No. 18-107

In the
Supreme Court of the United States

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent,

and AIMEE STEPHENS,
Respondent-Intervenor.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* CENTER FOR ARIZONA POLICY IN SUPPORT OF THE PETITIONER

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Center for Arizona Policy ("CAP") promotes and defends the foundational values of life, marriage and family, and religious freedom. As a nonprofit advocacy group, CAP works with state legislators and other elected officials at all levels of government to ensure that public policy promotes foundational principles. CAP has an interest in protecting citizens' First Amendment right to express their views freely—a bedrock principle of a free society where robust public policy debates can take place.

SUMMARY OF ARGUMENT

The First Amendment's protection of free speech necessarily includes a corollary right not to speak: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring). And in addition to protecting the broad "right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), this Court has made clear that the First Amendment's protection

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[1] Petitioner and Respondent Equal Employment Opportunity Commission have filed blanket consents with the Supreme Court; their consents are on file with the Clerk. Counsel for individual Respondent-Intervenor Aimee Stephens granted consent to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person, other than *amicus curiae*, their members, or their counsel, make a monetary contribution that was intended to fund the preparation or submission of this brief.

"includes within it the choice of what not to say." *PG&E Co. v. Pub. Utilities Comm'n of Calif.*, 475 U.S. 1, 16 (1986) (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)).

Reading the concept of "gender identity" into Title VII's definition of "sex" has broad implications on the free-speech rights of individuals that believe there are only two sexes and that gender is rooted in biological sex. Even now, people from across the political and ideological spectrum have been punished or threatened for publicly supporting or expressing viewpoints that run contrary to transgender ideology. In specific cases, individuals have been disciplined, terminated, or publicly humiliated for refusing to agree with those who believe that gender is not based in biological sex or for refusing to use another's preferred gender pronoun.

Whatever someone's basis for objecting to an opposing ideology or the compelled use of particular language, no government agency, local ordinance, or school should "invade the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Barnette*, 319 U.S. at 642. Indeed, the First Amendment protects these individuals' "choice of what not to say." *PG&E*, 475 U.S. at 16 (citing *Miami Herald*, 418 U.S. at 258).

Changing the definition of "sex" in Title VII to include "gender identity" threatens this choice and will lead to numerous compelled-speech problems. Such a change poses a fundamental threat to people's ability to speak freely—or the decision not to say something

they believe to be untrue—about the issues of sex and gender. The consequences of exercising free-speech rights in public or the workplace become particularly harsh if the Court changes the clear meaning of "sex" in Title VII.

ARGUMENT

I. The First Amendment protects individuals' right not to speak contrary to their beliefs

It is axiomatic that the Free Speech Clause not only protects free speech, but the "concomitant" right not to speak: a "system which secures the right to proselytize religious, political and ideological causes must also guarantee the concomitant right to decline to foster such concepts." *Wooley*, 430 U.S. at 714 (citing *Barnette*, 319 U.S. at 633–34, 645 (Murphy, J., concurring)).

Not only is the negative right to refrain from speaking as broadly applicable as the positive freedom of speech, it must pass the same rigorous scrutiny. *Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 800 (1988) (government cannot "dictate the content of speech absent compelling necessity, and then, only by means precisely tailored").

The right not to speak was first raised and upheld by this Court in *West Virginia State Board of Education v. Barnette*. There, the Court struck down a law requiring elementary students to salute the American flag and recite the Pledge of Allegiance under threat of expulsion. In striking down the law, the Court stated that it is not "open to public authorities to compel [someone] to utter what is not in his mind." 319

U.S. at 634. That is because the Free Speech Clause includes the right not to convey a message the speaker does not endorse—a message that the speaker believes to be untrue. For "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

In *Wooley v. Maynard*, the Court extended the scope of the right not to speak. *Wooley* involved a New Hampshire statute making it a crime for state citizens to cover the state motto, "Live Free or Die," on their license plates. The Court struck down the law, in part, because it forced citizens to speak the State's message rather than their own. The compelled nature of that speech violated the citizens' right not to speak and did not appreciate how "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. Thus, the law violated citizens' Free Speech rights by "forc[ing] an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* In short, the State could not require its citizens to be "a mobile billboard for the State's ideological message." *Id.*

This Court made clear in *Wooley* that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid

becoming the courier for such message." *Id.* at 717. Individuals must be free to think and speak when and how they see fit. *Id.* at 714 (the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'").

