No. 23-477

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR *AMICUS CURIAE* DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES IN SUPPORT OF RESPONDENTS

DONALD A. DAUGHERTY, JR.
Counsel of Record
DEFENSE OF FREEDOM INSTITUTE FOR POLICY STUDIES
1455 Pennsylvania Avenue NW
Suite 400
Washington, DC 20004
(414) 559-6902
Don.Daugherty@dfipolicy.org
Counsel for Amicus Curiae

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QUESTION PRESENTED

Whether Tennessee Senate Bill 1 (SB1), Tenn. Code Ann. § 68-33-101 *et seq.*, violates the Equal Protection Clause of the Fourteenth Amendment.

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BRIEF OF *AMICUS CURIAE* DEFENSE OF FREEDOM INSTITUTE IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.2, the Defense of Freedom Institute for Policy Studies ("DFI") respectfully submits this *amicus curiae* brief in support of Respondents.[1]

STATEMENT OF INTEREST OF *AMICUS CURIAE*

DFI is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and in the workplace. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. As part of its mission, DFI is co-counsel for Mississippi, Louisiana, Montana, and Idaho, along with the Attorneys General for those four states, in *Louisiana v. U.S. Dep't. of Educ.*, No. 24-30399, 2024 U.S. App. LEXIS 17886 (5th Cir. 2024), which challenges new regulations under Title IX published by the Department of Education on April 29, 2024, *see Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* 89 Fed. Reg. 33,474 (Apr. 29, 2024).

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Bostock v. Clayton County*, 590 U.S. 644 (2020), this Court held that the prohibition in Title VII of the Civil Rights Act of 1964 on employment discrimination "because of [an] individual's . . . sex" included firing an employee "merely for being gay or transgender" because, under that statute's text, biological "[s]ex plays a necessary and undisguisable role" in the decision to terminate. *Id.* at 652, 661, 682. The United States now argues that *Bostock* should govern this Court's interpretation of the Fourteenth Amendment and that, under that case's reasoning, Tennessee Senate Bill 1 ("SB1"), Tenn. Code Ann. § 68-33-101 *et seq.*, does not survive heightened scrutiny under the Equal Protection Clause. The Sixth Circuit correctly rejected this novel approach, concluding that "the text-driven reasoning" in *Bostock* "applies only to Title VII." Pet. App. 40a. Because Title VII is not implicated in any way here, *Bostock* is inapposite. *Bostock*'s reasoning cannot be extricated from its Title VII context and simply dropped into a constitutional means-end test.

Contrary to the United States' characterization of the decision, *Bostock* never purported to offer some "fundamental insight about the nature of sex discrimination [that] applies in the equal-protection context," or anywhere else outside of Title VII. U.S. Br. 27. Rather, *Bostock* explicitly acknowledged the limited reach of its holding. *Bostock* interpreted specific statutory language in light of specific factual circumstances, and its "reasoning" does not apply to circumstances far afield from Title VII, like those in this case.

Because the level of constitutional review is often outcome determinative, the United States hopes to parlay *Bostock* into heightened scrutiny of SB1. However, application of any of the various tiers of scrutiny is not triggered unless a plaintiff makes a threshold showing that a government rule or action targets groups for unfair treatment based on sex. SB1 does not do so. Any purported "targeting" is based on an individual's age and the purpose for which he or she wishes to receive certain medical treatment. As *Skrmetti* stated, "Mere appearance of the words sex or gender in a law does not by itself require skeptical review under the Constitution," and *Bostock*'s interpretation of Title VII does not change that analysis. Pet. App. 40a. This Court should affirm the Sixth Circuit's decision.

In doing so, also clarifying *Bostock*'s scope will help to eliminate confusion about its application in the largely uncharted area of transgender legal issues. Even the language used in this area of law can be muddled and imprecise, increasing uncertainty.

