

No. 16-273

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD,

Petitioner,

v.

G.G., BY HIS NEXT FRIEND AND MOTHER,
DEIRDRE GRIMM,

Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF AMICI CURIAE OF
THE GENERAL CONFERENCE OF THE
SEVENTH-DAY ADVENTISTS AND THE
BECKET FUND FOR RELIGIOUS LIBERTY
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Should this Court reduce social conflict concerning religious liberty and transgender rights by allowing Congress and state legislatures to balance competing interests in the first instance?

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INTEREST OF THE *AMICI*¹

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents over 75,000 congregations with more than 18 million members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,200 congregations with more than one million members. The Adventist Church operates the largest Protestant educational system in the world, including 650 primary schools, 94 secondary schools, and 13 institutions of higher learning in the United States alone. The Church also operates many other ministries, including 67 healthcare institutions in the United States. All of these organizations are equal expressions of the Church's mission. The Church has a strong interest in being able to continue all of its forms of ministry without compromising the faith that animates its ministry. Since its founding, through its own programs and the work of the International Religious Liberty Association founded in 1893, the Adventist Church has worked to guarantee religious liberty for all.

The Adventist Church is committed to conducting its ministries based on its obligation to be obedient to the Bible and God's commands. This requires recognizing both that an important part of a person's identity is authored by God through that person's birth

¹ No party's counsel authored any part of this brief. No person other than *Amici Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

sex, and that God wants the Church to serve all people with dignity and respect.

The Adventist Church's ultimate biblically based stance will not change regardless of this Court's ruling. The Church recognizes, however, that the Court's ruling can have a significant impact on its ability to carry out its mission unless appropriate religious liberty protections are in place. The Church therefore urges the Court to reach a resolution that is respectful of the Church's sacred work and of religious liberty for all Americans.

The Becket Fund for Religious Liberty is a non-profit law firm that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

The Becket Fund has also represented religious people and institutions with a wide variety of views on the issue of gender identity, including both LGBT and non-LGBT clients. As a religious liberty law firm, the Becket Fund does not take a position on policy issues concerning gender identity, but focuses instead on these issues only as they relate to religious liberty.

The Becket Fund submits this brief to urge the Court to ensure that its ruling preserve space for legislative accommodations for religious objectors in the specific context of this case and in the broader context of LGBT rights generally.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In recent years, both this Court and the Nation have struggled with deep social conflicts concerning the nature of the human family, personal autonomy, and Americans' most profound views about the world and their place in it. And in a time marked by severe political polarization, these social conflicts have inevitably acquired a political valence.

Yet some of the conflicts that came to this Court did not have to happen, or at least not on such a large scale. Some conflicts resulted directly from agency choices to grasp public policy nettles that need not have been grasped. Had these conflicts had a longer time to gestate in public and legislative debate, much of their scope might have been avoided. But the perceived political advantages to be had on both sides, combined with the level of deference accorded agency decisions, meant that the social conflicts presented to this Court for decision were broader and deeper than if they had been allowed to run through the legislative process first.

This case involves another broad and deep social conflict that can and ought to be ameliorated through legislative consideration first. Redefining "sex" under Title IX to include "gender identity" will open a Pandora's box of litigation with massive impact on religious organizations and individuals well beyond the education arena. It will directly infringe the right of religious health care providers to rely on their best medical and moral judgment in determining appropriate care for transgender individuals. It will impede the

ability of emergency shelters to provide critical services that respect diverse health, safety, and religious needs of the homeless populations they serve. It will constrain the right of religious organizations to hire faith-observant employees to carry out their religious missions. And it will have untold and unintended impact on religious organizations in states that look to federal law in construing their own nondiscrimination laws.