That is partly why this Court has recognized the right not to speak in a wide variety of situations. *See, e.g.*, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) ("this arrangement violates the free speech rights of [union] nonmembers by compelling them to subsidize private speech on matters of substantial public concern"); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (compelling statement of agreement with government's policy against prostitution and sex trafficking as condition for federal funding violates the First Amendment); *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,* 515 U.S. 557, 559, 581 (1995) (government may not compel "private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey"); *PG&E*, 475 U.S. at 20 (forcing privately owned utility company to include in its billing envelope speech of a third party with which the utility disagrees violates the First Amendment); *Miami Herald*, 418 U.S. at 243–44 (government cannot force editors to include content in their newspaper).

Redefining "sex" in Title VII raises significant compelled-speech issues and will unnecessarily infringe on the rights of a wide variety of individuals and organizations.

A. Forcing individuals to use specific "preferred" pronouns compels speech

Various government entities have implemented gender identity nondiscrimination laws that compel people to speak contrary to their beliefs—thus, "forc[ing] an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715.

As one example, the New York City Human Rights Law "requires employers and covered entities to use the name, pronouns, and title (e.g., Ms./Mrs./Mx.) with which a person self-identifies, regardless of the person's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the person's identification."[2] Under such law, when a biological man identifies with the pronouns "she" or "her," those who believe that sex reflects biology are confronted with a choice—speak what they believe to be a biological falsehood and call a male "she," or face a penalty.

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[2] "New York City Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression," available at https://www1.nyc.gov/site/cchr/law/legal-guidances-gender-identity-expression.page#3.1.

Requiring others to use preferred pronouns—and punishing them when they refuse or are silent—is a brazen attempt to compel speech in favor of a particular ideology. And this type of compelled speech not only involves a radical application of existing gender specific pronouns, but also the substitution of plural pronouns for singular ones and the use of newly invented gender-neutral pronouns, like zie, tey, vis, eirs, and verself.[3] This kind of requirement strikes at the core of free speech protections because it is not "open to public authorities to compel [someone] to utter what is not in his mind." *Barnette*, 319 U.S. at 634.

The use of particular pronouns expresses a reality underlying those words. Words are never "mere words." The use of certain pronouns, whether longstanding or newly created, expresses a specific vision of reality. By compelling individuals to use others' "preferred pronouns," governments trample on citizens' free-speech rights and effectively silence those who disagree with a favored vision of reality.

B. Forcing expression of a particular viewpoint inhibits public debate

The Free Speech Clause is meant, in part, to safeguard a principle of the nation's founding—that a vigorous and robust debate about public policy is vital to the development of a free citizenry. But public debate is only effective when different viewpoints can

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[3] For a (currently) complete list of possible alternative pronouns, see University of Wisconsin Milwaukee Lesbian, Gay, Bisexual, Transgender Resource Center, "Gender Pronouns," available at https://uwm.edu/lgbtrc /support/gender-pronouns/.

be expressed in an "uninhibited, robust, and wide-open" manner. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This is especially the case when debating foundational issues like what it means to be human, what it means to be male or female, and whether these binary categories still have meaning in our society.

Public policy debates regarding human sexuality and gender and similar "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). As this Court has noted, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect" it. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). "Those who won our independence believed that the final end of the state was to make men free to develop their faculties." *Whitney v. People of State of Calif.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Without freedom of mind, citizens are not able to achieve the vision the founders had.

> [The founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a

> fundamental principle of the American government.

Id., at 375 (Brandeis, J., concurring). By compelling the use of language inconsistent with a person's biology, the government stifles public discussion and debate over these foundational issues.

Indeed, removing the opportunity for political debate about human sexuality and gender is the opposite of what the framers intended. Instead of silence, the framers sought more speech, more discussion, and more debate to resolve important political and societal issues: "Believing in the power of reason as applied through public discussion, [the founders] eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Id.* at 375–76. We should welcome the debate on these foundational questions about humanity.

