

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,

v.

CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., et al., *Petitioners*,

v.

MELISSA ZARDA, et al., *Respondents*.

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

v.

EQUAL OPPORTUNITY EMPLOYMENT  
COMMISSION, *Respondent*,

and

AIMEE STEPHENS, *Respondent-Intervenor*.

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

**BRIEF AMICI CURIAE OF BILLY GRAHAM  
EVANGELISTIC ASSOCIATION, SAMARITAN'S  
PURSE, CONCERNED WOMEN FOR AMERICA,  
NATIONAL LEGAL FOUNDATION, PACIFIC  
JUSTICE INSTITUTE, AND THE INTERNATIONAL  
CONFERENCE OF EVANGELICAL CHAPLAIN  
ENDORSERS**

*in support of the Employers*

Steven W. Fitschen

James A. Davids

The National Legal  
Foundation

5424 Johnstown Rd  
Chesapeake, Va. 23322

David A. Bruce  
205 Vierling Dr.  
Silver Spring, Md. 20904

Frederick W. Claybrook, Jr.

*Counsel of Record*

Claybrook LLC

700 Sixth St., NW, Ste. 430  
Washington, D.C. 20001  
(202) 250-3833

Rick@Claybrooklaw.com

**TABLE OF CONTENTS**

**STATEMENTS OF INTEREST ..... 1**

**SUMMARY OF THE ARGUMENT ..... 3**

**ARGUMENT ..... 5**

**I. Sex Does Not Include Gender Identity or Sexual Orientation; If *Price Waterhouse* Indicates Otherwise, It Should Be Expressly Limited..... 5**

**II. Solid Social Science and Health Statistics Support Legislatures that have not Incorporated Gender Identity and Sexual Orientation into Their Civil Rights Laws..... 8**

**A. Social Science Studies Demonstrate Serious Health Concerns for those with Gender Dysphoria, Concerns that are not Caused by Social Stressors..... 9**

**B. Social Science Studies Demonstrate Serious Health Concerns for Practicing Homosexuals, Concerns that are not Caused by Social Stressors. .... 14**

**C. Based on These Health Statistics and Studies Alone, Legislators have a Compelling Interest to Exclude Gender Identity and Sexual Orientation as Protected Classes..... 18**

**III. Legislators Who Add Protections for Gender Identity or Sexual Orientation Also Appropriately Address Special Problems That May Stem from Doing So.. 19**

<b>A. Special Concern No. 1: Adolescents with Gender Dysphoria.....</b>	<b>19</b>
<b>B. Special Concern No. 2: Safety of Women from “Temporary” Transvestites .....</b>	<b>20</b>
<b>C. Special Concern No. 3: Women’s Athletics Trumped by Transgendered, Biological Males .....</b>	<b>20</b>
<b>D. Special Concern No. 4: Religious Exercise, Both of Those Who Consider Transgender and Homosexual Practices Unethical and of Those Who Wish Assistance to Live Consistent with Religious Teachings.....</b>	<b>21</b>
<b>CONCLUSION .....</b>	<b>24</b>

## TABLE OF AUTHORITIES

### **Cases**

<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 134 S. Ct. 2751 (2014).....	23, 24
<i>DeJohn v. Temple Univ.</i> , 537 F.3d 301 (3d Cir. 2008) .....	8
<i>Doe v. Boyertown</i> , 897 F.3d 519 (3rd Cir. 2018) .....	20
<i>Hively v. Ivy Tech.</i> , 853 F.3d 339 (7th Cir. 2017) .....	8
<i>Klein v. Ore. Bur. of Labor and Indus.</i> , 289 Or. App. 507 (2017) ), <i>petition for cert. granted, rev'd, and remanded</i> (U.S. June 17, 2019) (No. 18-547).....	23
<i>Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n</i> , 138 S. Ct. 1719 (2018) .....	23, 24
<i>Meriwether v. Shawnee State Univ.</i> , 2019 WL 2052110 (S.D. Ohio May 9, 2019) .....	22
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015) .....	23
<i>Osborn v. Bank of the U.S.</i> , 22 U.S. 738 (1824).....	8
<i>Planned P'hood of Se. Pa. v. Casey</i> , 505 U.S. 833 (1992) .....	19
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	3, 5-6
<i>Welch v. Brown</i> , 834 F.3d 1041 (9th Cir. 2016) .....	22

**Statutes**

20 U.S.C. §§ 1681 <i>et seq.</i> .....	21
42 U.S.C. § 12221(a), (b)(1).....	4
42 U.S.C §§ 2000bb <i>et seq.</i> .....	22
Conn. Gen. Stat. Ann. § 46b-22b (West 2019) .....	23
Ga. Code Ann. § 16-6-2 (West 2019) .....	7
Haw. Rev. Stat. Ann. § 572-12.1 (West 2019).....	23
Mass. Gen. Laws ch. 46, § 13(e)(1)(i) .....	19
Mich. Comp. Laws Ann. § 750.158 (West 2019) .....	7
N.Y. Penal Law § 130.38 (McKinney, repealed 2001).....	7
Pub. L. No. 88-352 §§ 702, 703, 78 Stat. 253, 255 (1964), <i>codified as amended at</i> 42 U.S.C. §§ 2000e <i>et seq.</i> .....	23
Wash. Rev. Code Ann. § 26.04.010(4) (West 2019) .....	23

