

No. 23-477

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**In the  
Supreme Court of the United States**

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UNITED STATES,  
*Petitioner,*

v.

JONATHAN SKRMETTI, ATTORNEY GENERAL AND  
REPORTER FOR TENNESSEE, ET AL.,  
*Respondents.*

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

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**BRIEF OF THE UNITED STATES  
CONFERENCE OF CATHOLIC BISHOPS AND  
THE TENNESSEE CATHOLIC CONFERENCE AS  
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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**INTERESTS OF AMICI CURIAE<sup>1</sup>**

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The USCCB provides a framework and a forum for the Bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the Nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. When cases before this Court touch upon important tenets of Catholic teaching, the USCCB has filed *amicus curiae* briefs to assert its view. In so doing, the USCCB seeks to further the common good for the benefit of all.

The Tennessee Catholic Conference (TCC) serves as the combined public policy voice of the bishops of the Roman Catholic dioceses of Nashville, Memphis, and Knoxville, Tennessee. TCC's mission is to represent the Church and the state of Tennessee's Catholic dioceses in public policy matters, including before the Tennessee General Assembly, with other elected officials, and in legal proceedings. TCC advocates for laws and policies that reflect Gospel values and the social

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<sup>1</sup> Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

teachings of the Church. This includes a broad range of issues—economic, political, material, and cultural. TCC seeks to promote the common good by advocating for the conditions that are necessary for all people to realize their human dignity and reach their full potential.

### **SUMMARY OF THE ARGUMENT**

Catholics believe that God created humans in his own image with both a body and a soul, which are intrinsic to human persons and a gift from God, our creator. God’s created order also includes the fundamental sexual differences between men and women, which God has willed and deemed good. Catholics believe humans must act consistently with God’s created order, including when considering medical interventions affecting the human body.

Transgender body manipulation, whether through the use of puberty blockers, hormone treatments, or surgical interventions, attempts to alter the fundamental sexual differences between men and women and is incompatible with the respect due to God’s created order. Transgender body manipulation objectifies the body for a person to use as he or she pleases, often based on a false belief that the body is “wrong” or a “mistake” to be corrected. It also sacrifices healthy bodily functions and organs for reasons other than to serve the body as a whole. Accordingly, transgender body manipulation is immoral and contrary to God’s will. This teaching arises from longstanding beliefs about the human person (beliefs that, in fact, predate the Catholic Church itself), which are accessible to human reason as well as

divinely revealed, and which do not stem from animus or prejudice of any kind.

*Amici* seek to ensure that the Catholic Church and its faithful can continue to live according to these truths. Yet Petitioner would have this Court hold that longstanding Catholic beliefs about men, women, and God's created order are presumptively suspect and that these beliefs inherently target a particular group based on animus or prejudice. That is not true, and this Court should not enshrine such a false concept in the Constitution. Nor should the Court do so while attempting to carve out room for religious adherents to continue living according to their faith. The Court took that approach in *Obergefell*, *Masterpiece Cakeshop*, and *Bostock*, but despite these assurances, Catholic and other Christian faithful have faced a litigation onslaught in which these holdings are weaponized to attack their beliefs, practices, believers, and institutions.

Respectfully, *amici* urge the Court to affirm the decision below.

## ARGUMENT

### I. Catholic Teaching That Transgender Body Manipulation Is Morally Wrong Is Not Discriminatory.

Catholic teaching about the human body and the application of that teaching to transgender body manipulation is not based on animus or prejudice, but on anthropological and metaphysical principles that are both divinely revealed and accessible to reason. Consistent with principles that predate the establishment

of the Church, Catholics believe that the body and soul are intrinsic to the human person and a gift from God, our loving creator. Accordingly, humans must act consistently with God’s created order, including when undertaking medical interventions. Because the fundamental sexual differentiation of male and female is good and willed by God, medical interventions must be undertaken only while respecting this sexual differentiation. Transgender body manipulation, including puberty blockers, certain hormone treatments, and surgical interventions, is contrary to this principle. Transgender body manipulation treats the human body as an object that a person can use and dispose of at will; it views the human body as a mistake to be corrected; and it sacrifices healthy sexual functioning when it is not necessary to do so in service of the whole body. For these reasons, Catholic teaching deems transgender body manipulations immoral and contrary to God’s will, not out of animus or prejudice, but on the basis of principles grounded in reason and revelation, long-held and universally applied by the Catholic Church.

