholic schools in the Nation; 2,299 of those schools have a waitlist for admission. *Id.* at x.

Catholic schools serve America's students regardless of belief, background, or life challenges. Almost 22 percent of students at these schools are not Catholic. *Id.* Just under 10 percent have learning disabilities. *Id.* at ix. Almost 35 percent of Catholic-school students are racial minorities. *Id.* at x. And over 6,100 international students with visas are enrolled in Catholic schools. *Id.* at 37.

Catholic-school students outperform their public-school peers. Consider their graduation rates: 98.6 percent at Catholic schools versus 87 percent in traditional public schools. NCEA Statistical Report at 4. Or consider tests: the recently released "National Report Card" shows that Catholic-school students greatly outperformed their public-school peers; so much so that, "[i]f Catholic schools were a state, they would rank first in" National Assessment of Educational Progress ("NAEP") "scale scores for grades 4 and 8 in math and reading." National Catholic Education Association, *Catholic Schools Outshine Public Schools in Nation's Report Card*, https://perma.cc/ZG4J-ZGU6. This aligns with longstanding trends: for decades, Catholic schools have outperformed their public-school peers on the NAEP in fourth- and eighth-grade math and reading. *See NAEP 2024 Results for Catholic Schools*, https://perma.cc/YXM9-WZS7.

It would be foolish to risk these benefits. So it is good news that Title IX, properly understood,

does not mean what the Fourth Circuit thinks it means.

4. Affirming the Fourth Circuit's decision could have catastrophic effects on religious hospitals.

Rejecting the Fourth Circuit's interpretation will also avert problems that might otherwise arise under §1557 of the Affordable Care Act. That law prohibits discrimination in any "health program or activity" receiving federal funds. 42 U.S.C. §18116(a). Thus, §1557 applies to entities, including Catholic hospitals, that accept Medicaid or Medicare. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 217 (2022).

Section 1557 matters here because it prohibits, by reference, all forms of discrimination that violate Title IX. §18116(a). Thus, if Title IX prohibits gender-identity discrimination, §1557 does too. Relying on that interpretation, HHS could (as it has in the past) interpret §1557 as requiring hospitals to provide surgeries and "treatment[s]" designed to affirm patients' "gender identit[ies]." *HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy* at 2, HHS Office of Civil Rights (Mar. 2, 2022), https://perma.cc/LX26-59QR. Catholic hospitals serve all in need, without regard to race, religion, sex, or any other characteristic. They "must employ all appropriate resources to mitigate the suffering of those who struggle with gender incongruence, but the means used must respect the fundamental order of the human body." *Doctrinal Note on the Moral*

Limits to Technological Manipulation at ¶18. Therefore, Catholic hospitals cannot provide "gender-affirming" treatments, which violate Catholic religious tenets. So, without a religious exemption, these hospitals could not continue accepting Medicare and Medicaid, decimating their ability to serve their communities. The Affordable Care Act contains no religious exemption. And HHS has previously denied that §1557 incorporates *Title IX's* religious exemption. *See* 81 Fed. Reg. 31375, 31380 (May 18, 2016). Further, at least one court has interpreted Title IX to exclude non-educational entities, including some hospitals, from the definition of "educational institution[s]" that can claim Title IX's exemption. *Mercy Catholic*, 850 F.3d at 554. Thus, if the Fourth Circuit were right about Title IX's meaning, that would imperil Catholic hospitals' ability to continue filling their critical role in the American medical system.

CONCLUSION

This Court should reverse the judgments below.

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