The contrary path—that of compelling the use of particular language—is not only unheard of in American history, it silences debate about important public issues without any corresponding benefit. *Id.* at 377 ("Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty."). Any perceived benefit derived from cutting off this discussion is far outweighed by the government silencing (and punishing) those who believe gender is binary and rooted in biological sex. *See Sorrell v. IMS Health*, 564 U.S. 552, 583 (2011) (recognizing "the

constitutional importance of maintaining a free marketplace of ideas" because "[w]ithout such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people's informed will"). Those who wish to see transgender ideology reflected in law may live to see that reality, but such a change should not come through a judicial redefinition of "sex." *See generally Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function."); Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012) ("What the legislature 'would have wanted' it did not provide, and that is an end of the matter.").

Many people have already suffered for expressing their views on sex and compelled speech in public debate. Professor Camille Paglia, a well-known feminist with a doctorate in English literature, has been ridiculed for her statements against some advocates of transgender ideology. Despite identifying as transgender herself, Paglia has been shunned, in part, because of her belief that "preferred" pronouns "are a courtesy that we may choose to defer to, but in a modern democracy, no authority has the right to compel their usage."[4]

Dr. Jordan Peterson, a best-selling author and academic in Canada, has spoken out against compelled

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[4] Sam Dorman, *Prominent Democratic Feminist Camille Paglia Says Hillary Clinton 'Exploits Feminism*,' The Washington Free Beacon, May 15, 2017, https://freebeacon.com/culture/prominent-democratic-feminist-camille-paglia-says-hillary-clinton-exploits-feminism/.

speech in response to federal laws and provincial ordinances related to gender identity. In his book, *12 Rules for Life* and elsewhere, Peterson identifies the negative implications of speech restrictions, exhorting readers to "[s]peak your mind. Put your desires forward, as if you had a right to them—at least the same right as others."[5] Peterson has been vilified by many supporters of the transgender movement for rejecting the compelled use of their "preferred" pronouns, saying his comments are "unacceptable, emotionally disturbing and painful."[6]

Lindsay Shepherd, another Canadian and a "free speech activist," was banned from Twitter based on her refusal to call a biological male by his preferred transgender pronouns, allegedly "misgendering" him as a biological male.[7] After public outcry, Twitter reinstated her.

Paglia, Peterson, and Shepherd oppose compelled speech primarily on free-speech grounds. However,

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[5] Jordan Peterson, *12 Rules for Life* 27–28 (2018).

[6] Jessica Murphy, *Toronto professor Jordan Peterson takes on gender-neutral pronouns*, BBC News, Nov. 4, 2016, https://www.bbc.com /news /world-us-canada-37875695. *See also* Patty Winsa, *He says freedom, they say hate. The pronoun fight is back*, The Star, Jan. 15, 2017, https://www.thestar.com/news/insight/2017/01/15/he-says-freedom-they-say-hate-the-pronoun-fight-is-back.html.

[7] Mark Gollom, *For Twitter bans, a 'lack of transparency' is a bigger issue than political bias, experts say*, CBC News, July 20, 2019, https://www.cbc.ca/news/technology/lindsay-shepherd-twitter-ban-bias-1.5216185.

others may oppose compelled speech for different reasons. Some might object on religious grounds. For instance, a Virginia school board fired a high school teacher for refusing to use a student's preferred pronoun; he believed doing so would be speaking against his belief that God created human beings male and female.[8] And although he was willing to use the student's new first name, he explained that "out of good conscience and faith he could not use the male pronouns." Forcing him to use male pronouns for a biologically female student communicated a picture of reality—a worldview—that he believed was false and in violation of his sincerely held religious beliefs.

Still others in the education field may object to compelled speech for personal and professional reasons. For many educators, their goal is to help students think for themselves and arrive at the truth—goals which would be undermined if they, as educators, were compelled to speak words they believed pointed students away from the truth. As it has been pointed out, "Why do people see universities as important, and, until recently, as trusted institutions, worthy of receiving billions of dollars of public subsidy? Because there is widespread public agreement that the discovery and transmission of truth is a noble goal and

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[8] Karina Bolster, *West Point High teacher fired following transgender controversy*, NBC 12 News, Dec. 6, 2018, https://www.nbc12.com/2018/12/06/west-point-high-teacher-fights-dismissal-following-transgender-controversy/; Monica Burke, *This Teacher Was Fired for "Misgendering" a Student. Who Could Be Next?* The Heritage Foundation, Dec. 11, 2018, https://www.heritage.org/gender/commentary/teacher-was-fired-misgendering-student-who-could-be-next.

a public good." Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind* 253 (2018). Of all people, educators should not be compelled to communicate a message about reality to their students that they think is false.