**Other Authorities**

American College of Pediatricians, “Gender Ideology Harms Children” (Mar. 2016, updated Sept. 2017), <a href="https://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children">https://www.acpeds.org/the-college- speaks/position-statements/gender-ideology- harms-children</a> .....	12-15
Cal. Health Interview Study, cited in Center for American Progress, “How to Close the LGBT Health Disparities Gap,” <a href="https://www.american">https://www.american</a>	

progress.org/issues/lgbt/reports/2009/12/21/ 7048/how-to-close-the-lgbt-health-disparities -gap/.....	16
Centers for Disease Control, “HIV and Gay and Bisexual Men,” <a href="http://www.cdc.gov/hiv/group/msm/index.html">www.cdc.gov/hiv/group/ msm/index.html</a> .....	15
Centers for Disease Control, “CDC Fact Sheet: Syphilis & MSM . . . .” <a href="http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm">www.cdc.gov/std/ Syphilis/STDFact-MSM-Syphilis.htm</a> .....	16
Centers for Disease Control, “HIV Cost- effectiveness,” <a href="http://www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/index.html">www.cdc.gov/hiv/prevention/ ongoing/costeffectiveness/index.html</a> .....	18
Centers for Disease Control, “Sexually Transmitted Diseases,” <a href="http://www.cdc.gov/msmhealth/std.htm">www.cdc.gov/ msmhealth/std.htm</a> .....	16
Centers for Disease Control, “Viral Hepatitis,” <a href="http://www.cdc.gov/msmhealth/viral-hepatitis.htm">www.cdc.gov/msmhealth/viral-hepatitis.htm</a> .....	16
Linda Chin, “A Prisoner’s Right to Transsexual Therapies: A Look at <i>Brooks v. Berg</i> ,” 11 Cardozo Women’s L.J. 151, 158 (2004) .....	5
“Getting Rid of Sodomy Laws . . . .” <a href="https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision">https://www.aclu.org/other/getting-rid-sodomy- laws-history-and-strategy-led-lawrence- decision</a> .....	6
<a href="https://www.acped.org">https://www.acped.org</a> .....	12
<a href="https://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048">https://www.americanprogress.org/issues/lgbt/ report/2009/12/21/7048</a> .....	11

<a href="https://www.canada.ca/en/public-health/services/infectious-diseases/sexual-health-sexually-transmitted-infections/syphilis-resource-population-specific-prevention.html">https://www.canada.ca/en/public-health/services/infectious-diseases/sexual-health-sexually-transmitted-infections/syphilis-resource-population-specific-prevention.html</a> .....	17
<a href="https://www.canada.ca/en/public-health/services/suicide-prevention/suicide-canada.html#a2">https://www.canada.ca/en/public-health/services/suicide-prevention/suicide-canada.html#a2</a> .....	17
<a href="https://www.catholicbridge.com/downloads/human-rights-complaint.pdf">https://www.catholicbridge.com/downloads/human-rights-complaint.pdf</a> .....	17
<a href="https://www.courant.com/sports/high-schools/hc-sp-transgender-policy-runners-respond-20190619-20190620-5x2c7s2f5jb6dnw2dwpftiw6ru-story.html">https://www.courant.com/sports/high-schools/hc-sp-transgender-policy-runners-respond-20190619-20190620-5x2c7s2f5jb6dnw2dwpftiw6ru-story.html</a> .....	20
<a href="http://www.militarytimes.com/story/military/2015/03/10/chaplain-fired/24699275/">http://www.militarytimes.com/story/military/2015/03/10/chaplain-fired/24699275/</a> .....	22
<a href="https://www.theglobeandmail.com/world/article-caster-semenya-loses-her-challenge-of-new-testosterone-rules-for/">https://www.theglobeandmail.com/world/article-caster-semenya-loses-her-challenge-of-new-testosterone-rules-for/</a> .....	21
<a href="https://www.verywell.com/what-is-the-lifetime-cost-if-hiv-49641">https://www.verywell.com/what-is-the-lifetime-cost-if-hiv-49641</a> .....	18
<a href="https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120">https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120</a> (originally published June 12, 2014, updated May 13, 2016) .....	12
102 The J. of Clinical Endocrinology & Metabolism 3869, 3873 (2017), found at <a href="https://doi.org/10.1210/jc.2017-01658">https://doi.org/10.1210/jc.2017-01658</a> .....	7

Lawrence C. Mayer & Paul R. McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 1 (Fall 2016), found at [https://www.thenewatlantis.com/docLib/20160819\\_TNA50SexualityandGender.pdf](https://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf)..... 9-11

“Number and percentage distribution of reported AIDS cases . . .,” <https://www.canada.ca/en/public-health/services/reports-publications/canada-communicable-disease-report-ccdr/monthly-issue/2017-43/ccdr-volume-43-12-december-7-2017/aids-2016-supplementary-tables.html#t11> ..... 17

Rick Maese, *Stripped of women’s records, transgender powerlifter asks, “Where do we draw the line?”* *Wash. Post*, May 19, 2019..... 20

Samantha Pell, *Transgender Policy Violates Title IX, Connecticut Girls Say*, *Wash. Post*, June 20, 2019 ..... 21

Ward, B.W., et al., “Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013,” reported in *CDC, National Health Statistics Reports*, no. 77 (July 15, 2014)..... 16

[www.armytimes.com/news/2018/04/19/army-chaplain-faces-same-sex-discrimination-claim-lawyer-says-he-was-following-army-guidance/...](http://www.armytimes.com/news/2018/04/19/army-chaplain-faces-same-sex-discrimination-claim-lawyer-says-he-was-following-army-guidance/...) 22

## STATEMENTS OF INTEREST<sup>1</sup>

The Billy Graham Evangelistic Association (“BGEA”) was founded by Billy Graham in 1950 and, continuing the lifelong work of Billy Graham, exists to support and extend the evangelistic calling and ministry of Franklin Graham by proclaiming the Gospel of the Lord Jesus Christ to all we can by every effective means available to us and by equipping the church and others to do the same. BGEA ministers to people around the world through a variety of activities including Decision America Tour prayer rallies, evangelistic festivals and celebrations, television and internet evangelism, the Billy Graham Rapid Response Team, the Billy Graham Training Center at the Cove, and the Billy Graham Library. Through its various ministries and in partnership with others, BGEA intends to represent Jesus Christ in the public square, to cultivate prayer, and to proclaim the Gospel. Thus, it is concerned whenever government acts to restrict and inhibit the free expression of the Christian faith those activities represent.