The United States has contributed to the confusion by aggressively invoking *Bostock* in numerous and myriad circumstances not involving Title VII. Recently, this Court rejected unanimously (albeit on an emergency basis and a limited record) a major regulatory effort by the United States to extend *Bostock* beyond Title VII. *See U.S. Dep't. of Educ. v. Louisiana*, 144 S. Ct. 2507 (2024) (per curiam) (denying application to stay preliminary injunction of new regulations under Title IX that, inter alia, define sex discrimination to include gender identity discrimination). This case presents an opportunity to

do similarly in the constitutional context, while also providing much-needed direction to lower courts and litigants.

ARGUMENT

It is difficult to argue successfully that a state statute violates an amendment to the United States Constitution based on reasoning from this Court's interpretation of an unrelated federal statute. Not surprisingly, the United States fails in its attempt to do so.

The fact that under Title VII, "sex plays an unmistakable . . . role" in the termination of a transgender employee, *Bostock*, 590 U.S. at 660, sheds little if any light on the constitutionality of Tennessee's statute under the Fourteenth Amendment.

The United States' relentless effort in this case and elsewhere to graft *Bostock*'s reasoning onto, *inter alia*, constitutional means-end tests is little more than trying to force a square peg into a round hole, and should be rejected.

I. *Bostock*'s Interpretation Of Title VII Has Little, If Anything, To Say About Heightened Scrutiny Review Of SB1 Under The Equal Protection Clause.

The Sixth Circuit correctly held that "the text-driven reasoning" in *Bostock* "applies only to Title VII." Pet. App. 40a. This Court said as much in *Bostock*, making clear that besides Title VII, all other

laws prohibiting sex discrimination were not before it, and expressly declining to "prejudge" whether *Bostock* would "sweep beyond Title VII" to affect such other laws. *Bostock*, 590 U.S. at 681; *see also id*., at 681 ("The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex.'").

A. SB1's Reference to Sex Does Not Trigger Heightened Scrutiny Under *Bostock*.

The United States contends that the presence of the word "sex" in SB1 automatically triggers heightened scrutiny because the Tennessee statute is, under *Bostock*, "sex-based" and thus, a "facial classification." U.S. Br. 26. However, SB1's only meaningful classifications are based on age and the purpose for medical treatment, not sex. It simply is not true that "but for" their sex, the minor plaintiffs below would have received the medical procedures listed in Tenn. Code Ann. §§ 68-33-102(5)(A) & (B). Rather, but for both their ages and the reason they wanted the medical interventions – namely, "for the purpose of" either (1) "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or (2) "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity," *see id.* § 68-33-103(a)(1) -- they would have received the treatments identified in Sections 68-33-102(5)(A) & (B). No adult of either sex is affected by SB1, nor is any minor of either sex who

seeks treatment for purposes not prohibited by the statute. As the Sixth Circuit observed, "*Bostock* does not alter [the] conclusion" that the "[m]ere appearance of the words sex or gender in a law does not by itself require skeptical review under the Constitution." Pet. App. 40a.

Contrary to the United States' assertion, the "very purpose" of SB1 is not "sex-based line-drawing" between transgender minors and the rest of the population. U.S. Br. 22. Rather, the statute's goal is to protect minors "from physical and emotional harm" that might result from what the state legislature has determined to be risky and unproven medical procedures performed for "the purpose of" addressing "inconsisten[cies]" or "discordance" between "the minor's sex" and his or her "purported" or "asserted identity." Tenn. Code Ann. §§ 68-33-101(b); 68-33-101(n)(1) & (2). Whether the transgender is a minor or an adult, and the purpose for the treatment, are the determinative factors, not sex.

Heightened scrutiny also does not apply *ipso facto* to every statute referencing sex because "inherent differences" between the sexes may justify such distinctions. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996). "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001); *see also Miller v. Albright*, 523 U.S. 420, 444-45 (1998); *Virginia*, 518 U.S. at 533; *Michael M. v. Superior Court of Sonoma Cnty.*, 450 U.S. 464, 471-73 (1981). Here, SB1's restrictions on gender transition treatment for minors rely on biology and

medicine, not "archaic and stereotypic notions," *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982), or "obsolescing view[s]" about differences between men and women, *Sessions v. Morales-Santana*, 582 U.S. 47, 62-63 (2017).