### **A. Body and Soul Are Intrinsic to the Human Person.**

The Catholic Church teaches that “human life in all its dimensions, both physical and spiritual, is a gift from God, ... to be accepted with gratitude and placed in service of the good.” *Declaration of the Dicastery for the Doctrine of the Faith, “Dignitas Infinita” on Human Dignity, August 4, 2024*, ¶ 57, <https://bit.ly/3zNEPz> (last visited Oct. 4, 2024) (“Dignitas Infinita”). Because our human nature is a gift from a loving creator, humans do not “own’ our human nature, as if it were something that we are free

to make use of in any way we please.” *Doctrinal Note on the Moral Limits to Technological Manipulation of the Human Body* ¶ 3, U.S. CONF. OF CATH. BISHOPS, COMM. ON DOCTRINE (March 20, 2023), <https://bit.ly/3BzOAP2> (“Moral Limits to Technological Manipulation”); *see also* *Dignitas Infinita*, ¶ 9 (“We do not create our nature; we hold it as a gift.”). Humans are therefore bound to act consistently with God’s created order.

One crucial aspect of God’s created order is the body-soul unity of each human person. *Dignitas Infinita*, ¶ 18 (Human dignity applies to the “person as an inseparable unity of body and soul.”); *Moral Limits to Technological Manipulation*, ¶ 4. The Church has taught throughout its history that “[w]hat it means to be a human person necessarily includes bodiliness.” *Id.* Both the body and the soul are “constitutive of what it means to be human,” and the two “are not two natures united, but rather their union forms a single nature,” our human nature. *Id.* (quoting *Catechism of the Catholic Church* (2d ed.), no. 365, <https://bit.ly/3XYGDKO> (“the Catechism”)).

### **B. Sexual Differentiation Is an Intrinsic Part of Human Bodiliness.**

One intrinsic aspect of human bodiliness is sexual differentiation. “Just as every human person necessarily has a body, so also human bodies, like those of other mammals, are sexually differentiated as male or female.” *Moral Limits to Technological Manipulation*, ¶ 5. The Bible notes this reality in the first chapter of the Book of Genesis: “Male and female he created them.” *Id.* (quoting Genesis 1:27). This means that “‘being man’ or ‘being woman’ is a reality which is good

and willed by God.” Moral Limits to Technological Manipulation, ¶ 5 (quoting the Catechism, no. 369).

Sexual differentiation is not only the “greatest possible difference that exists between living beings,” but “is also the most beautiful and powerful of them” because “[i]n the male-female couple, this difference achieves the most marvelous of reciprocities[:] ... the arrival of new human beings into the world.” *Dignitas Infinita*, ¶ 58. And sexual differentiation also characterizes men and women at the psychological and spiritual level, in keeping with the unity of soul and body. Moral Limits to Technological Manipulation, ¶ 5. See *Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World*, no. 8, VATICAN (2004), <https://bit.ly/3NgxJDm>. “Sexuality characterizes man and woman not only on the physical level, but also on the psychological and spiritual” levels, and “cannot be reduced to a pure and insignificant biological fact.” *Id.* (first quoting *Educational Guidance in Human Love* at 4, CONGREGATION FOR CATH. EDUC. (Nov. 1, 1983)).

Accordingly, Pope Francis has explained that “biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated” because they “are inseparable aspects of reality.” Moral Limits to Technological Manipulation, ¶ 6 (quoting Pope Francis, *Amoris Laetitia*, no. 56 (March 19, 2016), <https://bit.ly/3YcIWv1>). “[T]he body serves as the living context in which the interiority of the soul unfolds and manifests itself.” *Dignitas Infinita*, ¶ 60. Because sexual differentiation is indisputably part of God’s created order, humans must reject “attempts to obscure reference to the ineliminable sexual difference between man and woman,” in any form. *Id.* ¶ 59.

### C. Medical Interventions Must Respect God's Created Order.

Medical interventions, like all human acts, must respect God's created order. "The body is not an object, a mere tool at the disposal of the soul, one that each person may dispose of according to his or her own will, but it is a constitutive part of the human subject, a gift to be received, respected, and cared for as something intrinsic to the person." *Moral Limits to Technological Manipulation*, ¶ 7. Accordingly, "genuine respect for human dignity requires that decisions about the use of technology be guided by genuine respect for [God's] created order." *Id.* ¶ 3.

Catholic doctrine permits medical and technological intervention in the human body where it is morally justified, which occurs in essentially two circumstances. First, medical intervention is morally justified where its aim is to repair a defect in the body. Second, medical intervention is justified when the sacrifice of a part of the body is necessary for the welfare of the whole body. *Id.* ¶ 8. Where an intervention has another, immoral object as its aim, the intervention cannot be morally justified. An intervention that aims to "alter the fundamental order of the body" is immoral because it "do[es] not respect the order and finality inscribed in the human person." *Id.*

Some individuals experience discomfort in their body's sex, a condition known as "gender dysphoria." These individuals are loved by God and possess the same inherent dignity that all human persons possess. Nonetheless, the morality of medical interventions for these individuals is subject to the same principles that underlie all medical interventions and



technological manipulations of the human body. Human use of technology must respect God’s created order. “As the range of what [humans] *can* do expands, we must ask what we *should* or *should not* do.” *Id.* ¶ 19 (emphasis in original). “An indispensable criterion in making such determinations is the fundamental order of the created world,” which “[o]ur use of technology must respect.” *Id.*

