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 Ninth and Fourth Circuits

BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; NATIONAL ASSOCIATION OF EVANGELICALS; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; COALITION FOR JEWISH VALUES; AND JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF *AMICI CURIAE*[1]

Amici represent diverse faiths—Latter-day Saint, Evangelical, Baptist, and Jewish—who share both a common belief in the inseparability of biological sex and gender and a profound commitment to preserving religious freedom under the Constitution. Some have participated in this Court's leading cases under the First and Fourteenth Amendments. See, *e.g.*, *Mahmoud* v. *Taylor*, 145 S. Ct. 2332 (2025); *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021); *Obergefell* v. *Hodges*, 576 U.S. 644 (2015). Our institutional experience teaches that adopting transgender status as a quasi-suspect class would jeopardize established rights and protections securing religious freedom.

SUMMARY OF ARGUMENT

Unremarkable facts can summon the Constitution's fundamental guarantees. Examples include a child's refusal to salute the American flag, another's plea to attend a local public school, and a church's dismissal of a schoolteacher. See *W.V. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954); *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171 (2012). So too here. Disputes over athletic participation raise the momentous question whether transgender status is a quasi-suspect class under the Equal Protection Clause. It is not. Petitioners and the Government will explain why transgender status fails the accepted test and has no foundation in constitutional text or history.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

See *Little* Pet. Br. 36–39 (explaining that the equal protection claim fails under *Lyng* v. *Castillo*, 477 U.S. 635 (1986)); *id.* at 22 (arguing that the Fourteenth Amendment's text offers no support for heightened scrutiny based on transgender status).

We agree—but write to underscore a different concern. Elevating transgender status under the Fourteenth Amendment will shatter the framework of rights and protections reflecting this Nation's fundamental commitment to religious freedom. Constitutional guarantees of the free exercise of religion and equal protection are both subject to judicial balancing tests. A novel equality right would compel courts to steer between liberty and equality, without compass or star, at the expense of rights embodied in the written Constitution. And because constitutional rights prevail over statutes, elevating transgender status would weaken the Religious Freedom Restoration Act (RFRA) and create uncertainty for religious organizations in employment, public accommodations, public funding, and parental rights. Uncertainty breeds risk, and risk chills the exercise of religion. Making transgender status a quasi-suspect class will expose religious people and institutions to fines, damages suits, and the loss of public benefits—all for exercising their religion.

Nor is that all. The Court's warnings about the costs of adopting constitutional solutions to bitter national controversies apply here. Constitutional law shapes national morality. Granting transgender status heightened judicial protection would recast millennia-old religious teachings about the inseparability of sex and gender as akin to racism and their adherents as bigots. Consigning religious people and institutions to second-class status in American life would contradict "the best of our traditions"—which prize religious

liberty rather than suppress it. *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

Grave consequences for religious organizations and people of faith are not only unwarranted, but unnecessary. Tailored legislation can safeguard basic rights for transgender people without putting an unprecedented gloss on the Fourteenth Amendment. The Fourth and Ninth Circuits were wrong to say otherwise, when recognizing transgender status will undermine religious freedom. The Constitution guarantees both freedom and equality—not a false choice between them. The decisions below should be reversed.

ARGUMENT

I. ENDORSING TRANSGENDER STATUS AS A QUASI-SUSPECT CLASS WOULD CHILL RELIGIOUS FREEDOM BY UNSETTLING FEDERAL RIGHTS.

Religious organizations depend on the settled framework of federal rights. First Amendment guarantees and statutory protections secure the freedom of a religious organization to exercise its religion. Uncertainty about whether a court will vindicate these rights and protections would chill that right. A religious organization's pursuit of a unique religious mission would be molded to avoid government penalties and private litigation rather than to express the organization's authentic self-definition. See *Corp. of Presiding Bishop of The Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 343–44 (1987) (Brennan, J., concurring in the judgment).

Religious freedom would be less free.