Samaritan’s Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to “go and do likewise” in response to the story of the Samaritan who helped a hurting stranger. Samaritan’s Purse operates in over 100 countries providing emergency relief, community development, vocational programs, and resources for

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<sup>1</sup> The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

children, all in the name of Jesus Christ. Samaritan's Purse's concern arises when government hostility prevents persons of faith from practicing core aspects of faith such as prayer, discipleship, evangelism, acts of charity for those in need, or other day-to-day activities of those practicing their sincerely held religious beliefs.

Concerned Women for America ("CWA") is the largest public policy organization for women in the United States, with approximately half a million supporters from all 50 States. Through its grassroots organization, CWA encourages policies that strengthen women and families and advocates for the traditional virtues that are central to America's cultural health and welfare. CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—everyday, middle-class American women whose views are not represented by the powerful elite.

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in Georgia, Michigan, and New York, seek to ensure that businesses owned or operated by people of faith are permitted to operate in accordance with their religious convictions.

The Pacific Justice Institute (PJI) is a non-profit legal organization established under Section 501(c)(3) of the Internal Revenue Code. Since its founding in 1997, PJI has advised and represented in court and administrative proceedings thousands of individuals, businesses, and religious institutions, particularly in the realm of First Amendment rights. As such, PJI has a strong interest in the development of the law in

this area.

The International Conference of Evangelical Chaplain Endorsers (ICECE) has as its main function to endorse chaplains to the military and other organizations requiring chaplains that do not have a denominational structure to do so, avoiding the entanglement with religion that the government would otherwise have if it determined chaplain endorsements. ICECE safeguards religious liberty for chaplains and all military personnel.

### SUMMARY OF THE ARGUMENT

The term gender identity was coined to distinguish it from the term sex in our civil rights laws. That by itself should end the attempt to equate the two expressions. Similarly, sexual orientation is not a concept inherent in the term sex. Sex refers to one's objective, biological gender. Sexual orientation refers to one's romantic preference.

To allow "precedent creep" from the plurality's concern in *Price Waterhouse v. Hopkins*<sup>2</sup> for "sex stereotyping" to encompass gender identity and sexual orientation effectively gives the judiciary powers reserved to the legislature, clearly violating the separation of powers. If that is required by the *Price Waterhouse* plurality's opinion, that opinion should be expressly limited.

Congress and the state legislatures have repeatedly considered adding "gender identity" and "sexual orientation" to existing civil rights categories. Only 20 states have done so on a statewide basis (plus D.C.).<sup>3</sup> As other briefs recount, Congress has repeatedly

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<sup>2</sup> 490 U.S. 228 (1989).

<sup>3</sup><https://www.freedomforallamericans.org/how-were-winning/> (last visited May 14, 2019).

refused to do so.<sup>4</sup>

Federalism and the state “laboratories” are obviously working well when some states favor a measure and others do not. Tipping these legislative scales on one side or the other or to “speed up” the process is not the prerogative of this or any court, particularly when it involves semantic legerdemain. On the contrary, principles of federalism require recognition that legislators have many good and sufficient reasons, supported by strong social science and logic, to refuse to recognize “gender identity” and “sexual orientation” as protected classes. State, local, and federal legislative bodies, rather than the judiciary, are best able to articulate precisely what they want protected, for example, by distinguishing between different categories (e.g., those who have had surgical sex change procedures and those who have not), dealing with particular applications (e.g., whether biological males may compete as women on sports teams), and addressing legitimate concerns (e.g., protecting abused women in shelters from males claiming to be female for predatory purposes and guarding the free exercise of religion by chaplains and pastors).

In these cases, the Sixth Circuit wielded the blunt instrument of judicial redefinition to find gender identity encompassed in sex; the Second Circuit did the same with sexual orientation. They erred in doing so, and their judgments should be reversed. The Eleventh Circuit read Title VII properly and with restraint when it recognized that sex does not include sexual

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<sup>4</sup> For example, Congress in the Americans With Disabilities Act expressly excluded homosexuality, bisexuality, tranvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders. 42 U.S.C. § 12221(a), (b)(1).

orientation, and it should be affirmed.

## ARGUMENT

### **I. Sex Does Not Include Gender Identity or Sexual Orientation; If *Price Waterhouse* Indicates Otherwise, It Should Be Expressly Limited.**

The fluidity of some terms does not obscure what should be obvious to all: inclusion of sex as a protected class in Title VII (and other civil rights laws) did not (and does not) encompass gender identity or sexual orientation. Amici will not belabor this point as a matter of legislative interpretation, but we make several observations that bolster this obvious conclusion.

1. Proponents of the term gender identity coined and used that term to distinguish it from the term sex.<sup>5</sup> They (properly) saw sex as defining an individual's gender by natural, objective, biological processes, i.e., by reference to chromosomes, sex organs, and the like. In contrast, the term gender identity was crafted to mean something different from that: no matter your biological makeup, you, subjectively, as an individual, may determine whether you would like to be considered as male or female.<sup>6</sup> It is ironic, then—not to mention internally inconsistent—to hold that sex includes gender identity.

2. It is also obvious that both proponents and opponents of including “gender identity” and “sexual orientation” as protected classes understand that they are currently not included in the civil rights laws. All

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<sup>5</sup> See Linda Chin, “A Prisoner’s Right to Transsexual Therapies: A Look at *Brooks v. Berg*,” 11 *Cardozo Women’s L.J.* 151, 158 (2004).

<sup>6</sup> See *id.*

state laws, as well as Title VII, currently include sex as a protected class. Nevertheless, 20 states (and D.C.) have included gender identity and sexual orientation as separate categories—which, of course, would be unnecessary if they were already encompassed by the term sex. Other state legislatures have proposed, but not enacted, the inclusion of gender identity and sexual orientation in their civil rights laws. Such proposals have not been rejected because legislators thought it superfluous, but because they recognize that both gender identity and sexual orientation mean something very different than sex.