Transgender body manipulation is not a moral medical intervention for individuals suffering from gender dysphoria because the aim of this treatment is neither to repair a defect in the body nor to sacrifice a part of the body for the welfare of the whole body. These interventions “are intended to transform the body so as to make it take on as much as possible the form of the opposite sex, contrary to the natural form of the body.” *Id.* ¶ 16. “They are attempts to alter the fundamental order and finality of the body and to replace it with something else.” *Id.* This is equally true of the full range of medical interventions that may be deployed for the purpose of effectuating transgender body manipulation. While puberty blockers, hormone treatments, and surgical interventions “differ in the magnitude of the changes brought about in the body,” “[t]hey are alike ... in that they all have the same basic purpose: that of transforming sex characteristics of the body into those of the opposite sex.” *Id.* ¶ 17; *see also* *Dignitas Infinita*, ¶ 60 (“[A]ny sex-change intervention, as a rule, risks threatening the unique dignity the person has received from the moment of conception.”).

The same treatments may be morally licit when performed for purposes other than transgender body manipulation. Individuals born with genetic

abnormalities affecting their sexual organs may choose medical intervention to resolve those abnormalities, but this is not an effort to *change* one’s sex and is instead an effort to correct a bodily dysfunction. *Dignitas Infinita*, ¶ 60. Women suffering from uterine fibroids or certain cancers may choose a hysterectomy to remove these organs, but this is also not an effort to *change* their sex; it is a sacrifice of one part of the body for the welfare of the whole.

Transgender body manipulation does not share either of these morally licit aims because it presupposes that an individual can be born into the “wrong” body such that healthy and functional sexual organs could require “correction.” This is contrary to Catholic teaching about God’s created order. Because “[t]his soul only comes into existence together with *this* body,” and is inseparable from it, the soul “can never be in another body, much less be in the wrong body.” *Moral Limits to Technological Manipulation*, ¶ 4 (emphasis in original).

None of this means that individuals suffering from gender dysphoria are to receive *no* treatment. Catholic healthcare providers “must employ all appropriate resources to mitigate the suffering of those who struggle with gender incongruence.” *Id.* ¶ 18. But the means selected “must respect the fundamental order of the human body” because “[o]nly by using morally appropriate means do healthcare providers show full respect for the dignity of each human person.” *Id.* And “[a]s new treatments are developed, they too should be evaluated according to sound moral principles grounded in the good of the human person as a subject with his or her own integrity.” *Id.* ¶ 22.

#### **D. These Principles Apply Broadly, Including Outside of Questions of Gender Identity.**

The principles described here and their application to transgender body manipulation are not premised on prejudice or discrimination. These same principles apply broadly and consistently outside of questions of gender identity. They are principles the Catholic Church has recognized since long before the rise of modern gender ideology and transgender body manipulation.

The principles described here apply to any medical or technological interventions affecting the human body. For example, genetic engineering can be employed for both moral and immoral purposes according to these principles. Genetic engineering performed “on somatic [body] cells for therapeutic purposes [is] in principle morally licit” because these procedures “seek to restore the normal genetic configuration of the patient or to counter damage caused by genetic anomalies or ... other pathologies.” *Id.* ¶ 13 (quoting *Instruction on Certain Bioethical Questions (Dignitas Personae)*, no. 26, VATICAN (2008), <https://bit.ly/4eTvGki>). But genetic engineering performed “for purposes other than medical treatment,” are immoral because the “intention is to replace the natural order with what is imagined to be a new and better order.” *Id.*

The same principles can be applied to assess the morality of drug use, or assisted reproductive technologies, or the possibility of replacing bodily organs with artificial devices, just as they are applied to transgender body manipulation. These principles are

not and cannot be a teaching motivated by animus or prejudice toward those seeking or providing transgender body manipulations.

These principles also long predate the rise of modern gender ideology and transgender body manipulation. They find support in the Bible itself, for example, in the statement in the Book of Genesis, Chapter 1, that God created humans in his image, both male and female, and that his creation is good. And the Catholic Church has been outspoken about them throughout its history. Beginning in the second century, for example, the Church opposed the heresy of Gnosticism, which held that all physical matter is evil. Such a belief is incompatible with respect for God's created order and is wrong. This further demonstrates that Catholic teaching on transgender body manipulation does not depend on prejudice or animus for transgender people. Rather, Catholic teaching on this subject emanates from anthropological and metaphysical principles that the Catholic Church has long believed, both as principles accessible to human reason and as principles divinely revealed.