The public debate about these issues of human sexuality and gender should not be silenced prematurely. As Justice Brandeis noted, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney*, 274 U.S. at 377; *see Citizens United*, 558 U.S. at 340 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.").

Silence "strangle[s] the free mind at its source." *Barnette*, 319 U.S. at 637. Indeed, "[t]he constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." *Cohen v. Calif.*, 403 U.S. 15, 24 (1971). Freedom of speech may make some people uncomfortable, but it "put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.* That some people would be irritated or even offended by others' free speech (including the right not to speak) is one of the "necessary side effects of the broader enduring values which the process of

open debate permits us to achieve." *Id.* at 25. And it is then, "in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, [that] these fundamental societal values are truly implicated." *Id.*

Thus, although some people who regard gender as a matter of choice detached from biology may find opposing views "misguided, or even hurtful," *Hurley*, 515 U.S. at 574, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The First Amendment calls us to engage in such debate, not to shy away from difficult discussions: "Speech is powerful. It can . . . —as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Snyder*, 562 U.S. at 460–61; *Cohen*, 403 U.S. at 25 ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.").

C. Compelling grammatical usage and coercing speech will harm our society

Societies are molded by the thoughts of their citizens. Those thoughts, in turn, are expressed in words. And for thousands of years, those in society who have controlled the language often control society. In Plato's time, it was the Sophists who sought to control society, those "highly paid and popularly applauded experts in the art of twisting words, who were able to

sweet-talk something bad into something good and turn white into black." Josef Pieper, *Abuse of Language, Abuse of Power* 7 (1988). The Sophists manipulated words to their own ends regardless of whether they corresponded with reality.

When words become corrupted, Pieper argues, "instead of genuine communication, there will exist something for which *domination* is too benign a term; more appropriately we should speak of tyranny, of despotism." *Id.* at 30. And the manipulation of words "creates on its part, the more it prevails, an atmosphere of epidemic proneness and vulnerability to the reign of the tyrant." *Id.* at 31. Then, when the words are used by those in power, "[s]erving the tyranny, the corruption and abuse of language becomes better known as *propaganda*." *Id.* at 31.

This move from verbal manipulation to propaganda and tyranny—harmful to any society—has, perhaps fittingly, captured the attention of writers. Taken to an extreme, such lexicographic legerdemain results in the corruption of thought and speech as described in George Orwell's *1984*: "In the end the Party would announce that two and two made five, and you would have to believe it. It was inevitable that they should make that claim sooner or later: the logic of their position demanded it." George Orwell, *1984* 80 (Signet Classics, 1977).[9]

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[9] Lewis Carroll expressed the same position in language much more playful, but no less powerful. In an exchange between Humpty Dumpty and Alice, Carroll writes: "'When I use a word, it means just what I choose it to mean. Neither more or less.' Alice responded to Humpty Dumpty, 'The question is, whether you can

Yet that is what many people supporting the redefinition of "sex" in Title VII are trying to do—silence opposing viewpoints by controlling the language. One example of this is their reworking of existing pronouns and inventing new ones to accommodate their newly found non-binary and fluid understandings of gender. As noted above, the Lesbian, Gay, Bisexual, Transgender Resource Center at the University of Wisconsin Milwaukee provides the following guide on pronouns:[10]

1	2	3	4	5
(f)ae	(f)aer	(f)aer	(f)aers	(f)aerself
e/ey	em	eir	eirs	eirself
he	him	his	his	himself
per	per	pers	pers	perself
she	her	her	hers	herself
they	them	their	theirs	themself
ve	ver	vis	vis	verself
xe	xem	xyr	xyrs	xemself
ze/zie	hir	hir	hirs	hirself

make words mean so many different things?' Humpty Dumpty retorted: 'The question is, which is to be master? That's all.'" R. Albert Mohler, Jr., "Humpty Dumpty, Alice in Wonderland, and the Masters Who Control the Language" (Aug. 3, 2019 Blog Post), available at https://albertmohler.com/2019/08/02/humpty-dumpty-alice-in-wonderland-and-the-masters-who-control-the-language.