Congress and state legislatures can never perfectly anticipate the measures necessary to protect the full diversity of religious exercise in our Nation. Hence the Free Exercise and Establishment Clauses and the imperative that they be robustly applied. But excluding legislative bodies from the policy-making process both threatens individual freedoms and leads to the impression that citizens lack a voice on issues of fundamental importance to them. In contrast with the administrative process, which is uniquely insensitive to religious concerns, the legislative process has historically balanced religious protections with other interests in ways that have minimized social conflict and the need for litigation *en masse*. In that spirit, the Court should reject Respondent's invitation to short-circuit the legislative process, an invitation that would otherwise increase social conflict, mass litigation, and judicial burdens.

ARGUMENT

I. Skirting the legislative process to redefine “sex” under Title IX will create widespread conflicts that extend far beyond the education arena.

Many federal agencies have aggressively moved to expand the definition of “sex,” bootstrapping from one agency action to the next, while also dismissing concerns about conflicts for religious believers. With the resulting web of agency rules and regulations, construing “sex” to include “gender identity” under Title IX will confirm agency action in a number of other arenas with widespread impact on religious organizations. This will unnecessarily generate social conflict that can only be resolved through extensive litigation.

A. Conflicts for health care providers

The challenge posed to religious organizations by redefining “sex” under Title IX is perhaps most evident with respect to Section 1557 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010). There, rather than impose new non-discrimination requirements, Congress simply incorporated pre-existing laws, including Title IX. 42 U.S.C. § 18116(a) (prohibiting discrimination “on the ground prohibited under * * * Title IX of the Education Amendments of 1972”). And Title IX is the only statute referred to in Section 1557 that prohibits discrimination on the basis of sex. *Ibid.*

Six years after the Act’s passage, the Department of Health and Human Services (“HHS”) issued “implementing” regulations that define “sex” to include “gender identity.” 45 C.F.R. 92.101(a)(1), 92.4 (“HHS

Rule”). Lacking any evidence of congressional intent, HHS relied instead on the Department of Education’s interpretation of “sex” in the May 13, 2016 “Dear Colleague” letter at issue in this lawsuit, as well on the Fourth Circuit’s decision below. See 81 Fed. Reg. 31,389 & 31,389 nn.66 & 67 (May 18, 2016). The HHS Rule thus defines “gender identity” as an individual’s “internal sense of gender, which may be male, female, neither, or a combination of male and female.” *Id.* at 31,467.

Notably, Title IX includes an express exemption for religious organizations, which provides that Title IX “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” 20 U.S.C. § 1681(a)(3). But despite Congress’s incorporation of Title IX into the Affordable Care Act without limitation, and despite pleas from over 150 commenters that the exemption be included in the new regulation,² HHS refused.

HHS justified its decision by announcing that “there are significant differences between the educational and health care contexts that warrant different approaches.” 81 Fed. Reg. at 31,380. Citing no other

² See, e.g., U.S. Conference of Catholic Bishops *et al.*, Comment on the Dep’t of HHS Proposed Rule: Nondiscrimination in Health Programs & Activities (Nov. 6, 2015), <http://bit.ly/2jzoz95> (writing on behalf of ten religious groups); Council for Christian Colleges & Universities, Comment on the Dep’t of HHS Proposed Rule: Nondiscrimination in Health Programs & Activities (Nov. 9, 2015), <http://bit.ly/2jqDazK> (writing on behalf of 143 religious colleges and universities).

authority, HHS thus concluded it would rather make its own “determinations” about religious exemptions “on a case-by-case basis.” *Ibid.* Thus, religious organizations in the healthcare context are now subject to additional liability related to “sex” discrimination with no clear religious protections.

The liability that flows from this new HHS Rule is significant. Specifically, Section 1557’s “sex” non-discrimination provision applies to any “entity that operates a health program or activity, any part of which receives Federal financial assistance.” 45 C.F.R. 92.4 (definition of “Covered entity”). By HHS’s own estimate, the HHS Rule applies to almost every health care provider in the country, including around 133,000 hospital and nursing facilities, 445,000 clinical laboratories, 1,200 community health centers, 171 health-related schools, as well as to “almost all licensed physicians.” 81 Fed. Reg. at 31,445.