## **II. Petitioner's Rule Would Nullify The Court's Unrealized Promise That Religious Believers Would Be Protected From The Court's Rulings On Same-Sex Marriage And Gender Ideology.**

This Court has previously acknowledged that its rulings on same-sex marriage and gender ideology could carry disastrous consequences for religious believers. To temper those consequences, the Court made clear that its rulings in *Obergefell*, *Masterpiece Cakeshop*, and *Bostock* should not be construed to

undermine the ability of religious institutions and individuals to live out their faith. Despite these assurances, the Catholic Church and other Christian faithful have faced an onslaught of litigation using those cases as a sword to attack the ability of religious entities and individuals to adhere to bedrock teachings regarding marriage, sexuality, and the human body. And now, Petitioner seeks a ruling that would all but ensure this Court's promise to religious believers will never be fulfilled. The Court should reject the invitation to make classifications that turn on longstanding Catholic doctrine presumptively suspect.

**A. The Court's Promise That Religious Believers Would Be Protected From *Obergefell* and *Bostock* Has Not Been Realized.**

It is no secret that the Court's decisions in *Obergefell* and *Bostock* represented a radical departure from the Catholic Church's understanding of marriage, sexuality, and the human body. Indeed, the Court acknowledged that some might try to use its holdings to chase religion from the public square. To foreclose that possibility, the Court made assurances that neither *Obergefell* nor *Bostock* should be construed to limit the ability of religious institutions and individuals to live out their faith. Unfortunately, those assurances have proven insufficient to protect the Catholic Church from litigants and government officials who use *Obergefell* and *Bostock* in an attempt to limit the presence of the Catholic faith in American life.

**1. The Court’s Assurances In *Obergefell* and *Masterpiece Cakeshop* Have Not Adequately Protected The Catholic Church.**

*Obergefell* constitutionalized the transgression of the Catholic (and traditional) understanding of marriage. Specifically, the Court held that the Constitution protects an individual right to same-sex marriage. *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015). In doing so, the Court “invalidate[d] the marriage laws of more than half the States and order[ed] the transformation of a social institution that has formed the basis of human society for millennia.” *Id.* at 687 (Roberts, C.J., dissenting).

The Court and individual Justices foresaw that litigants who oppose the Catholic Church’s teaching on marriage would attempt to use *Obergefell* as a sword. *See id.* at 711 (“Today’s decision, for example, creates serious questions about religious liberty.”) (Roberts, C.J., dissenting); *id.* at 733-34 (Scalia, J., dissenting) (“It appears all but inevitable” that the Court’s holding and religious exercise “will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.”); *id.* at 741 (Alito, J., dissenting) (cautioning that the Court’s decision “will be used to vilify Americans who are unwilling to assent to the new orthodoxy”). To its credit, the majority in *Obergefell* made clear that the Catholic (and traditional) understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” *Id.* at 657. The Court further

acknowledged that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious” grounds, *id.* at 672, and it emphasized that “religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned,” *id.* at 679. But as Justice Alito warned: “We will soon see whether this proves to be true.” *Id.* at 741 (Alito, J., dissenting).

Indeed, it was not long before religious believers were forced to defend themselves from claims of discrimination under *Obergefell*. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm’n*, 584 U.S. 617 (2018). In *Masterpiece Cakeshop*, the Colorado baker, Jack Phillips, was charged with violating Colorado’s public-accommodations law because he refused to bake a custom cake celebrating a same-sex wedding. See *id.* at 621-22. After he was forced to litigate his case all the way to the Supreme Court, the Court held that the proceedings against Mr. Phillips had violated the Free Exercise Clause because the officials responsible for adjudicating the charges against him had exhibited hostility to his religion. *Id.* at 636-40. In its opinion, the Court reiterated that its rulings on same-sex marriage should not be construed as an attempt to stamp out traditional views of marriage. See *id.* at 631 (emphasizing that “religious and philosophical objections to gay marriage are protected views”); see also *id.* at 666 (Thomas, J., concurring in part) (“*Obergefell* itself emphasized that the traditional understanding of marriage ‘long has been held—and continues to be held—in good faith and by reasonable and

sincere people here and throughout the world.” (quoting *Obergefell*, 576 U.S. at 657)).

Despite these assurances, however, the promise of protection for religious believers has not been realized. To the contrary, religious entities and believers, including Catholic institutions and individuals, have now endured *years* of resource-consuming litigation across various contexts, including employment,<sup>2</sup> public accommodations,<sup>3</sup> adoption and foster care,<sup>4</sup> and use of government funds and resources.<sup>5</sup>

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<sup>2</sup> See, e.g., *Califano v. Roman Cath. Diocese of Rockville Centre, N.Y.*, No. 2:24-cv-04346-AMD-JMW (E.D.N.Y. 2024); *Doe v. Cath. Relief Servs.*, 529 F. Supp. 3d 440 (D. Md. 2021); *Seattle Pac. Univ. v. Ferguson*, No. 3:22-cv-05540-RJB (W.D. Wash. 2022); *Butler v. St. Stanislaus Kostka Cath. Acad.*, 609 F. Supp. 3d 184 (E.D.N.Y. 2022).