Finally, SB1 treats similarly-situated individuals similarly by prohibiting certain uses of medical treatment for all minors, making heightened review inapplicable. *See Bostock*, 590 U.S. at 657; *Vacco v. Quill*, 521 U.S. 793, 800 (1997), The only differential relates to one of the three prohibited medical procedures identified in Section 68-33-102(5).[2] As the United States points out, cross-hormone therapy requires the provision of estrogen to transgender girls and testosterone to transgender boys. (U.S. Br. at 5, 21-22, 28). However, for this specific procedure, minor males and females seeking treatment are not "similarly-situated," *Michael M.*, 450 U.S. at 469, but have inherent physical differences. Moreover, assuming they were similarly-situated, the United States would be making the strange argument that one-third of SB1 violates the Equal Protection Clause as applied, which it does not appear to make.

[2] SB1's prohibition on surgery is not at issue here, *see* Pet. App. 63a, n.3, and "puberty blockers involve the same drug used equally by gender-transitioning boys and girls," (Pet. App. 38a), so they cannot be considered "sex-based."

B. Fundamental Differences Between Title VII and the Equal Protection Clause Make *Bostock*'s Reasoning Irrelevant to SB1.

The United States argues that notwithstanding obvious, material differences between Title VII and the Equal Protection Clause, as well as between *Bostock* and the instant facts, *Bostock*'s reasoning controls here. Echoing *Skrmetti*'s dissent, the United States complains that "the Sixth Circuit did 'not explain why or how any difference in language'" between the Equal Protection Clause and Title VII "would 'require[] different standards for determining whether a facial classification exists in the first instance,' such that a restriction can simultaneously be sex-based under Title VII yet sex-neutral under the Equal Protection Clause." U.S. Br. 27. The differences between construing a constitutional amendment and a statute should be so clear, however, as to not require lengthy explication.

As a strictly textual matter, Title VII and the Equal Protection Clause have entirely different language. It is not merely that they "are not identical," Pet. App. 79a (White, J., dissenting); on their faces, the two legal texts have nothing to do with one another. Most notably, *Bostock* turned on the statutory terms "sex" and "because of," which are not in the Fourteenth Amendment. "That such differently worded provisions should mean the same thing is implausible on its face." *Students for Fair Admissions Inc. v. Presidents & Fellows of Harv. Coll.,* 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) (comparing the Equal Protection Clause with Title VI).

Notwithstanding this obvious textual basis for why *Bostock*'s interpretation of Title VII does not support heightened scrutiny of SB1, the dissent and the United States insist that the majority needed to further "explain" why different standards should apply to Title VII and the Equal Protection clause. Again, the nontextual reasons should be evident. *Cf. Washington v. Davis*, 426 U.S. 229, 239 (1976) ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII.").

Interpretation of a statute differs greatly from construction of a constitutional provision. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("we must never forget, that it is a constitution we are expounding").[3] For example, although it is well-settled that "relevant pre-ratification history" may inform "interpret[ation of] broadly worded language in . . . the Fourteenth Amendment," *United States v. Rahimi*, 144 S. Ct. 1889, 1915 (2024) (Kavanaugh, J., concurring), there is considerable disagreement about using a similar approach for a statute like Title VII, *see, e.g., Bostock*, 590 U.S. at 673-75; *id.*, at 721-22 (Alito, J., dissenting). Similarly, analogical reasoning may be useful for determining

[3] Importantly, Chief Justice Marshall's famous observation did not mean that the Constitution somehow evolves over time: "There would be no need to give the provision an expansive reading if today's narrow reading could be changed ('evolved') tomorrow as the need arises." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 405 (2012).

the scope of constitutional rights, *see Rahimi*, 144 S. Ct. at 1925-26, but less so for statutory rights. (Barrett, J. concurring.)