And the HHS Rule has major implications for covered entities and individuals. First, it requires them to offer gender transition procedures or be liable for “discrimination.” 81 Fed. Reg. at 31,455. Thus, for example, the HHS Rule states that a health provider willing to perform a hysterectomy for a woman with cancer would be deemed “discriminatory” if unwilling to perform the same procedure for a gender transition. *Ibid.* This reasoning applies across the full “range of transition-related services,” *id.* at 31,435-36, and across all ages of patients, including children, *id.* at 31,408 (stating in context of services for “children” that “arbitrary age, visit, or coverage limitations could constitute discrimination, including discrimination based on age”). The HHS Rule also requires covered entities to pay for

any gender transition procedures in their health insurance plans. 45 C.F.R. 92.207(b).

Failure to comply with these requirements carries significant risk for religious organizations, which would face massive financial penalties, including loss of Medicare, Medicaid, and other federal funds; debarment from federal contracting; enforcement proceedings brought by the Department of Justice; liability under the False Claims Act, including treble damages; and private lawsuits brought by patients or employees for damages and attorneys' fees. See 45 C.F.R. 92.301, 81 Fed. Reg. at 31,439-31,440, 31,472.

Indeed, HHS itself recognized that as “a result of the new [HHS Rule], complex cases that involve novel issues of law and complicated facts will dramatically increase,” and thus that the agency would “ramp up its investigative staff.” Office for Civil Rights, Department of Health and Human Services, *Justification of Estimates for Appropriations Committee, Fiscal Year 2017 2* (2016), <http://bit.ly/2jzcJMt>. Not surprisingly, in less than eight months since HHS issued the new Rule, five complaints have already been filed against healthcare entities, three of which are Catholic hospitals.³ The ACLU even has an active campaign to identify clients who were treated at “Catholic-sponsored

³ See Compl. for Declaratory, Compensatory, & Injunctive Relief, *Conforti v. St. Joseph's Hosp. Sys.*, No. 17-50 (D.N.J. Jan. 5, 2017) (claiming violation of § 1557 because Catholic hospital refused to provide gender transition medical services); Compl. & Jury Demand, *Dovel v. Pub. Library of Cincinnati & Hamilton Cty.*, No. 16-955 (S.D. Ohio Sept. 26, 2016) (claiming employer violated § 1557 by failing to provide insurance coverage for gender transition); Compl., *Prescott v. Rady Children's Hosp. – San*

hospital[s]” so that it can file lawsuits against them for following their “religiously based Directives.”⁴

Religious organizations in turn have already been compelled to seek protections, with the HHS Rule having taken effect on July 18, 2016. 81 Fed. Reg. at 31,376. In proceedings in Texas and North Dakota, *Amicus* Becket Fund currently represents seven religious organizations, including multiple hospitals, health clinics run by religious sisters, a religious university, and an association of 18,000 religious health professionals. While none of the plaintiffs has any objection to providing general medical services to transgender individuals, they have medical, ethical, and moral concerns about providing gender transition services. See, e.g., Br. at 8-10, *Franciscan Alliance v. Burwell*, No. 16-108 (N.D. Tex. Oct. 21, 2016), ECF No. 25; Mem. at 9-10, 21-22, *Religious Sisters of Mercy v. Burwell*, No. 16-386 (D.N.D. Nov. 17, 2016), ECF No. 6.⁵

Diego, No. 16-2408 (S.D. Cal. Sept. 26, 2016) (claiming violation of § 1557 because hospital referred to patient with wrong gender pronouns); Compl., *Robinson v. Dignity Health*, No. 16-3035 (N.D. Cal. June 6, 2016) (claiming Catholic employer violated § 1557 by failing to provide insurance coverage for gender transition); Admin. Compl., *ACLU v. Ascension Health*, U.S. Dept. of Health & Human Servs., Office for Civil Rights (Oct. 25, 2016) (claiming violation of § 1557 because Catholic hospital refused to provide postpartum tubal ligation).