<sup>3</sup> See, e.g., *Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353 (W.D.N.Y. 2021); *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017), *vacated and remanded*, 143 S. Ct. 2686 (Mem.) (U.S. June 30, 2023); *Cal. Civil Rts. Dep’t v. Cathy’s Creations, Inc., DBA Tastries*, No. BCV-18-102633 (Cal. Super. Ct. 2023).

<sup>4</sup> See, e.g., *New Hope Family Servs., Inc. v. Poole*, 626 F. Supp. 3d 575 (N.D.N.Y. 2022); *Cath. Charities W. Mich. v. Mich. Dep’t of Health and Human Servs.*, No. 2:19-cv-11661-DPH-DRG (E.D. Mich. 2022); *Buck v. Hertel*, No. 1:19-cv-286 (W.D. Mich. 2022); *Lasche v. New Jersey*, No. 3:18-cv-17552 (D.N.J. 2022).

<sup>5</sup> See, e.g., *Country Mill Farms, LLC v. City of East Lansing*, 280 F. Supp. 3d 1029 (W.D. Mich. 2017); *Bethel Ministries, Inc. v. Salmon*, No. SAG-19-1853 (D. Md. 2020); *Easter v. U.S. Dep’t of Health & Human Servs.*, No. 1:21-cv-02681 (D.D.C. 2022); *Fellowship of Christian Athletes v. District of Columbia*, No. 24-cv-1332 (DLF) (D.D.C. 2024).



In addition, much remains unsaid about the application of *Obergefell* to religious exercise. For example, at oral argument in *Obergefell*, the Solicitor General suggested “that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage.” *See Obergefell*, 576 U.S. at 711 (Roberts, C.J., dissenting). And the question whether governments have, as a general matter, a compelling interest in prohibiting discrimination on the basis of sexual orientation—which could potentially *overcome* a Free Exercise claim—was discussed during oral argument in *Fulton* just a few terms ago but not clearly resolved. *See* Transcript of Oral Argument at 42, 45-49, *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123). Thus, *Obergefell*’s promise to religious believers has not been fulfilled. And the Catholic Church, its faithful, and other religious believers have had to “pay the price—in dollars, in time, and in continued uncertainty about their religious liberties” as a result. *Fulton*, 593 U.S. at 625 (Gorsuch, J., concurring in the judgment).

## **2. The Court’s Assurances In *Bostock* Have Not Adequately Protected The Catholic Church.**

The fallout from the Court’s decision in *Obergefell* parallels the fallout from the Court’s decision in *Bostock*. There again, the Court’s ruling amounted to a repudiation of the Catholic (and traditional) understanding of sexuality and the human body. Specifically, the Court held that making an adverse employment decision on the basis of an individual’s sexual orientation or “gender identity” violated Title VII. *Bostock v. Clayton County*, 590 U.S. 644, 649-52 (2020).

The Court and individual Justices again foresaw that litigants who opposed the Catholic Church’s teaching on sexuality and the human body would attempt to use *Bostock* as a sword. *See, e.g., id.* at 681-82; *id.* at 728-29 (Alito, J., dissenting) (noting that briefs from “a wide range of religious groups” had “express[ed] deep concern that the position now adopted by the Court” would inhibit religious exercise). The Court, again to its credit, responded that it was “deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution.” *Id.* at 681. The Court forswore any suggestion that its ruling would sweep beyond the facts at hand. *Id.* And the Court noted that at least some protection from the Court’s ruling could be provided by the Religious Freedom Restoration Act of 1993, the exception from Title VII for religious organizations, and the Court’s First Amendment doctrine regarding employment of those who minister to the faithful. *See id.* at 681-82.

But just like the Court’s assurances in *Obergefell* and *Masterpiece Cakeshop*, the Court’s assurance in *Bostock* has also proven insufficient. And even in the few years since that decision, religious entities and believers, including Catholic institutions and individuals, have been forced to spend resources litigating cases relating to employment,<sup>6</sup> public

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<sup>6</sup> *See, e.g., Brown v. Alaska Airlines, Inc.*, 642 F. Supp. 3d 1259 (W.D. Wash. 2022); *Hobby Lobby Stores, Inc. v. Sommerville*, 186 N.E.3d 67 (Ill. Ct. App. 2021); *Kloosterman v. Metro. Hosp.*, No. 1:22-cv-00944 (W.D. Mich. 2022); *Goodknight v. County of Douglas*, No. 6:24-cv-00088-MC (D. Or. 2024).

accommodations,<sup>7</sup> healthcare,<sup>8</sup> and education.<sup>9</sup> And for “those who cannot afford such endless litigation,” some undoubtedly “have been and will continue to be forced to forfeit their religious freedom.” *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring).