Title VII is "'more than a simple paraphrasing' of the Equal Protection Clause." *Students for Fair Admissions*, 600 U.S. at 308 (2023) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)) (Gorsuch, J., concurring). The two operate differently and their goals are not identical. Title VII focuses on discrimination against individuals, *see Bostock*, 590 U.S. at 658, while Equal Protection is most concerned with disparities in the treatment of different groups, *see Enquist v. Or. Dep't. of Agric.*, 553 U.S. 591, 601 (2008). The Equal Protection Clause "operates on States" and "does not purport to regulate the conduct of private parties;" Title VII "applies to recipients of federal funds – covering not just many state actors, but many private actors too." *Students for Fair Admissions*, 600 U.S. at 308. While Title VII reaches entities and organizations that the Equal Protection Clause does not, "[i]n other respects, . . . the relative scope of the two provisions is inverted." *Id.* The Equal Protection Clause "addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classification." *Id.* Title VII bans only classifications based on sex, and "does not direct courts to subject th[is] classification[] to one degree of scrutiny or another," *id.*; rather, under Title VII, "it is *always* unlawful to discriminate among persons even in part because of" sex, *id.* at 309 (emphasis original).

Besides the relevant law, the facts in *Bostock* also are completely dissimilar from those here.

Bostock did not involve a challenge to the constitutionality of a state statute, but the interpretation of a federal statute without any constitutional dimension to the analysis. Thus, not surprisingly, *Bostock* said nothing about heightened scrutiny (as well as "facial unconstitutionality," "suspect classes," or the like).

Again, as a textual matter, *Bostock* stated that the use of "because of" in Title VII required that it apply a "but for" test to determine whether sex was a cause of discrimination. No such language is present in the Equal Protection Clause, which prohibits government "den[ial] . . . of equal protection of the laws" without reference to its cause. And rather than a "but for" standard derived directly from statutory language, causation under the Equal Protection Clause is proven by showing that some discriminatory purpose was "a motivating factor" for the challenged governmental action, a judicially-supplied standard. *See Vill. Of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265-66 (1977). At most, sex "merely play[s] a non-essential contributing role" in keeping a minor from treatment prohibited by SB1, *Burrage v. United States*, 571 U.S. 204, 212 (2014), and has no constitutional significance.

Like *Bostock* itself, none of the decisions it relied on for its conclusion regarding causation under Title VII had anything to do with the Equal Protection Clause specifically or the Constitution generally. *See Bostock*, 590 U.S. at 655. *Univ. of Tex. Southwestern Med. Ctr. v. Nassar* and *Gross v. FBL Financial Services, Inc.* analyzed causation standards applicable to federal employment statutes, with *Nassar* holding

that under the specific text of Title VII, retaliation had to be the "but for" cause of an adverse employment decision in order to make a claim. *See Nassar*, 570 U.S. 338, 352-53 (2013) (noting that same "but for" standard applied under Age Discrimination in Employment Act, which was at issue in *Gross*); *Gross*, 557 U.S. 167, 180 (2009). *Burrage* relied on *Nassar* and *Gross* to hold that the use of the phrase "results from" in the federal Controlled Substances Act also required "but for" causation in the same way that "because" and "because of" did in Title VII and the ADEA, respectively.[4] *Burrage*, 571 U.S. at 212-13. Neither "because," "because of," "results from," or any similar phrase from the statutes at issue in *Bostock*, *Nassar*, *Gross*, or *Burrage* appears in the Equal Protection Clause. And the United States makes no effort to show that some discriminatory legislative animus motivated enactment of SB1, as required by *Village of Arlington*.

As a general matter, courts should resist requests to delve into the tiers of constitutional scrutiny based on novel legal theories. Balancing tests like heightened scrutiny "are a relatively modern judicial innovation in constitutional decisionmaking," and appear to have been adopted "'by accident' in the 1950's and 1960's . . ., 'rather than as the result of considered judgment.'" *Rahimi*, 144 S. Ct. at 1921 (citations omitted)(Kavanaugh, J., concurring). A

[4] While both *Nassar* and *Gross* held that retaliation and age, respectively, had to be "*the* but-for-cause" of the adverse employment event, *Burrage* replaced the definite article in quoted material from each case with the indefinite article, thereby lowering the standard. 571 U.S at 212, 213 & 213 n. 4.

primary weakness with such balancing approaches is that they "require[] highly subjective judicial evaluations of how important a law is." *Id.* This Court should decline the United States' invitation to extend the application of heightened scrutiny further.