3. The fluidity of terms, and the resulting confusion, is demonstrated by the plurality decision in *Price Waterhouse*. Although that 1989 decision repeatedly used both sex and gender,<sup>7</sup> it is apparent from the context that the plurality used the term gender synonymously with sex, i.e., biologically and objectively. It requires a tortured logic to conflate a biologically objective fact with a subjective feeling. The English language is malleable,<sup>8</sup> but not infinitely so.

4. By like token, the attempt to press into service the concern for “sex stereotyping” articulated in *Price Waterhouse* goes too far. Discriminating against someone because of homosexuality is not a cloak for discriminating against them because of their sex. Sexual orientation discrimination focuses not on the sex of individuals, but on their actions. Indeed, homosexual practices (as opposed to inclinations) were outlawed in most states when Congress enacted Title VII in 1964; only Illinois had decriminalized sodomy.<sup>9</sup> Thus, this is

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<sup>7</sup> *E.g.*, 490 U.S. at 235, 237, 239-42.

<sup>8</sup> See *DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*) (Alito, J.).

<sup>9</sup> “Getting Rid of Sodomy Laws,” <https://www.aclu.org/other/getting-rid-sodomy-laws-history-and-strategy-led-lawrence->

not a situation that requires judicial accommodation of new phenomena to the original text, like wiretapping did when considered under the Fourth Amendment.

5. If this Court perceives the *Price Waterhouse* plurality to have included concepts of non-biologically, subjectively determined gender identity and sexual orientation into its discussion of sexual stereotyping, then it is the plurality's language that should be clarified and limited. To hold otherwise superimposes a new meaning on the term sex that violates its common understanding.

6. When Congress inserted the term sex in Title VII, the common understanding was that Congress referred to objective, biological gender. Gender dysphoria was a well understood phenomenon in 1964,<sup>10</sup> as was homosexuality, but there is zero support for the view that sex was meant at that time to include protection for those who wish to present themselves in a gender other than their biological one or to those who practice a homosexual orientation.

7. Some obviously consider it progress to extend civil rights protections to the categories of gender identity and sexual orientation. Twenty states and D.C., not to mention many localities, have thought so. But, in our system of government based on the rule of law, such change, whether progress or not, is to come from the legislatures, not the judiciary. With due

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decision (last visited August 1, 2019). See, e.g., Ga. Code Ann. § 16-6-2 (West 2019), Mich. Comp. Laws Ann. § 750.158 (West 2019), and N.Y. Penal Law § 130.38 (McKinney, repealed 2001).

<sup>10</sup> Gender dysphoria, which before 2013 was called “gender identity disorder” or “transsexual,” was part of the medical literature as early as 1923. See 102 *The J. of Clinical Endocrinology & Metabolism* 3869, 3873 (2017), found at <https://doi.org/10.1210/jc.2017-01658> (last visited May 21, 2019).

respect to Judge Posner’s considered views, it is not appropriate under the separation of powers embedded in our Constitution for the judiciary to “interpret” legislative terms so as to incorporate concepts additional to the common meanings of those terms.<sup>11</sup> This Court should instead embrace the wisdom of Chief Justice Marshall:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law: and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge: always for the purpose of giving effect to the will of the Legislature: or, in other words, to the will of the law.<sup>12</sup>

## **II. Solid Social Science and Health Statistics Support Legislatures that have not Incorporated Gender Identity and Sexual Orientation into Their Civil Rights Laws.**

Underlying the push to incorporate gender identity and sexual orientation into the civil rights laws are the assumptions that (a) there are no natural, adverse consequences either for an individual who wishes to “reverse” his or her biological sex (to the degree

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<sup>11</sup> “[I]nterpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text)—a meaning that infuses the statement with vitality and significance today. . . . Title VII . . . invites an interpretation that will update it to the present . . .—call it judicial interpretive updating . . . .” *Hively v. Ivy Tech.*, 853 F.3d 339, 352-53 (7th Cir. 2017) (Posner, J., concurring).

<sup>12</sup> *Osborn v. Bank of the U.S.*, 22 U.S. 738, 866 (1824).

possible) or for one who practices homosexuality and (b) the only adverse consequences arise from social opprobrium. Neither of these assumptions is affirmed by reputable social science studies. To the contrary, ample studies indicate the contrary, and legislators act rationally when they exercise their discretion and refuse to include gender identity and sexual orientation as protected classes.

**A. Social Science Studies Demonstrate Serious Health Concerns for those with Gender Dysphoria, Concerns that are not Caused by Social Stressors.**

Dr. Paul R. McHugh is one of the leading practicing and research psychiatrists of his generation. He has worked actively with gender dysphoria for decades and was formerly Chief of Psychiatry at Johns Hopkins Hospital. He and Dr. Lawrence C. Mayer, an epidemiologist trained in psychiatry who has held professional appointments at Princeton, Penn, Stanford, and Johns Hopkins (among other universities), did an exhaustive survey of social science studies published through 2015 concerning sexuality, mental health outcomes, and social stress.<sup>13</sup>

Drs. Mayer and McHugh concluded as follows, based on their detailed analysis of the relevant literature:

- The hypothesis that gender identity is an innate, fixed property of human beings that is independent of biological sex—that a person might be a

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<sup>13</sup> Lawrence C. Mayer & Paul R. McHugh, “Sexuality and Gender,” 50 *The New Atlantis* 1 (Fall 2016), found at [https://www.thenewatlantis.com/docLib/20160819\\_TNA50SexualityandGender.pdf](https://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf) (last visited May 20, 2019) (hereinafter “Mayer & McHugh”).

“man trapped in a woman’s body” or a “woman trapped in a man’s body”—is not supported by scientific evidence.<sup>14</sup>

- Studies comparing the brain structures of transgender and non-transgender individuals have demonstrated weak correlations between brain structure and cross-gender identification. These correlations do not provide any evidence for a neurobiological basis for cross-gender identification.<sup>15</sup>
- Members of the transgender population are at higher risk of a variety of mental health problems compared to members of the non-transgender population. Especially alarming, the rate of lifetime suicide attempts across all ages of transgender individuals is estimated at 41%, compared to under 5% in the overall U.S. population. They reported that one study found that, compared to controls, sex-reassigned individuals were about five times more likely to attempt suicide and about 19 times more likely to die by suicide.<sup>16</sup>
- There is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for transgender populations. More high-quality longitudinal studies are necessary for the “social stress model” to be a useful tool for understanding public health concerns.<sup>17</sup>

These latter two conclusions are reinforced by data

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<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 8-9.