A. Federal Safeguards for Religious Employment Would Be Uncertain If Transgender Status Were a Quasi-Suspect Class.

Recognizing transgender status as a quasi-suspect class would make established legal protections for religious organizations profoundly uncertain. Equality claims would generate conflicts affecting religious freedom in employment. Novel questions would cast doubt on whether religious organizations can exercise their faith without facing penalties and lawsuits.

Consider the distinctive requirements of religious employment. "Unlike secular employers, a religious organization depends on its employees not only to carry out workaday tasks, but to pursue the organization's religious mission. * * * Without the freedom to make judgments about the religious suitability of its employees, a religious organization's capacity to pursue its religious mission will deteriorate or disappear." R. Shawn Gunnarson, James Cleith Phillips & Christopher A. Bates, *Religious Employment and the Tensions between Liberty and Equality*, 2025 BYU Law Rev. (forthcoming 2025) (manuscript at 4), https://ssrn.com/abstract=5183766.

Title VII of the Civil Rights Act prohibits an employer from firing someone "merely for being gay or transgender." *Bostock* v. *Clayton County*, 590 U.S. 644, 683 (2020). But the Court reserved questions about "how Title VII may intersect with religious liberties." *Id.* at 681. And while reaffirming its commitment to "preserving the promise of the free exercise of religion enshrined in our Constitution," the Court acknowledged that "RFRA operates as a kind of super statute" that "might supersede Title VII's commands in appropriate cases." *Id.* at 681–82.

Recognizing transgender status as a quasi-suspect class would undermine RFRA's purpose as a "very broad protection for religious liberty." *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 692, 693 (2014). RFRA directs that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). Imposing such a burden is lawful only if applying the burden to the person "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b)(1)–(2).

A religious employer faced with an employment discrimination suit under Title VII may invoke RFRA as a defense. See *Bostock*, 590 U.S. at 682. Today, an employer would be entitled to complete relief if it shows that applying Title VII to it would impose a substantial burden on its exercise of religion unless denying the employer an exemption meets the compelling interest test. See 42 U.S.C. § 2000bb-1(b); accord *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (under RFRA, the relevant issue is "whether exceptions are required under the test set forth by Congress").

The EEOC has disputed that RFRA offers a defense against Title VII suits by LGBT employees. In *Braidwood Management, Inc.* v. *EEOC*, 70 F.4th 914 (5th Cir. 2023), two religious employers—a nondenominational Christian church and a management company operated by its sole owner as a Christian business—challenged Title VII as interpreted by the EEOC. *Id.* at 918–19. The EEOC took the view that under Title VII, "employers must treat homosexual marriage as the same as heterosexual marriage, and

bathroom policy should be dictated by an employee's asserted gender identity as distinguished from his or her biological sex." *Id.* at 920–21. So interpreted, Title VII conflicted with both employers' sincere religious beliefs about marriage, sexuality, and gender. See *id.* at 919. The parties did not dispute that "numerous policies promulgated by plaintiffs (such as those about dress codes and segregating bathroom usage by solely biological sex) already clearly violate EEOC guidance." *Id.* at 919–20. The EEOC argued that RFRA offers no shield against liability under Title VII. See *id.* at 938–40. The Fifth Circuit disagreed. It concluded that the EEOC had no evidence rebutting the employers' contention that complying with the Commission's reading of Title VII would substantially burden their religious exercise. See *id.* at 938–39. And the court held that the EEOC's "generalized interest in prohibiting all forms of sex discrimination in every potential case" did not satisfy RFRA. See *id.* at 939–40.

If transgender status were a quasi-suspect class, however, *Braidwood*'s analysis could change. Suppose that a religious employer invokes RFRA as a defense against a Title VII suit alleging transgender discrimination. A court would then have to decide whether the government's interest in eradicating discrimination against a quasi-suspect class meets RFRA's compelling interest test. Unresolved questions about when RFRA applies will chill the exercise of religion by religious organizations with sincere religious beliefs in the indivisibility of sex and gender.