C. The Equal Protection Cases Cited By The United States That Rely On *Bostock* Do Little More Than Invoke It.

The United States argues that "the Fourth, Ninth, and Tenth Circuits have already recognized" that the "inconsistency" between the standards for sex discrimination under Title VII and the Fourteenth Amendment "make[s] no sense" in light of "*Bostock*'s fundamental insight about the nature of sex discrimination appl[ying] in the equal-protection context." U.S. Br. 27 (citing *Kadel v. Folwell*, 100 F.4th 122, 153-154 (4th Cir. 2024) (en banc), petition for cert. pending, No. 24-90 (filed July 25, 2024), and petition for cert. pending, No. 24-99 (filed July 26, 2024); *Hecox v. Little*, 104 F.4th 1061, 1080 (9th Cir. 2024), petition for cert. pending, No. 24-38 (filed July 11, 2024); *Fowler v. Stitt*, 104 F.4th 770, 793-794 (10th Cir. 2024)). However, although these cases reach the same result – all holding that various state transgender restrictions violate the Equal Protection Clause -- they do so largely by invoking *Bostock* with little additional reasoning.

Applying heightened scrutiny, *Kadel* and *Hecox* struck down, respectively, exclusions of certain transgender treatments in a state health care plan and a state girls' sports protection statute, both on grounds that they discriminated against transgender

individuals under the Equal Protection Clause. *See Kadel*, 100 F.4th at 164; *Hecox*, 104 F.4th at 1080-81. *Fowler* struck down on rational basis review a Governor's executive order restricting the amendment of birth certificates to reflect gender transitions.

Reading the cases, it is not clear what "fundamental insight about the nature of sex discrimination" in *Bostock* they all recognized that compelled them to strike down a variety of state actions. If anything, they demonstrate the problems that result from trying to make *Bostock*'s reasoning relevant outside of Title VII.

For example, applying the same "thought experiment" it claimed *Bostock* used, the *Kadel* court asserted that even if an individual is "born without a vagina," "we do not know what sex they were assigned at birth." 100 F.4th at 153. In addition, the court stated, "The assumption that people who have been assigned female at birth are supposed to have breasts, and that people assigned male at birth are not" is a "gender stereotype" that courts "must be particularly careful in order to keep . . . out of our Equal Protection jurisprudence." *Id.* at 154. Surely *Bostock* did not mean to usher in judicial "thought experiments" that deny biological fact.

Bostock is apparently not even needed to reach the result the United States seeks. *Brandt v. Rutledge* never mentioned the case, but still struck down on Equal Protection grounds an Arkansas statute banning medical treatments for minors like the statute at issue in this action. 47 F.4th 661, 669 (8th Cir. 2022).

Finally, the United States does not address a case involving state laws like those in *Brandt* and *Skrmetti*. *Eknes-Tucker v. Governor of the State of Alabama*, 80 F.4th 1205, 1210 (11th Cir. 2023) involved an Alabama statute prohibiting the use of puberty blockers or cross-sex hormones to treat a minor for discordance between his or her biological sex and sense of gender identity. As in *Skrmetti*, the court rejected an equal protection challenge to the statute, stating, "Because *Bostock* . . . concerned a different law (with materially different language) and a different factual context, it bears minimal relevance to the instant case." *Id.* at 1229. Further, notwithstanding the appearance of "sex" in the Alabama statute, the court did not subject it to heightened scrutiny, finding that, like with SB1, the predominant distinction drawn by the statute was based on age, not sex. *Eknes-Tucker* and *Skrmetti* offer the better reading of *Bostock*.

II. The United States Has Repeatedly Invoked *Bostock* In Circumstances Far Afield From Title VII, With Limited Success But Increased Uncertainty.