Perhaps most remarkably, Jack Phillips, the Colorado baker who was sued in the aftermath of *Obergefell* for refusing to bake a cake celebrating a same-sex wedding, has now been sued in the aftermath of *Bostock* for refusing to bake a cake celebrating a gender-transition anniversary. See *Scardina v. Masterpiece Cakeshop, Inc.*, No. 2019CV32214, 2021 WL 10312171 (Colo. Dist. Ct. Mar. 4, 2021). The Colorado Court of Appeals ruled against him. See *Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926 (Colo. App. 2023), *cert. granted in part* 2023 WL 6542667 (Colo. Oct. 3, 2023). Although he recently prevailed on procedural grounds before the Colorado Supreme Court, the court

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<sup>7</sup> See, e.g., *Olympus Spa v. Armstrong*, 675 F. Supp. 3d 1168 (W.D. Wash. 2023); *Downtown Soup Kitchen v. Mun. of Anchorage*, 406 F. Supp. 3d 776 (D. Alaska 2019); *Scardina*, 2021 WL 10312171.

<sup>8</sup> See, e.g., *Taking Offense v. State of California*, No. 34-2017-80002749-CU-WM-GDS (Cal. Super. Ct.); *Cath. Charities of Jackson, Lenawee, & Hillsdale Cntys. v. Whitmer*, No. 1:24-cv-00718 (W.D. Mich. 2024); *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (Mem.) (U.S. Dec. 11, 2023); *Minton v. Dignity Health*, 252 Cal. Rptr. 3d 616 (Cal. Ct. App. 2019), *cert. denied*, 142 S. Ct. 455 (Mem.) (U.S. Nov. 1, 2021).

<sup>9</sup> See, e.g., *Mirabelli v. Olson*, 691 F. Supp. 3d 1197 (S.D. Cal. 2023); *Footte v. Ludlow*, No. 3:22-cv-30041, 2022 WL 18356421 (D. Mass. Dec. 14, 2022); *Geraghty v. Jackson Loc. Sch. Dist. Bd. of Educ.*, No. 5:22-cv-2237 (N.D. Ohio 2024); *Vitsaxaki v. Skaneateles Cent. Sch. Dist.*, No. 5:24-cv-00155 (DNH/ML) (N.D.N.Y. 2024).

did “not consider the merits” of his claim. *Opinion* at 11, *Masterpiece Cakeshop, Inc. v. Scardina*, No. 23SC116 (Colo. Sup. Ct. Oct. 8, 2024). His now decade-long “odyssey thus barrels on.” *Fulton*, 593 U.S. at 626 (Gorsuch, J., concurring).

### **3. Recent Federal Regulations Have Only Compounded The Problem.**

Recent federal regulations have only made matters worse for religious believers. In rule after rule, the current administration has asserted that the Court’s decision in *Bostock* requires other sex discrimination statutes to be interpreted to prohibit gender identity discrimination as well, and has pointedly refused to guarantee protection for affected religious exercise.

For example, the federal government has issued numerous rules that potentially require Catholic entities, including hospitals and charities and schools, to “affirm” the asserted “gender identity” of an individual when those entities are carrying out their faith-based missions—such as caring for children in foster care,<sup>10</sup> educating youth in schools,<sup>11</sup> or sheltering unaccompanied migrants.<sup>12</sup> Indeed, a single rule issued

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<sup>10</sup> *See, e.g.*, Designated Placement Requirements Under Titles IV-E and IV-B for LGBTQI+ Children, 89 Fed. Reg. 34,818 (Apr. 30, 2024) (to be codified at 45 C.F.R. pt. 1355).

<sup>11</sup> *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106).

<sup>12</sup> *See, e.g.*, Unaccompanied Children Program Foundational Rule, 89 Fed. Reg. 34,384 (Apr. 30, 2024) (to be codified at 45 C.F.R. pt. 410).

by the U.S. Department of Health and Human Services (HHS) to regulate the award of federal grants<sup>13</sup> covers wide swaths of the Church’s mission including supporting victims of domestic violence, refugees, the mentally ill, those affected by major disasters, and the poor.<sup>14</sup> The Equal Employment Opportunity Commission has even issued guidance stating its view that to “misgender” an employee or to maintain sex-separate bathrooms may constitute sexual harassment under Title VII.<sup>15</sup>

Perhaps most relevant here, the Administration has issued a rule interpreting Section 1557 of the Affordable Care Act, which prohibits sex discrimination, to incorporate *Bostock’s* analysis.<sup>16</sup> If that reading is correct, a Catholic hospital could be forced to perform gender transition surgeries. This would be no minor change: Catholic hospitals in the United States serve 1 out of every 7 patients in the country and employ over 700,000 full and part-time employees. *See U.S. Catholic Health Care*, CATH. HEALTH ASS’N U.S. (2023), <https://bit.ly/3Nlkguc> (citing *2021 American*

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<sup>13</sup> *See, e.g.*, Health and Human Services Grants Regulation, 89 Fed. Reg. 36,684 (May 3, 2024) (to be codified at 45 C.F.R. pt. 75).