[10] University of Wisconsin Milwaukee Lesbian, Gay, Bisexual, Transgender Resource Center, "Gender Pronouns," available at https:// uwm.edu/lgbtrc/support/gender-pronouns/.

Such Orwellian Newspeak used to be considered a deviation from standard grammar. Now it is supposed to represent a new and enlightened reflection of changing mores. *See* Orwell, *1984* at 52 ("Has it ever occurred to you, Winston, that by the year 2050, at the very latest, not a single human being will be alive who could understand such a conversation as we are having now?").

Advocates of transgender ideology are free to reimagine human sexuality and gender, and create a language that will communicate their view of reality. But they are not free to impose their novel view of what it means to be human on the rest of society and use the government to punish those who are unwilling to adopt their language or viewpoint. Yet many have been punished for not adhering to an official government position on transgender issues. For example, Julia Beck was investigated and removed from the Baltimore mayor's LGBT Commission— despite being its only lesbian member—because she "misgendered" a rapist, a biological male—by referring to him as a man. That man claimed a female gender identity, was placed in an all-female prison, and then proceeded to rape a female inmate.[11]

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[11] Madeleine Kearns, *Feminist Testifies Against the 'Equality Act,'* National Review, Apr. 2, 2019, https://www.nationalreview.com/Corner/feminist-julia-beck-testifies-against-equality-act/. *See also* Jean Marbella, *Baltimore lesbian's view on transgender women gets her kicked off LGBTQ panel—and onto Tucker Carlson show*, The Baltimore Sun, Feb. 14, 2019, https://www.baltimoresun.com/maryland/baltimore-city/bs-md-lgbtq-dispute-20190213-story.html.

Silencing opposing views like Ms. Beck's will have far-reaching harmful consequences. Reading "gender identity" into the word "sex" as understood in 1964 will serve to mandate one view among many through manipulation of the English language to change the public's view on sex.[12] The issue is not merely about using the right pronoun, it is about being compelled to use words that communicate a certain message about what it means to be human and being silenced for dissenting from that message. And based on the speed with which this movement has progressed, we will soon find that society has "changed into something contradictory of what [it] used to be." *Id.*

II. Forcing individuals to speak certain words and use someone's preferred pronouns will invite a host of lawsuits from all sides of the gender debate

Redefining "sex" in Title VII would have far-reaching consequences well beyond Title VII cases because many federal and state courts interpret terms in other non-discrimination statutes based on how they are interpreted in Title VII cases. *See Olmstead v L.C.*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) ("We have incorporated Title VII standards of discrimination when interpreting statutes prohibiting other forms of discrimination. For example, Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981 has been

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[12] *See* Orwell, *1984* at 53 ("The whole literature of the past will have been destroyed. Chaucer, Shakespeare, Milton, Byron—they'll exist in Newspeak versions, not merely changed into something different, but actually changed into something contradictory of what they used to be.").

interpreted to forbid all racial discrimination in the making of private and public contracts. *See Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987). This Court has applied the 'framework' developed in Title VII cases to claims brought under this statute. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989). Also, the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 623(a)(1), prohibits discrimination on the basis of an employee's age. This Court has noted that its 'interpretation of Title VII applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA "were derived *in haec verba* from Title VII.'" *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)). This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.*, which prohibits discrimination under any federally funded education program or activity. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (relying on *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), a Title VII case, in determining that sexual harassment constitutes discrimination.").

Thus, a definitive interpretation of "sex" in this case would likely determine the interpretation of the same word in a wide variety of cases involving federal, state, and municipal regulations, leading to an even greater number of lawsuits being filed.