⁴ ACLU, *Do You Believe a Catholic Hospital Provided You or a Loved One Inadequate Reproductive Health Care?*, <http://bit.ly/2dFjFEZ> (last visited Dec. 14, 2016).

⁵ In the Texas lawsuit, the district court has issued an injunction against the HHS Rule. See Order, *Franciscan Alliance*, No.

These concerns arise, in part, from the plaintiffs' religious and professional commitments to follow the Hippocratic Oath's injunction to "do no harm." The consequences of gender transition services are not fully understood. Indeed, HHS's own experts have written, as recently as this summer, that "[b]ased on a thorough review of the clinical evidence available at this time, there is *not enough evidence* to determine whether gender reassignment surgery improves health outcomes." Ctrs. for Medicare & Medicaid Servs., *Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery* (June 2, 2016), <http://go.cms.gov/1ZjgTTk> (emphasis added).

There are also sound medical reasons for not covering these procedures, particularly for children. Guidance documents relied on by HHS during the rulemaking process explain that "[g]ender dysphoria during childhood does not inevitably continue into adulthood," with "persistence rates" ranging from 6 to 27%. World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 11 (7th ed. 2012), <http://bit.ly/2igZ48t> ("WPATH Report") (cited in 81 Fed. Reg. at 31,435 n.263).

Moreover, for both children and adults, medical transition procedures carry significant health risks. The Institute of Medicine has noted that transgender individuals "may be at increased risk for breast, ovarian, uterine, or prostate cancer as a result of hormone

16-108 (N.D. Tex. Dec. 31, 2016), ECF No. 62 (granting preliminary injunction).

therapy.” Institute of Medicine of the National Academies, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 264 (2011), <http://bit.ly/2hWrvrg>. The same study found that “[l]onger duration of hormone use * * * may well exacerbate the effects of aging, such as cardiac or pulmonary problems.” *Id.* at 265. And the WPATH report notes that hormone therapy is associated with increased risk of cardiovascular disease, Type 2 diabetes, gallstones, venous thromboembolic disease, and hypertension. WPATH Report at 40.

All these concerns warrant careful consideration in the legislative process and through public discourse. But because Section 1557 directly incorporates Title IX, expanding the definition of “sex” in this case would automatically expand it under Section 1557 as well, leaving tens of thousands of entities and individuals with medical, ethical, and moral objections exposed to liability without the benefit of Title IX’s statutory exemption.

B. Conflicts for other social services providers

In the final days of 2016, HHS issued a new regulation further extending the Title IX non-discrimination requirement, through the HHS Rule, to grant recipients under the Runaway and Homeless Youth Act. 81 Fed. Reg. 93,062 (Dec. 20, 2016) (incorporating 45 C.F.R. pt. 92).

Grants under the Act are generally awarded to organizations, including religious organizations, that provide short-term and emergency care to homeless youth. This new expansion of the Title IX “sex” non-discrimination requirement will make federal grants

conditional on whether religious organizations treat those they serve “consistent with [their] gender identity,” rather than their biological sex, including by “assign[ing] them housing based on their gender self-identification.” 81 Fed. Reg. at 93,047, 93,062. By incorporating 45 C.F.R. pt. 92, the regulation also subjects grant recipients to HHS’s interpretation of Title IX’s non-discrimination provision as applied to employee health benefits and the use of bathrooms and similar facilities. 45 C.F.R. 92.207(b); 81 Fed. Reg. at 31,409. The regulation offers no exemption or accommodation for the religious beliefs of grant recipients, again forcing religious organizations to choose between their religious beliefs about gender identity and their religiously-mandated ministries to the homeless.

Although not directly incorporating Title IX, the Department of Housing and Urban Development (“HUD”) has applied a similar rule to the provision of emergency shelters, citing other agencies’ expanded definition of “sex” in support of its own.