<sup>14</sup> *See* Letter from William J. Quinn, General Counsel at Religious Liberty to U.S. Dep’t of Health and Human Servs. at 4-5 (Sept. 5, 2023), <https://bit.ly/4eTpzNH>.

<sup>15</sup> *See Enforcement Guidance on Harassment in the Workplace, Equal Employment Opportunity Commission*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Apr. 29, 2024), <https://bit.ly/3YgdLz0>.

<sup>16</sup> *See Nondiscrimination in Health Programs and Activities*, 89 Fed. Reg. 37,522 (May 6, 2024) (to be codified at 45 C.F.R. pts. 80, 84, 92, 147, 155 and 156).

*Health Association Annual Survey*, CATH. HEALTH ASS'N). The Catholic Church pioneered our modern-day hospital system, and serving the sick is a core part of the Church's mission in the world. Marcy Doderer, *Catholic Hospitals and the Safety Net*, 13 *AMA J. OF ETHICS* 569 (2011), <https://bit.ly/48qO1lp>.

Meanwhile, the federal government often appears to maintain deliberate ambiguity with respect to religious exemptions for these rules and others. For example, in the Section 1557 rule, HHS declined to incorporate the robust religious exemption in Title IX—the source of Section 1557's prohibition on sex discrimination—and instead opted to construct a complex administrative process by which religious entities can seek, but not necessarily receive, an exemption.<sup>17</sup> Other rules, such as the Unaccompanied Children Foundational Rule, simply note that the rule is subject to federal laws protecting conscience and religious freedom.<sup>18</sup>

Compounding this problem, HHS has published a new rule on conscience rights in healthcare that would apply in the context of abortion, gender transition

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<sup>17</sup> See *Nondiscrimination in Health Programs and Activities*, 89 *Fed. Reg.* 37,522, 37,701-02 (May 6, 2024) (§ 92.302).

<sup>18</sup> See *Unaccompanied Children Program Foundational Rule*, 45 *C.F.R.* §§ 410.1307(c), 410.1401(d) (2024) (imposing duties “subject to applicable Federal religious freedom and conscience protections” without explaining what those protections are); see also *Designated Placement Requirements*, 45 *C.F.R.* § 1355.22(i) (2024) (granting protection only “[i]nsofar as the application of any requirement under this section would violate applicable Federal protections for religious freedom, conscience, and free speech,” without explaining the scope and availability of those protections).

procedures, and sterilization. *See* Safeguarding the Rights of Conscience as Protected by Federal Statutes, 89 Fed. Reg. 2,078 (Jan. 11, 2024) (codified at 45 C.F.R. pt. 88). The rule contains no clarifying definitions of the terms that drive the meaning of the statutes the rule is meant to enforce. When the USCCB asked HHS to explain, “in at least general terms, principles governing how the Department will interpret the federal health care conscience statutes,” HHS declined, saying that it would instead proceed “on a case-by-case basis.” *Id.* at 89 Fed. Reg. 2,088.<sup>19</sup> So the other rules’ reassuring references to the protections of the conscience statutes find, in the Conscience Rule, no substance to support them.

In litigation, the federal government has similarly made a habit of waving away religious-freedom concerns by vaguely referencing conscience exemptions while studiously avoiding providing any concrete details on how those purported exemptions work in practice. *See, e.g., All. for Hippocratic Med. v. FDA*, No. 23-10362, 2024 WL 4196546, at \*1-2 & n.1 (5th Cir. Sept. 16, 2024) (Ho, J., concurring) (explaining how the federal government “has taken precisely the *opposite* position on federal conscience laws in other cases and in other courts” compared to positions it has taken in this Court) (emphasis in original). Moreover, conscience exemptions like the Church Amendments, *see* 42 U.S.C. § 300a-7(c)(1), do not even contain a private cause of action but rather depend on enforcement by

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<sup>19</sup> *See also* Memorandum from the U.S. Conf. of Cath. Bishops on Safeguarding the Rights of Conscience as Protected by Federal Statutes, RIN 0945-AA18 at 3, 8 (Mar. 1, 2023), <https://bit.ly/3NlcDUt>.

the federal government—the very actor refusing to specify with any clarity what the conscience exemptions actually cover. This maneuver of deliberate ambiguity may be a useful litigation tactic, but it is no help to those religious believers laboring under the uncertainty created by *Obergefell* and *Bostock*.