B. Granting Transgender Status Heightened Scrutiny Would Clash with the Free Exercise of Religion.

Claims under the Free Exercise Clause likewise run into headwinds. The First Amendment guarantee of religious freedom has been distilled into three pertinent rules. One, a law must satisfy strict scrutiny unless it is neutral and generally applicable. *Fulton*, 593 U.S. at 533 (citing *Emp. Div., Dept. of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 878–82 (1990)). Two, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 593 U.S. 61, 62 (2021) (per curiam). Three, a law triggers strict scrutiny (if not a categorical bar) when it "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 532 (1993). Public benefit programs may not so discriminate either. See *Carson* v. *Makin*, 596 U.S. 767, 789 (2022) (public benefit programs may not "identify and exclude otherwise eligible [recipients] on the basis of their religious exercise").

Offending these rules requires the government to show that its law or policy survives strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997). Under that test, the law or policy survives "only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 593 U.S. at 541 (quoting *Lukumi*, 508 U.S. at 546) (inner quotations omitted).

Embracing transgender status as a quasi-suspect class could prevent a religious organization from vindicating its rights under the Free Exercise Clause. Both free exercise doctrine and equal protection doctrine operate through balancing tests.[2] No principle of law instructs a court how to resolve a conflict between a constitutional right guarded by strict scrutiny (free exercise) and one guarded by suspect-class status (equal protection). Without a meta-principle for resolving directly clashing constitutional rights, a court would be tempted to balance the rights against each other. And unguided judicial balancing, in an increasingly secular society, poses special risks for faith communities whose religious doctrines are unfamiliar or unpopular. A religious organization would then have to guess at the strength of its free exercise rights. Many religious organizations will feel considerable pressure to curtail their religious activities or adjust their religious standards to avoid potential liability. See *Amos*, 483 U.S. at 343–44 (Brennan, J., concurring in the judgment). Because uncertainty breeds risk, elevating transgender status would chill the exercise of religion.

Fulton offers no guidance. It explains why a municipal ordinance with individualized exemptions fails strict scrutiny based on generalized interests in eliminating discrimination. See *Fulton*, 593 U.S. at

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[2] *Bostock* also mentions the ministerial exception as a First Amendment limitation on "employment discrimination laws." 590 U.S. at 682. "Under this rule, courts are bound to stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." *Our Lady of Guadalupe Sch.* v. *Morrissey-Berru*, 591 U.S. 732, 746 (2020). Because the ministerial exception operates as a categorical rule, not a balancing test, a contrary claim of transgender discrimination probably would fail.

541–42. But *Fulton* does not explain how to resolve a free exercise claim that clashes with a nondiscrimination requirement reflecting the government's interest in ending discrimination against a quasi-suspect class.

Adding transgender status to the equal protection canon would chill religious practice. Religious organizations would face deep uncertainty about the reliability of their First Amendment right to exercise religion. That result is wrong. The equal protection of law should not be expanded by sacrificing rights embodied in the written Constitution.

C. Granting Transgender Status Heightened Scrutiny Would Clash with Religious Freedom in Other Settings.

A new equal protection right based on transgender status would tear at foundational protections for religious organizations in public accommodations, public funding, and parental rights.

1. Public accommodations statutes can conflict with religious beliefs and standards, though federal public accommodations law does not. The Civil Rights Act prohibits discrimination in places of public accommodation, such as hotels, restaurants, and theaters. See 42 U.S.C. § 2000a(b). Prohibited grounds of discrimination include race, color, religion, or national origin—but not sex. Few religious organizations exclude people from their facilities on these grounds, except perhaps for religion. And the Act allows a religious organization to discriminate based on religion under an exemption for an "establishment not in fact open to the public." *Id.* § 2000a(e).