<sup>17</sup> *Id.* at 8.

collected by the California Health Interview Study that showed that “[t]ransgender adults are much more likely to have suicide ideation” (2% heterosexual; 5% gay; 50% transgender).<sup>18</sup> If social stressors were the sole factor, one would expect that the suicide ideation rates for homosexuals and transgenders would be closely related, not 10 times greater for transgenders than homosexuals.

Adolescents present a special category of those with gender dysphoria. In their analysis of relevant social science studies, Drs. Mayer and McHugh noted the following:

- Only a minority of children who experience cross-gender identification will continue to do so into adolescence or adulthood.<sup>19</sup>
- There is little scientific evidence for the therapeutic value of interventions that delay puberty or modify the secondary sex characteristics of adolescents, although some children may have improved psychological well-being if they are encouraged and supported in their cross-gender identification. There is no evidence that all children who express gender-atypical thoughts or behavior should be encouraged to become transgender.<sup>20</sup>

In a Wall Street Journal column, Dr. McHugh referenced two relevant studies: “When children who reported transgender feelings were tracked without medical or surgical treatment at both Vanderbilt University and London’s Portman Clinic, 70%-80% of them spontaneously lost those feelings. Some 25% did

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<sup>18</sup> See [www.americanprogress.org/issues/lgbt/Report/2009/12/21/7048](http://www.americanprogress.org/issues/lgbt/Report/2009/12/21/7048) (last visited May 17, 2019).

<sup>19</sup> Mayer & McHugh at 9.

<sup>20</sup> *Id.*

have persisting feelings; what differentiates those individuals remains to be discerned.”<sup>21</sup>

The American College of Pediatricians (“ACP”) is a national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children.<sup>22</sup> It “urges educators and legislators to reject all policies that condition children to accept as normal a life of chemical and surgical impersonation of the opposite sex. Facts—not ideology—determine reality.”<sup>23</sup> In its report, ACP concludes, among other things, as follows:

- “When an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind not the body, and it should be treated as such. These children suffer from gender dysphoria. Gender dysphoria (GD), formerly listed as Gender Identity Disorder (GID), is a recognized mental disorder in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-5). The psychodynamic and social learning

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<sup>21</sup> <https://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120> (originally published June 12, 2014, updated May 13, 2016) (last visited May 20, 2019). *See also*, The World Professional Association for Transgender Health *Standards of Care (Ver. 7)*, which states, “In most children, gender dysphoria will disappear before, or early in, puberty.” (at 12) [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf) (last visited August 14, 2019).

<sup>22</sup> <https://www.acped.org>.

<sup>23</sup> “Gender Ideology Harms Children,” American College of Pediatricians (Mar. 2016, updated Sept. 2017), <https://www.acped.org/the-college-speaks/position-statements/gender-ideology-harms-children> (last visited May 20, 2019).

theories of GD/GID have never been disproved.”<sup>24</sup>

- “According to the DSM-5, as many as 98% of gender confused boys and 88% of gender confused girls eventually accept their biological sex after naturally passing through puberty.”<sup>25</sup>
- “Pre-pubertal children diagnosed with gender dysphoria may be given puberty blockers as young as eleven, and will require cross-sex hormones in later adolescence to continue impersonating the opposite sex. These children will never be able to conceive any genetically related children even via artificial reproductive technology. In addition, cross-sex hormones (testosterone and estrogen) are associated with dangerous health risks including but not limited to cardiac disease, high blood pressure, blood clots, stroke, diabetes, and cancer.”<sup>26</sup>
- “Conditioning children into believing a lifetime of chemical and surgical impersonation of the opposite sex is normal and healthful is child abuse. Endorsing gender discordance as normal via public education and legal policies will confuse children and parents, leading more children to present to ‘gender clinics’ where they will be given puberty-blocking drugs. This, in turn, virtually ensures they will ‘choose’ a lifetime of carcinogenic and otherwise toxic cross-sex hormones, and likely consider unnecessary surgical mutilation of their healthy body parts as young adults.”<sup>27</sup>

That some may disagree with these findings and conclusions does not make them irrational.

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Legislators may rationally decline to elevate gender identity to the same protected status as sex. That remains a call for them to make, not the judiciary.

**B. Social Science Studies Demonstrate Serious Health Concerns for Practicing Homosexuals, Concerns that are not Caused by Social Stressors.**

Although the reasons for same-sex attraction are not well understood, the deleterious consequences associated with acting on such attraction have been extensively documented by the United States Centers for Disease Control (“CDC”) and others. Drs. McHugh and Mayer in their report synthesized the following conclusions from their analysis of relevant studies:

- “The understanding of sexual orientation as an innate, biologically fixed property of human beings—the idea that people are ‘born that way’—is not supported by scientific evidence.”<sup>28</sup>
- “Although there is evidence that biological factors such as genes and hormones are associated with sexual behaviors and attractions, there are no compelling causal biological explanations for human sexual orientation. Although minor differences in the brain structures and brain activity between homosexual and heterosexual individuals have been identified by researchers, such neurobiological findings do not demonstrate whether these differences are innate or are the result of environmental and psychological factors.”<sup>29</sup>
- “Longitudinal studies of adolescents suggest that sexual orientation may be quite fluid over the life

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<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.*

course for some people, with one study estimating that as many as 80% of male adolescents who report same-sex attractions no longer do so as adults (although the extent to which this figure reflects actual changes in same-sex attractions and not just artifacts of the survey process has been contested by some researchers).<sup>30</sup>

- “Compared to heterosexuals, non-heterosexuals are about two to three times as likely to have experienced childhood sexual abuse.”<sup>31</sup>