In sum, far from preserving the promise of free exercise, *Bostock* has offered another front for litigants seeking to eliminate the teachings of the Catholic Church from the public square.

**B. A Ruling For Petitioner Would Make The Court’s Promises In *Obergefell*, *Masterpiece Cakeshop*, and *Bostock* Illusory.**

Although the Court’s assurances in *Obergefell*, *Masterpiece Cakeshop*, and *Bostock* have not been realized, a ruling for Petitioner would ensure those promises will *never* be fulfilled. Specifically, if the Court holds that transgender status is a protected trait—either because transgender classifications are sex discrimination or because transgender persons are a quasi-suspect class—that decision would destroy any protection the Court has previously sought to preserve. Indeed, a holding for Petitioner would effectively make classifications that turn on longstanding Catholic doctrine—*i.e.*, classifications based on traditional views of marriage, sexuality, and the God-given human body—presumptively suspect. In short, this Court will have declared that the Catholic Church is presumptively bigoted.

This is not the world the Court promised. In *Obergefell*, “the majority made a commitment.” *Fulton*, 593 U.S. at 616 (Alito, J., concurring). “It refused to equate



traditional beliefs about marriage, which it termed ‘decent and honorable,’ with racism, which is neither.” *Id.* (quoting *Obergefell*, 576 U.S. at 672). “And it promised that ‘religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned.” *Fulton*, 593 U.S. at 616 (quoting *Obergefell*, 576 U.S. at 679). Although the Court has not yet made good on its guarantee, a ruling for Petitioner would destroy any chance of ever doing so.

Adopting Petitioner’s rule would have drastic consequences for both Catholic institutions and individuals. On Petitioner’s theory, Catholics’ attempt to adhere to the Church’s teaching with respect to the human body would be presumptively bigoted—permissible only if they can satisfy a searching heightened-scrutiny analysis. A ruling for Petitioner would thus constitutionalize the view that the Catholic Church’s teachings are presumptively unlawful and undercut *Obergefell*’s guarantee that those who adhere to the Catholic and traditional understandings of marriage and the human body are “reasonable and sincere people” who do so “in good faith,” *Obergefell*, 576 U.S. at 657, based on “decent and honorable religious” convictions, *id.* at 672. The fallout would have wide-ranging effects across various social, economic, and professional contexts—including in Catholic hospitals, Catholic schools, Catholic shelters, Catholic charities, and even within Catholic churches themselves. And if the Court holds that classifications based on gender identity or sexual orientation are inherently suspect, there can be little doubt that the tax-exempt status of the Catholic Church as a whole will be questioned. *See*

*id.*, 576 U.S. at 711 (Roberts, C.J., dissenting) (noting that the Solicitor General said “tax exemptions of some religious institutions would be in question if they opposed same-sex marriage”).

Moreover, it has now been nearly *a decade* since *Obergefell* was decided. In that time, the Court has come no closer to ensuring religious believers are protected from that holding. And *Bostock* has accelerated the need for resolution. The Court’s silence on the protection for religious believers has left a void that has been filled by litigants, lower courts, and federal agencies who have taken actions limiting the practice of religion in the public square. Thus, a ruling for Petitioner that leaves religious exemptions for another day (as the Court did in *Obergefell*, *Masterpiece Cakeshop*, and *Bostock*), while ostensibly neutral on this question, would impose a real cost: “Individuals and groups across the country will pay the price—in dollars, in time, and in continued uncertainty about their religious liberties.” *Fulton*, 593 U.S. at 625 (Gorsuch, J., concurring). As detailed above, religious entities and individuals have been bogged down in litigation *for years* in an effort to confirm they may continue to live out their faith after *Obergefell* and *Bostock*. But not all believers have the time, money, and energy to wage such a war of attrition. And “those who cannot afford such endless litigation” have undoubtedly been “forced to forfeit religious freedom” rather than spend years in court. *Id.* at 626.

To be clear, a ruling in favor of Petitioner that was paired with clear protections for religious entities and individuals would be better than a ruling in favor of Petitioner without such protections, but even the

former would be disastrous. The destructiveness of a holding that Church teaching is presumptively bigoted cannot be overstated.

In *Obergefell*, Justice Alito worried that the Court's decision would mean "that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools." 576 U.S. at 741 (Alito, J., dissenting). So far, that concern has been validated. But Justice Alito also acknowledged the majority's reassurance "to [] those who oppose same-sex marriage that their rights of conscience will be protected." *Id.* He added: "We will soon see whether this proves to be true." *Id.* This case provides one such opportunity.

### CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge the Court to affirm the decision below.

October 15, 2024

Respectfully submitted,

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