The contention that compelled-speech litigation will increase is not speculative. These cases are already percolating in the lower courts, where individuals have been punished for expressing their views or for not using another's "preferred" pronouns. Although this Court said in *Obergefell v. Hodges* that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths," that protection has failed many in the debate over human sexuality and gender. 135 S. Ct. 2584, 2607 (2015). This Court also noted in *Obergefell* that people reach conclusions contrary to same-sex marriage and similar gender-related issues in "good faith" and "based on decent and honorable religious or philosophical premises." *Id.* at 2594, 2602. Those opposed to non-biological gender identification are simply seeking the protection of the First Amendment—the right not to use words that "foster[ ] public adherence to an ideological point of view [they] find[ ] unacceptable." *Wooley*, 430 U.S. at 715.

A. Employers will face an unmanageable challenge of balancing rights to avoid lawsuits

Reading the concept of "gender identity" into the word "sex" in Title VII and, by extension, other non-discrimination laws, could expose employers to a flood of claims. Transgender employees will sue for sex discrimination if they believe they have been treated differently because of their gender identity, including when they are "misgendered" with the wrong pronoun. This is not paranoid speculation. An Oregon school

teacher who identified as "transmasculine and genderqueer, or androgynous," sued his school district in part because fellow teachers refused to refer to him as "they."[13] The school district settled the lawsuit for $60,000 with the agreement that it would create a policy mandating preferred-pronoun use. Employees that believe gender is binary and rooted in biology will sue claiming religious discrimination, compelled speech, and other legal violations if the employer requires them to recognize another's non-biological gender identity or to use another's "preferred" pronouns.

Employees on both sides of the issue could likewise sue based on a hostile work environment, and employers are doomed to trample on one worker's rights in order to prevent hostile work environment claims from another. Employers simply cannot balance these rights, especially because for some, gender is fluid and can change from day to day. According to Dylan Vade, the co-founder of the Transgender Law Center, "For some transgender people, gender identification varies frequently. Some people's gender is situational . . . . My gender is situational . . . . Some people wake up on different days with slightly different genders. For some, gender is fixed, and for some it is

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[13] Eugene Volokh, *Claims by transgender schoolteacher (who wants to be called 'they') yield $60,000 settlement, agreement to create disciplinary rules regulating 'pronoun usage*,' The Washington Post, May 25, 2016. https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/25/claims-by-transgender-schoolteacher-who-wants-to-be-called-they-yield-60000-settlement-agreement-to-create-disciplinary-rules-regulating-pronoun-usage/.

fluid."[14] Similarly, "All people are entitled to express and actualize themselves; no person should be limited in the number of times they may make a gender change, whether that change applies to clothing, identity documents, or medically assisted change."[15] If such is the case, how can employers keep track of genders and preferred pronouns without risking a lawsuit? And this risk does not even take into account how to address comments about gender fluidity in interactions between employees with ever-changing genders.

At a practical level, Respondent's proposed mandate would not only stifle honest discussion but unleash a flood of litigation on unwary employers. Facing such lawsuits, employers will have no manageable standards and they will have immense pressure to silence employees' speech. This Court should hesitate before exposing honest people of good will to costly litigation based on a controversial approach to sex and gender.

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[14] Dylan Vade, *Expanding Gender and Expanding the Law: Toward A Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 Mich. J. Gender & L. 253, 267-68 (2005).

[15] Jamison Green, *"If I Follow the Rules, Will You Make Me A Man?": Patterns in Transsexual Validation*, 34 U. La Verne L. Rev. 23, 85 (2012).

B. Although "[t]he classroom is peculiarly the 'marketplace of ideas,'"[16] educators have been punished for refusing to use preferred pronouns

Peter Vlaming was a French teacher for the West Point High School in Virginia until he was terminated for "insubordination."[17] His violation? Refusing to use a transgender student's preferred pronouns. Mr. Vlaming had taught the biologically female student during the prior school year. After the student transitioned over the summer and began using a traditionally male first name, Vlaming agreed to refer to the student using the new name. Mr. Vlaming then sought and received an accommodation from the school based on his religious beliefs to use the transgender student's new first name but not any pronouns. He consistently declined to use pronouns that reflected the student's "preferred" gender.

This consistent refusal eventually resulted in the Board's unanimous vote to terminate Mr. Vlaming. The sole issue leading to the termination was Vlaming's refusal to speak or advocate a position espoused by a particular student. Mr. Vlaming lost not only his right not to speak, but his right to offer a dissenting voice in the broader public debate.