CDC has published comprehensive surveys on health issues related to same-sex, intimate relationships in the United States. Those studies document a significantly higher incidence of serious disease among the population that is involved in such relationships, including:

- human immunodeficiency virus (HIV) and the auto-immunodeficiency syndrome (AIDS),<sup>32</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> The study, “Estimating the Population Sizes of Men Who Have Sex With Men in US States and Counties Using Data from the American Community Survey,” estimated that only 3.9% of adult males in the United States are men who have intimate sexual relations with men (MSM). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4873305/> (last visited August 1, 2019). This represents approximately 1.4% of the total population estimated by the Census Bureau. <https://www.statista.com/statistics/183457/united-states-resident-population/> (last visited August 1, 2019). The CDC estimated that in 2016 they accounted for 67% of new HIV infections and 82% of new HIV diagnoses among all males aged 13 and older. “CDC, HIV and Gay and Bisexual Men,” [www.cdc.gov/hiv/group/msm/index.html](http://www.cdc.gov/hiv/group/msm/index.html) (last visited August 1, 2019).

- syphilis,<sup>33</sup>
- human papilloma virus,<sup>34</sup>
- hepatitis,<sup>35</sup> and
- cancer.<sup>36</sup>

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<sup>33</sup> “Once nearly eliminated in the U.S., syphilis is increasing, especially among gay, bisexual, and other men who have sex with men (MSM).” CDC, “CDC Fact Sheet: Syphilis & MSM . . .” [www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm](http://www.cdc.gov/std/Syphilis/STDFact-MSM-Syphilis.htm) (last visited August 14, 2019). “In 2014, gay, bisexual, and other men who have sex with men accounted for 83% of primary and secondary syphilis cases where sex of sex partners was known in the United States.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm) (last visited August 14, 2019).

<sup>34</sup> “HPV (Human papillomavirus), the most common STD [sexually transmitted disease] in the United States, is also a concern for gay, bisexual, and other men who have sex with men. Some types of HPV can cause genital and anal warts and some can lead to the development of anal and oral cancers . . .” *Id.*

<sup>35</sup> “Gay, bisexual, and other men who have sex with men have a higher chance of getting viral hepatitis including Hepatitis A, B, and C, which are diseases that affect the liver. About 10% of new Hepatitis A and 20% of all new Hepatitis B infections in the United States are among gay and bisexual men.” CDC, “Viral Hepatitis,” [www.cdc.gov/msmhealth/viral-hepatitis.htm](http://www.cdc.gov/msmhealth/viral-hepatitis.htm) (last visited August 14, 2019). This is to be compared to the prevalence of homosexuality: “Based on the 2013 NHIS [National Health Interview Survey] data, 96.6% of adults identified as straight, 1.6% identified as gay or lesbian, and 0.7% identified as bisexual. The remaining 1.1% of adults identified as ‘something else,’ stated ‘I don’t know the answer,’ or refused to provide an answer.” Ward, B.W., *et al.*, “Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013,” reported in CDC, National Health Statistics Reports, no. 77 (July 15, 2014).

<sup>36</sup> “Gay, bisexual and other men who have sex with men are 17 times more likely to get anal cancer than heterosexual men. Men who are HIV-positive are even more likely than those who do not have HIV to get anal cancer.” CDC, “Sexually Transmitted Diseases,” [www.cdc.gov/msmhealth/std.htm](http://www.cdc.gov/msmhealth/std.htm). “LGB [lesbian/gay/bisexual] adults are more likely to have cancer,” with 6% of heterosexuals having cancer and 9% LGB. Cal. Health Interview

Canadian studies show similar results.<sup>37</sup>

The health care costs for HIV/AIDS and other illnesses that have been statistically proven to be related to homosexual intercourse are estimated to be in the billions of dollars annually in our nation. These costs are borne by states directly, by state residents indirectly through health insurance premiums and taxes, by private financial assistance organizations, and by the patients through out-of-pocket costs. For

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Study, cited in Center for American Progress, “How to Close the LGBT Health Disparities Gap,” <https://www.americanprogress.org/issues/lgbt/reports/2009/12/21/7048/how-to-close-the-lgbt-health-disparities-gap/> (last visited August 14, 2019).

<sup>37</sup> For example, Health Canada reports, “Thoughts of suicide and suicide-related behaviours are more frequent among LGBTQ youth in comparison to their non-LGBTQ peers,” <https://www.canada.ca/en/public-health/services/suicide-prevention/suicide-canada.html#a2>; where risk information is reported, men having sex with men (MSM) account for over 83% of AIDS cases from 1979-2016 (“Table 11: Number and percentage distribution of reported AIDS cases . . . .” <https://www.canada.ca/en/public-health/services/reports-publications/canada-communicable-disease-report-ccdr/monthly-issue/2017-43/ccdr-volume-43-12-december-7-2017/aids-2016-supplementary-tables.html#t11>); infectious syphilis rates are rising, and the majority of infections are among MSM (<https://www.canada.ca/en/public-health/services/infectious-diseases/sexual-health-sexually-transmitted-infections/syphilis-resource-population-specific-prevention.html> (last visited August 14, 2019)). See also a human rights complaint filed against the Canadian government in 2009 by LGBT activists alleging that life expectancy of gay/bisexual men in Canada is 20 years less than the average; gay and bisexual men comprise 76.1% of AIDS cases and 54% of new HIV infections each year and have higher anal cancers risks; and GLB people have suicide rates 2 to 13.9 times more often than average, smoking rates 1.3 to 3 times higher than average, rates of alcoholism 1.4 to 7 times higher than average, rates of illicit drug use 1.6 to 19 times higher than average, and rates of depression 1.8 to 3 times higher than average. <https://www.catholicbridge.com/downloads/human-rights-complaint.pdf> (last visited August 14, 2019).

instance, the CDC, based on 2009 data, reported, “In all, the total lifetime treatment cost for HIV based on new diagnoses in 2009 was estimated to be \$16.6 billion,” an estimate it said was likely understated.<sup>38</sup> More recent studies suggest a range of cost of \$250,000 to \$600,000 per infected individual, depending on when treatment is begun and what treatment regimen is used.<sup>39</sup>