State public accommodations laws can raise more serious conflicts with religion. States have expanded the meaning of "place of public accommodation" far

beyond the common-law roots of federal law. See, *e.g.*, *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995).[3] "States have also expanded their laws to prohibit more forms of discrimination." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 591 (2023). Approximately 21 States prohibit discrimination based on transgender status in public accommodations. See Movement Advancement Project, *Nondiscrimination Laws: Public Accommodations*, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Sep. 15, 2025). The Court has stressed that "no public accommodations law is immune from the demands of the Constitution." *303 Creative*, 600 U.S. at 592. But that principle may not shield religious freedom if transgender status gets heightened protection. Because free exercise doctrine operates through a balancing test, which includes deciding whether the law reflects a compelling governmental interest, determining in advance how a court would reconcile a free exercise defense with a new constitutional imperative to protect transgender equality is uncertain.

2. Conditions on public aid can likewise pose sharp conflicts. Religious organizations are active members of the American community. Churches, charities,

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[3] See, *e.g.*, Cal. Civ. Code § 51(b) ("All persons within the jurisdiction of this state are free and equal, and * * * are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."); N.Y. Exec. Law § 292(9) (places of public accommodation include "wholesale and retail stores and establishments dealing with goods or services of any kind"); 43 Pa. Cons. Stat. § 954(*l*) ("public accommodation" means "any accommodation, resort or amusement which is open to, accepts or solicits the patronage of the general public" as well as "clinics, hospitals," and "educational institutions" under state supervision).

schools, and other faith-based organizations practice their faith by serving the poor, feeding the hungry, administering to the sick, and transmitting their faith to the next generation.[4] Federal grants, loans, and contracts are often an indispensable means of carrying out these distinctly religious missions.

The Free Exercise Clause requires that public benefit programs may not "identify and exclude otherwise eligible [recipients] on the basis of their religious exercise." *Carson*, 596 U.S. at 789. This essential principle of religious equality does not slacken when the government manages its contracts with private entities. *Fulton* disclaimed the notion that "the government may discriminate against religion when acting in its managerial role." 593 U.S. at 536.

Yet a recent federal regulation ties financial assistance to a recipient's compliance with a policy of nondiscrimination based on sexual orientation or gender identity. See, *e.g.*, Off. of Mgmt. & Budget, *Guidance for Federal Financial Assistance*, 89 Fed. Reg. 30046, 30153 (Apr. 22, 2024) (when financial aid is issued subject to a statute prohibiting sex discrimination, the federal agency "must ensure that the award is administered in a way that does not unlawfully discriminate based on sexual orientation or gender identity"). OMB has added that a federal agency managing awards consistent with the

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[4] Faith-inspired activities of religious institutions deliver a profound economic impact. Taking into account religious donations, education, and charities, scholars estimate that "the economic contribution of religion to American society" amounts to "about $1.2 trillion." Brian J. Grim & Melissa E. Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 Interdisciplinary J. Rsch. Relig. 1, 24 (2016).

Constitution "must take account of the heightened constitutional scrutiny that may apply under the Constitution's Equal Protection guarantee for government action that provides differential treatment based on protected characteristics." *Ibid.* These provisions are codified at 2 C.F.R. § 200.300(b)–(c).

Adding transgender status as a "protected characteristic[]," *id.* § 200.300(c), would change the risk calculus when it comes to public aid. Once again, the absence of a meta-principle for reconciling rights under the Free Exercise Clause and the Equal Protection Clause will baffle courts and chill religious exercise. Courts would be tempted to balance the rights against each other. Unfamiliar or unpopular faith communities would confront unprecedented threats to the principle that religious organizations must not be "exclude[d] * * * from an otherwise generally available public benefit because of their religious exercise." *Carson*, 596 U.S. at 781.