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[16] *Bd. of Educ., Island Trees Union Free Sch. Dist. No 26 v. Pico*, 457 U.S. 853, 877 (1982) (Blackmun, J., concurring).

[17] Associated Press, *Teacher fired for refusing to use transgender student's pronouns*, NBC News Dec. 10, 2018, available at https://www.nbcnews.com/feature/nbc-out/teacher-fired-refusing-use-transgender-student-s-pronouns-n946006.

The same compelled-speech concerns were raised in another recent case, *Meriwether v. The Trustees of Shawnee State University*, 1:18-cv-00753-SJD (S.D. Ohio Nov. 5, 2018). There, a philosophy professor was told by his biologically male student that he should refer to him using female pronouns. Dr. Meriwether declined, citing his religious beliefs. But the university requires that professors refer to students using their preferred gender pronouns. The university punished Dr. Meriwether for not using such pronouns and said it will punish him again if he continues.

In the school context, this Court has repeatedly rejected the assertion that "a State might so conduct its schools as to 'foster a homogeneous people.'" *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)). More than any other context, academic environments are meant to include a variety of opinions; "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Pico*, 457 U.S. at 877 (Blackmun, J., concurring). To be a "marketplace," however, schools must incorporate many viewpoints, not just a state-mandated ideology: "state-operated schools may not be enclaves of totalitarianism. . . . In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511; *Barnette*, 319 U.S. at 637 ("Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction.").

Just as "the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons," *Pico*, 457 U.S. at 879 (Blackmun, J., concurring), the State may not force educators to express views that they do not hold. *Barnette*, 319 U.S. at 634 (State cannot "compel [someone] to utter what is not in his mind"); *see Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom"). The First Amendment, after all, is meant "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). That principle applies with particular force in schools, where the search for truth should be paramount.

Whether or not school officials actually agree with transgender ideology, many of them are nevertheless forcing their teaching staff to bend the knee to the new orthodoxy. Mr. Vlaming was a French teacher—someone who teaches grammar for a language that contains words with specific genders.[18] Even if he did not object based on his religious beliefs, Vlaming and other language teachers could have objected to being compelled to use certain preferred pronouns

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[18] In opposition to French activists trying to make French gender neutral, "linguist purists in the French Academy have issued a formal warning against this kind of inclusive language policy, calling it an aberration, and declaring the French language to be in mortal danger." *Language activists are trying to make French gender-neutral*, The Economist, May 17, 2018, https://www.economist.com/europe/2018/05/17/language-activists-are-trying-to-make-french-gender-neutral.

based solely on academic principles. Using "him" and "his" to refer to a biological female is incorrect as a matter of English grammar.[19] In elementary grades, a student who rewrote the sentence "John took Mary's book" as "She took his book" would show a profound lack of understanding. A teacher would correct such a student. Yet only a few years later, that same student may be told—indeed, mandated—to refer to his peers using grammatically incorrect pronouns.

The threat to free speech in schools and universities brought about by requirements to use "preferred" pronouns is real, and redefining "sex" under Title VII will only exacerbate the problem and squander resources on litigation.

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[19] Likewise, requiring people to use neologisms as replacement pronouns or using plural pronouns for singular ones is equally repugnant to English grammar, yet that is what laws like the New York City Human Rights Law requires: "Most people and many transgender people use female or male pronouns and titles. Some transgender, non-binary, and gender non-conforming people use pronouns other than he/him/his or she/her/hers, such as they/them/theirs or ze/hir. They/them/theirs can be used to identify or refer to a single person (e.g., 'Joan is going to the store, and they want to know when to leave')." "New York City Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression," available at https://www1.nyc.gov /site/cchr/law/legal-guidances-gender-identity-expression.page#3.1.

C. Medical professionals will be forced to profess views about sex contrary to their medical training and judgment

Dr. Allan M. Josephson was hired by the University of Louisville School of Medicine in 2003 as the Chief of the Division of Child and Adolescent Psychiatry and Psychology. After leading the department for nearly 15 years, Dr. Josephson had gained a national reputation for his work. Based on that work, he was invited by the Heritage Foundation to participate in a panel discussion related to gender identity issues. There, Dr. Josephson explained his professional opinions about the treatment of children with gender dysphoria.