Since shortly after *Bostock* was decided, the United States has been relentless in its efforts to apply the decision to Title IX and elsewhere outside of Title VII. *See, e.g., Exec. Order No.* 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) ("Under Bostock's reasoning, laws that prohibit sex discrimination — including Title IX of the Education Amendments of 1972, . . . , the Fair Housing Act, and . . . the Immigration and

Nationality Act . . . , along with their respective implementing regulations — prohibit discrimination on the basis of gender identity or sexual orientation."); Brief for the United States as Amici Curiae Supporting Plaintiff-Appellant*, M.K. v. Pearl River Cnty. Sch. Dist* No. 24-60035, at 7, ECF No. 32 (5th Cir. 2024) ("*Bostock*'s reasoning applies [to claim arising out of alleged bullying] and makes clear that sexual-orientation discrimination constitutes impermissible sex discrimination under Title IX, just as it does under Title VII."); 89 Fed. Reg. 33807 (*Bostock*'s "discussion of the text of Title VII appropriately informs the Department's analysis of Title IX.").

Bostock's relevance to Title IX may arguably be a closer question than to the Equal Protection Clause, given some superficial similarities between that statute and Title VII. In the past, courts have occasionally applied interpretations of one statute to the other as a short cut. *See*, *e.g.*, *Arceneaux v. Assumption Par. Sch. Bd.*, 733 Fed. Appx. 175, 178-79 (5th Cir. 2018); *Radwan v. Manuel*, 55 F.4th 101, 130-31 (2d Cir. 2022). However, this Court has still acknowledged that Titles VII and IX are vastly different, and that comparisons between them are of limited use. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175, (2005); *Gebser v. Lago Vista Indep. Sch Dist.*, 524 U.S. 274, 286-87 (1998). Thus, numerous courts have already enjoined preliminarily the new Title IX regulations published by the Department of Education on April 29, 2024. *See, e.g., Tennessee v. Cardona*, No. 24-5588, 2024 U.S. App. LEXIS 17600 (6th Cir. July 17, 2024); *Louisiana v.*

U.S. Dep't. of Educ., No. 24-30399, 2024 U.S. App. LEXIS 17886 (5th Cir. July 17, 2024); *Alabama v. U.S. Sec'y of Ed.*, No. 24-12444, 2024 U.S. App. LEXIS 21358 (11th Cir. August 22, 2024). And this Court recently rejected unanimously (on an expedited basis and limited record) the United States' contention in two of those actions that *Bostock* controls Title IX. *Louisiana*, 144 S. Ct. 2507. If *Bostock*'s reasoning does not govern interpretation of Title IX, it cannot do so for the Fourteenth Amendment.

This case provides an opportunity for the Court to give much needed guidance in the area of transgender legal issues. *See Fowler*, 104 F.4th at 804 (dissent). In particular, decisions in the area reflect a complete lack of clarity about the meaning of key terms. For example, are "sex" and "gender" synonyms? This Court has sometimes used them interchangeably in the past, *see, e.g., Grimm v. Gloucester Cty. Sch Bd.*, 972 F.3d 586, 607 n.8 (4th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021) (citing. *Hogan*, 458 U.S. 718, and *Virginia*, 518 U.S. at 515), but it is unclear if they should still be used that way, *see, e.g., Bostock*, 590 U.S. at 686-87, 693-95 (Alito, J., dissenting). Similarly, *Hecox* observed that in the context of issues like those raised in the instant case, "'such seemingly familiar terms as 'sex' and 'gender' can be misleading,'" *Hecox*, 104 F.4th at 1068 (quoting *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018)); thus, at the outset of the opinion, the court provided a glossary defining terms used in the decision, including "gender identity," "sex," "cisgender," and "transgender," *Hecox*, 104 F.4th at 1068-69; *see also Fowler*, 104 F.4th at 789

n.13 ("[i]n our analysis, we use 'sex' to mean sex assigned at birth"). Precision in language is critical to legal analysis and, unless words have commonly-accepted meanings throughout the legal community, precision is impossible. A decision in this case can help to corral the relevant language, so that courts and litigants do not end up talking past one another in this area of law.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondents' brief, this Court should affirm the Sixth Circuit's decision.

Respectfully submitted,

DONALD A. DAUGHERTY, JR.
Counsel of Record
DEFENSE OF FREEDOM
INSTITUTE FOR POLICY STUDIES
1455 Pennsylvania Avenue NW
Suite 400
Washington, DC 20004
(414) 559-6902
Don.Daugherty@dfipolicy.org
Counsel for Amicus Curiae

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