3. Parental rights present another area with troubling implications for faith communities. Religious organizations—including *amici*—often teach the importance of marriage and family, with a strong emphasis on the unique contributions of each gender, as a central religious doctrine.

a. Some States obstruct that goal by requiring candidates for adoption and foster care to certify that they will affirm and support a child's future expression of transgender status (if any). The Ninth Circuit in *Bates* v. *Pakseresht*, 146 F.4th 772 (2025), recently addressed a free exercise challenge to such an Oregon regulation. It requires would-be foster-care parents or adoptive parents to show they will "[r]espect, accept and support the * * * sexual orientation, gender identity, [and] gender expression * * * of a child or

young adult in the care or custody of the [State]." *Id.* at 777 (quoting Or. Admin. R. § 413-200-0308(2)(k)). Jessica Bates, a Christian widow and mother of five, applied to adopt two children in foster care. *Id.* at 779. Although she completed the prescribed training, the State denied her application because she would not agree in advance to "support [a child's possible] lifestyle or encourage any behavior related to their sexual orientation or gender identity." *Id.* at 781. In this, she is not alone. "Many Americans * * * believe that biological sex reflects divine creation, that sex and gender are inseparable, and that children should be encouraged to accept their sex and to live accordingly." *Mahmoud*, 145 S. Ct. at 2354.

The Ninth Circuit held that the Oregon regulation abridged Bates's rights under the Free Exercise Clause. After finding that the regulation was neither neutral nor generally applicable, see *Bates*, 146 F.4th at 791–98, the court applied strict scrutiny. The regulation failed. Bates raised "a substantial question" whether Oregon had identified a compelling interest in denying her an exemption "given the evident need for adoptive parents in Oregon and [her] unchallenged commitment to love and never denigrate a child." *Id.* at 798. Even if the State could produce a compelling interest, its means were inappropriate. "It is not narrowly tailored to impose on Bates an extreme and blanket rule that she may adopt no child at all based on her religious faith, for fear of hypothetical harms to a hypothetical child." *Id.* at 799.

Bates is a refreshing affirmation of religious freedom. But the Ninth Circuit's meticulous analysis was untroubled by an equal protection right based on transgender status. How a court would reconcile

First and Fourteenth Amendment norms in that circumstance is uncertain.

b. Another area of concern occurs when state and local laws and policies authorize public schools to conceal a child's transgender activities from her parents. Such policies burden the religious exercise of parents whose faith teaches that sex and gender are indistinguishable. Only last Term, this Court reaffirmed that "[t]he practice of educating one's children in one's religious beliefs, like all religious acts and practices, receives a generous measure of protection from our Constitution." *Mahmoud*, 145 S. Ct. at 2351. The right of parents to guide the religious upbringing of their children "follow[s] those children into the public school classroom." *Ibid.*

Whether public schools' concealment of a child's transgender activities from parents offends their constitutional rights is "a question of great and growing national importance." *Parents Protecting Our Children, UA* v. *Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (Alito, J., dissenting from the denial of certiorari). A pending petition for certiorari offers an opportunity to resolve that important question. *Foote* v. *Ludlow School Committee*, No. 25-77, asks "[w]hether a public school violates parents' constitutional rights when, without parental knowledge or consent, the school encourages a student to transition to a new 'gender' or participates in that process." Pet. at i (July 18, 2025). Constitutionalizing transgender status would make the outcome of this and similar cases unpredictable.

II. RELIGIOUS ORGANIZATIONS WILL FACE STIGMA IF TRANSGENDER STATUS BECOMES A QUASI-SUSPECT CLASS.

Legal risks are not the only problem. Adding transgender status to the equal protection canon would stigmatize religious people and institutions whose sincere religious beliefs reject any difference between sex and gender.

Reinterpreting the Equal Protection Clause would set the Constitution's commitment to equality on a collision course with its commitment to religious freedom. That freedom is not relegated to a once-a-week worship service or the private devotions of the faithful in their homes. The Free Exercise Clause "protect[s] the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022) (quoting *Smith*, 494 U.S. at 877). Putting religious people and institutions to the choice between their faith and full participation in American life contradicts the Constitution's axiom that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642.