### **C. Based on These Health Statistics and Studies Alone, Legislators have a Compelling Interest to Exclude Gender Identity and Sexual Orientation as Protected Classes.**

The battle to include gender identity and sexual orientation in our country’s civil rights laws is as pitched as it is because of the powerful message it communicates when its advocates are successful: a homosexual lifestyle is normal; it has no adverse consequences to individuals or society; it should be celebrated and confirmed; and those who disagree are, at best, behind the times and, at worst, bigoted. These propositions are leaps of faith supported by tendentious assertions, not by objective facts. Some legislatures have agreed to take those leaps. But a legislature acts entirely rationally, and consistently with the best social science research and health care statistics, when it declines to put the government’s imprimatur on those assertions by refusing to add gender identity or sexual orientation as a protected class in its civil

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<sup>38</sup> CDC, “HIV Cost-effectiveness,” [www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/index.html](http://www.cdc.gov/hiv/prevention/ongoing/costeffectiveness/index.html) (citing Schackman BR, Gebo, K.A., Walensky R.P., *et al.*, “The lifetime cost of current human immune-deficiency virus care in the United States.” *Medical Care* 2006; 44: 990-97) (last visited August 14, 2019).

<sup>39</sup> See <https://www.verywell.com/what-is-the-lifetime-cost-if-hiv-49641> (last visited August 14, 2019).

right laws. Congress in 1964 certainly did not adopt these propositions when it included sex as a protected class in Title VII.

### **III. Legislators Who Add Protections for Gender Identity or Sexual Orientation May Also Appropriately Address Special Problems That May Stem from Doing So.**

Even if a legislature decided to include gender identity or sexual orientation in its protected classes, it could reasonably decide to address several special problems associated with doing so. These include concerns related to adolescents, safety of women, athletic contests, health, and religious freedom.

#### **A. Special Concern No. 1: Adolescents with Gender Dysphoria**

As noted above, the large majority of adolescents who experience gender dysphoria grow out of it. A legislature can reasonably determine that, before undertaking life-altering pharmaceutical and/or surgical procedures, an adolescent should receive wise counsel and adequate information.<sup>40</sup>

This may entail parental or guardian notifications or consent, informational requirements, waiting periods, and medical concurrences. It may entail age restrictions and different requirements for different age groups.<sup>41</sup> These are legislative decisions to make and

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<sup>40</sup> Cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (upholding informational requirements in the abortion context).

<sup>41</sup> For example, in Massachusetts, changes to birth records for a person who has completed medical intervention for the purpose of permanent sex reassignment require, *inter alia*, an affidavit indicating the individual's sex executed by the parent or guardian if such person is a minor. Mass. Gen. Laws ch. 46, § 13(e)(1)(i). See also, The World Professional Association for Transgender Health *Standards of Care* (Ver. 7), which states,

legislative lines to draw.

### **B. Special Concern No. 2: Safety of Women from “Temporary” Transvestites**

Women have a right to be safe from predatory sexual attack.<sup>42</sup> Males who for predatory purposes pose as trans-females and gain access to spaces reserved for women, such as bathrooms and shelters for battered wives, present an obvious threat. Legislators are best able to address that threat.

### **C. Special Concern No. 3: Women’s Athletics Trumped by Transgendered, Biological Males**

The winner of Connecticut’s High School State Open 200-meter title for the second straight year in 2019 was a trans-female, who also won the Class S titles in the 100 and 200, as well as the New England 200-meter championship. Another trans-female finished third in the 100 meters in Class S and fourth in the 100 in the State Open.<sup>43</sup> Perhaps some believe this to be a desirable outcome, but others logically ask

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“Genital surgery should not be carried out until (i) patients reach the legal age of majority to give consent for medical procedures in a given country, and (ii) patients have lived continuously for at least 12 months in the gender role that is congruent with their gender identity. The age threshold should be seen as a minimum criterion and not an indication in and of itself for active intervention.” (at 21) [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf) (last visited August 14, 2019).

<sup>42</sup> See *Doe v. Boyertown*, 897 F.3d 519 (3rd Cir. 2018).

<sup>43</sup> <https://www.courant.com/sports/high-schools/hc-sp-trans-gender-policy-runners-respond-20190619-20190620-5x2c7s2f5jb6dnw2dwpftiw6ru-story.html> (last visited July 26, 2019); see also Rick Maese, *Stripped of women’s records, transgender powerlifter asks, “Where do we draw the line?”* Wash. Post, May 19, 2019, at D1.

whether it is consistent with benefits for biological females that Congress created by enacting Title IX.<sup>44</sup> After all, the Olympic Committee and other athletic organizations have testosterone testing for women athletes.<sup>45</sup> Again, legislators, not judges, are best able to wrestle with how to harmonize gender identity with girls' and women's athletics and how to set fair competition standards.

**D. Special Concern No. 4: Religious Exercise, Both of Those Who Consider Transgender and Homosexual Practices Unethical and of Those Who Wish Assistance to Live Consistent with Religious Teachings**

Many in our country, based on religious convictions and readings of sacred texts, believe that God purposefully created two sexes with distinct biology. Transgender and homosexual practices (as distinguished from inclinations) are morally wrong because they offend that order. As a result, these individuals often understand their religious commitments to include (a) expressing, including teaching their children, sincerely held religious beliefs about God's created order and interacting with individuals and society in a way that honors those beliefs; (b) refusing to assist in transgender social practices or medical procedures; (c) refusing to acknowledge any attempted adoption of a gender other than the person's objective, biological one; (d) speaking out against transgender and homosexual practices; and (e) assisting those with gender dysphoria or homosexual inclinations to

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<sup>44</sup> See 20 U.S.C. §§ 1681 *et seq.*; see also, Samantha Pell, *Transgender Policy Violates Title IX, Connecticut Girls Say*, Wash. Post, June 20, 2019, at D1.