By the time he sat on the Heritage Foundation panel, Dr. Josephson had already expressed his views as an expert witness in several federal and state courts. Once the University found out Dr. Josephson's views—and despite perfect scores in evaluations for the previous three years—they removed him as Chair and demoted him to being a junior faculty member. After another 15 months of ridicule and negative treatment, the University decided not to renew his contract in February 2019. He sued the University the following month. *See Josephson v. Bendapudi*, 3:19-mc-99999 (W.D. Ky. Mar. 28, 2019).

Dr. Josephson believes, and has testified as an expert witness, that "[s]ex is fixed in each person at the moment of conception, immutable, based on objective genetic facts, and binary (*i.e.*, male (having a chromosomal complement of XY) or female (have a chromosomal complement of XX))." *Id.* ¶ 92(a). Supporting this objective biological evaluation,

Dr. Josephson has testified that gender identity, on the contrary, is indistinct; it "is a social construct, cannot by definition be present at birth, and is culturally and societally influenced." *Id.* ¶ 92(b).

The University's termination of Dr. Josephson sends a clear message that anyone who deviates from the government's chosen message will be punished. This action is contrary to everything the Free Speech Clause is meant to protect. But rather than challenge Dr. Josephson's position on its merits, the University stifled debate in favor of adhering to a particular view. This kind of "Government-enforced [speech code] inescapably 'dampens the vigor and limits the variety of public debate.'" *Wooley*, 430 U.S. at 714 (quoting *N.Y. Times Co.*, 376 U.S. at 279).

Unfortunately, Dr. Josephson is not the only medical professional castigated for questioning transgender ideology based on their medical training and judgment. For example, the British government fired a doctor for refusing to use a patient's preferred pronouns. According to the doctor, using a preferred pronoun was a "denial of an obvious truth" because he believed "gender is defined by biology and genetics."[20] Also, the American College of Pediatricians, a national organization of pediatricians and other healthcare professionals, recently sent a letter to the United

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[20] *Dr David Mackereth: Trans pronouns 'denial of obvious truth.'* BBC News, July 10, 2019. https://www.bbc.com/news/uk-england-birmingham-48937805; Steve Bird, *Government drops doctor who says gender given at birth*, The Telegraph, July 8, 2018, https://www. telegraph.co.uk/news/2018/07/08/government-drops-doctor-says-gender-given-birth/.

States Surgeon General with concerns about "large-scale unethical medical experiment[s]" being performed on children and adolescents diagnosed with gender dysphoria.[21] In the letter, they explained their medical opposition to "gender affirming therapy" and how, because of their position, they "risk being marginalized, discriminated against or otherwise penalized."

Dr. Kenneth Zucker—a leading sex researcher in Toronto running a Gender Identity Clinic—was fired and his clinic closed simply because his clinicians "had a much more cautious stance on social transitioning for their younger clients—they believed that in many cases, it was preferable to first 'help children feel comfortable in their own bodies,'" because they knew that "gender is quite malleable at a young age and gender dysphoria will likely resolve itself with time."[22]

Drs. Zucker and Josephson, and other professionals like them, are being silenced because they oppose or even deviate slightly from transgender ideology. Removing experts' voices on one side of the ideological divide will harm public debate and the administration of justice in particular cases. *See Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("our adversarial system of

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[21] American College of Pediatricians, Letter to the Honorable Jerome M. Adams, United States Surgeon General, July 22, 2019. https://www.acpeds.org/wordpress/wp-content/uploads/7.16.19-Surgeon-General-letter1963-v4.pdf.

[22] Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut-New York, Feb. 7, 2016, https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html.

justice . . . is premised on the well-tested principle that truth—as well as fairness—is 'best discovered by powerful statements on both sides of the question'") (citation omitted). By redefining "sex" in Title VII and creating an environment where an entire side of the debate will not be supported, the Court would impermissibly put its weight behind one side of a debatable subject and influence decisions regarding this important issue.

Medical professionals are feeling the pressure to profess views about sex contrary to their medical training and judgment, or at least to stay silent about their views to avoid being targeted. Reading "gender identity" into "sex" under Title VII will only make the problem worse.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Sixth Circuit below.

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