The First Amendment forbids the government from making people outcasts for their religion. "Government actions that favor certain religions, the Court has warned, convey to members of other faiths that 'they are outsiders, not full members of the political community.'" *Cath. Charities Bureau, Inc.* v. *Wis. Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 248 (2025) (unanimous) (quoting *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309 (2000)). Nor can the government rescue transgender people "from stigma and isolation

by stigmatizing and isolating" religious people and institutions. *Mahmoud*, 145 S. Ct. at 2363.

Recognizing a novel right to transgender equality would threaten traditional faith communities with the same hostility, stigma, and isolation that members of the Court foresaw when asked to adopt same-sex marriage as a constitutional right.

In *United States* v. *Windsor*, 570 U.S. 744 (2013), Justice Alito warned that an equal protection challenge to the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), would require the Court to decide that "the presence of two members of the opposite sex is as rationally related to marriage as white skin is to voting * * *. Acceptance of the argument would cast all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools." 570 U.S. at 813 (Alito, J., dissenting).

Obergefell posed similar concerns. There, Chief Justice Roberts wrote that "[h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage." 576 U.S. at 711 (Roberts, C.J., dissenting). He worried aloud that the majority's "assaults on the character of fair-minded people will have an effect, in society and in court." *Id.* at 712. In his view, "[i]t is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority's 'better informed understanding' as bigoted." *Ibid.* (quoting *id.* at 672 (majority op.)).

Echoing his *Windsor* dissent, Justice Alito looked beyond the legal consequences of a right to same-sex marriage to the broader social and cultural effects.

He feared that the announced right to same-sex marriage would be "used to vilify Americans who are unwilling to assent to the new orthodoxy." *Id.* at 741 (Alito, J., dissenting). Because the Court's opinion "compares traditional marriage laws to laws that denied equal treatment for African-Americans and women," Alito predicted that "[t]he implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent." *Ibid.* With good reason he cautioned that "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." *Ibid.*

Interpreting the Equal Protection Clause to grant heightened scrutiny for transgender status poses similar threats. *Amici* and many other religious communities hold the sincere religious belief that sex and gender are divinely created and indistinguishable. This understanding is deeply rooted, widely held, and unlikely to fade. Yet because opposition to the Fourteenth Amendment's guarantee of equality is associated with opposition to civil rights for African-Americans, construing the Equal Protection Clause as a charter of transgender equality would cast religious beliefs about the indivisibility of sex and gender as akin to racism. Those who hold those beliefs would be considered "outside the mainstream" or simply bigots.

As *Barnette* memorably instructs, the Constitution guarantees freedom of religion—not national orthodoxy. See 319 U.S. at 642. Elevating transgender status to a quasi-suspect class, without any basis in constitutional text or history, would fail to "respect[] the religious nature of our people" by inscribing into the Constitution a judge-made rule at odds with widespread religious

beliefs and practices. *Zorach*, 343 U.S. at 314. The First Amendment condemns "enactments that exclude some members of the community * * * because of their religious exercise"—including judge-made doctrines of constitutional law. *Carson*, 596 U.S. at 781. It is said that the law is a teacher. This Court should reaffirm the lesson that the Constitution safeguards religious freedom as a fundamental right.

CONCLUSION

Constitutionalizing transgender status will diminish religious freedom by unsettling settled legal rights and protections for religious organizations. They and their members would face legal and social stigma because their faith teaches that sex and gender are inseparable. For nearly half a century, the canon of suspect classes has remained stable, permitting religious freedom to coexist with a robust interpretation of the Equal Protection Clause. Expanding the canon now would advance transgender interests at the expense of religious freedom. Because that result would be an intolerable retreat from America's First Freedom, the decisions below should be reversed.

Respectfully submitted,

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September 19, 2025