<sup>45</sup> See, e.g., <https://www.theglobeandmail.com/world/article-caster-semenya-loses-her-challenge-of-new-testosterone-rules-for/> (last visited May 21, 2019).

control them and to eschew such practices. Those who have such inclinations but, due to their religious understandings, do not wish to act on those inclinations also have free exercise rights to pursue assistance from religious and other counselors to help them live according to their ethical lights.

The conflicts between those desiring inclusion of gender identity and sexual orientation as protected classes in our civil rights laws is upon us. Teachers have already been disciplined for refusing to refer to students by their transgender names and pronouns, rather than their biological ones.<sup>46</sup> Pastors and other counselors are threatened with fines and penalties if legislation does not recognize and make room for their religious convictions.<sup>47</sup> Military chaplains have been ordered by superiors to refrain from expressing their church's doctrines on homosexual and transgender practices to those who have sought counseling from them.<sup>48</sup>

This Court hardly needs to be reminded of the present and nascent tensions between enforcing prohibitions against sexual orientation discrimination, on the one hand, and the free exercise of religion, on the other. This has played out in this Court most notably in the same-sex marriage situation, in which marriage

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<sup>46</sup> See, e.g., *Meriwether v. Shawnee State Univ.*, 2019 WL 2052110 (S.D. Ohio May 9, 2019).

<sup>47</sup> See, e.g., *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016). H.R. 5, the bill recently passed by the House of Representatives to add, *inter alia*, the term *gender identity* to Title VII, expressly excludes as a defense the protections of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*

<sup>48</sup> See, e.g., <http://www.militarytimes.com/story/military/2015/03/10/chaplain-fired/24699275/>; [www.armytimes.com/news/2018/04/19/army-chaplain-faces-same-sex-discrimination-claim-lawyer-says-he-was-following-army-guidance/](http://www.armytimes.com/news/2018/04/19/army-chaplain-faces-same-sex-discrimination-claim-lawyer-says-he-was-following-army-guidance/) (last visited August 14, 2019).

vendors have refused to support and be associated with ceremonies with which they have ethical objections.<sup>49</sup> Indeed, this Court has urged respect for religious teachings such as, for instance, that intimate sexual relations are ethically reserved for one man and one woman in marriage.<sup>50</sup> It has also recognized that some have a sincere religious belief that it is wrong to assist others in conduct considered unethical.<sup>51</sup>

One need only review recent enactments to demonstrate further that Congress, if it had intended to include sexual orientation in Title VII, would have been sensitive to religious freedom concerns. The most obvious examples are states that have passed laws or ratified constitutional amendments allowing same-sex marriage or civil unions and that, as part of those enactments, have provided religious exemptions for clergy with moral objections to the practice.<sup>52</sup> This is the kind of fine-tuning that legislators are charged to accomplish and that the judiciary is less well suited to perform.

Of course, Congress was well attuned to the free exercise of religion when it passed Title VII. It not only outlawed employment discrimination on the basis of religion,<sup>53</sup> but also exempted religious organizations

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<sup>49</sup> See *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); see also *Klein v. Ore. Bur. of Labor and Indus.*, 289 Or. App. 507 (2017), *petition for cert. granted, rev'd, and remanded* (U.S. June 17, 2019) (No. 18-547).

<sup>50</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1727-29; *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

<sup>51</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759, 2775 (2014).

<sup>52</sup> See, e.g., Conn. Gen. Stat. Ann. § 46b-22b (West 2019); Wash. Rev. Code Ann. § 26.04.010(4) (West 2019); Haw. Rev. Stat. Ann. § 572-12.1 (West 2019).

<sup>53</sup> Pub. L. No. 88-352 § 703, 78 Stat. 253, 255 (1964), *codified as amended at* 42 U.S.C. §§ 2000e *et seq.*

from Title VII's operation.<sup>54</sup> By both of these provisions, Congress exhibited its concern that the free exercise of religion would not be threatened by enforcement of Title VII protections.

In this context, it is most likely that, if Congress had intended to include sexual orientation when it used the term sex, it would have carved out additional exceptions for religious objectors to homosexual practices. Congress would have been immediately aware that situations such as those later encountered in cases such as *Burwell v. Hobby Lobby Stores, Inc.*<sup>55</sup> and *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Commission*<sup>56</sup> would present themselves.

These issues can and should be addressed by legislation, much diminishing the need for recourse to the courts. In our system, it is the legislators who have the right, and the obligation, to consider such solutions in the first instance.

## CONCLUSION

Congress did not incorporate gender identity or sexual orientation into sex in Title VII. The term gender identity was coined because sex was understood to refer only to objective, biological gender, while gender identity connotes the opposite. Neither does sexual orientation refer to objective, biological gender. These issues are best left to the legislatures, the bodies charged with deciding whether to include new categories in the civil rights laws. Those who decline to add gender identity and sexual orientation as protected categories in the civil rights laws act entirely rationally. And if they decide to include it, they are also best

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<sup>54</sup> *Id.* § 702; see also *id.* § 703(e) (exemptions for religious educational institutions).

<sup>55</sup> 134 S. Ct. 2751 (2014).

<sup>56</sup> 138 S. Ct. 1719 (2018).

sued to address the practical concerns that would accompany such inclusion.

The Sixth and Second Circuits in “updating” Title VII to include gender identity and sexual orientation overstepped their proper judicial bounds, and their decisions should be reversed. The Eleventh Circuit read Title VII the way it was written, and it should be affirmed.

Respectfully submitted,  
this 22<sup>nd</sup> day of August,

/s/ Frederick W. Claybrook, Jr

Frederick W. Claybrook, Jr.

*Counsel of Record*

Claybrook LLC

700 Sixth St., NW, Ste. 430

Washington, D.C. 20001

(202) 250-3833

Rick@Claybrooklaw.com

Steven W. Fitschen

James A. Davids

The National Legal Foundation

5424 Johnstown Rd

Chesapeake, Va. 23322

David A. Bruce

205 Vierling Dr.

Silver Spring, Md. 20904