Specifically, in September 2016, HUD adopted a new rule (“HUD Rule”) prohibiting “sex” discrimination in “temporary, emergency shelters with shared sleeping quarters or shared bathing facilities” that receive certain HUD funding. See 81 Fed. Reg. 64,764 (Sept. 21, 2016). Where such facilities are segregated by sex, the new HUD Rule requires access for all individuals on the basis of the “gender with which [the] person identifies, regardless of the sex assigned to that person at birth.” 24 C.F.R. 5.100, 5.106(c); 81 Fed. Reg. at 64,767.

HUD cited no clear statutory authority for the HUD Rule. Similarly, in response to comments questioning the agency's redefinition of "sex" to include "gender identity," HUD has contended that its authority is based on general policy statements by Congress encouraging HUD to "create strong, sustainable, inclusive communities and quality affordable homes for all" and to "address 'the needs and interests of the Nation's communities and of the people who live and work in them.'" 81 Fed. Reg. at 64,769. Further citing its general rulemaking authority, HUD argues that "Congress has not only given [it] this broad mission but also * * * broad authority to fulfill this mission and implement its responsibilities through rulemaking." *Ibid.* Finally, in construing the term "sex," the agency has suggested that its authority is found in its own prior interpretations, as well as similar interpretations by the Equal Employment Opportunity Commission, the Department of Justice, the Office of Personnel Management, and the Office of Federal Contract Compliance Programs. *Id.* at 64,470 & n.12.

With this cobbled-together authority, HUD not only redefined "sex" to include "gender identity," but dismissively rejected concerns about forcing residents "to share facilities with opposite-sex adults where their religions prohibit that." 81 Fed. Reg. at 64,773. HUD responded that asking residents to sleep or use restrooms with others of their biological sex would constitute "arbitrary exclusion, isolation, and ostracism" that "will not be tolerated." *Ibid.* It compared these concerns to racism and discrimination against the disabled, concluding that "accommodat[ing] the religious views of another shelter resident" could not justify racial discrimination. *Ibid.*

Related concerns rooted in privacy and safety were also summarily dismissed. The originally proposed rule would have allowed emergency shelters “under narrow circumstances” to make “a case-by-case determination” that alternative accommodations might be “necessary to ensure health and safety.” 81 Fed. Reg. at 64,765. But the final version of the rule abandoned that approach. Instead, shelter providers are instructed to “post a notice of rights * * * to clearly establish expectations,” to look for “opportunities to educate and refocus” occupants, and to have “policies and procedures in place” to help resolve “conflicts that escalate.” *Id.* at 64,767-68.

Such recommendations give short shrift to the complex issues faced by hundreds of religious organizations that operate emergency shelters. It is estimated that around 40% of the homeless population suffers from alcohol dependence. Seena Fazel *et al.*, *The Prevalence of Mental Disorders among the Homeless in Western Countries: Systematic Review and Meta-Regression Analysis*, 5 PLoS Med. 1670, 1675 (2008), <http://bit.ly/2jwjpe5>. Roughly 25% struggle with other forms of substance abuse. *Ibid.* Anywhere from 20-45% experience some form of mental illness, including nearly 13% who suffer from psychotic illnesses such as schizophrenia. John Ashmen, *Invisible Neighbors* 25 (2010); Fazel, 5 PLoS Med. at 1672. The statistics are even higher for transgender homeless individuals, National Health Care for the Homeless Council, *Gender Minority and Homelessness: Transgender Population*, 3 In Focus 1, 2-3 (2014), <http://bit.ly/2ftAYdk>, who are also disproportionately likely to be subjected to violence within the homeless community, Margot B. Kushel *et al.*, *No Door to Lock: Victimization Among*

Homeless and Marginally Housed Persons, 163 Arch. Intern. Med. 2492, 2495 (2003), <http://bit.ly/2jwvvcg>.

In these circumstances, “post[ing] a notice of rights,” having “policies and procedures” in place, and seeking “opportunities to educate and refocus” occupants about their rights and responsibilities are essentially meaningless as remedial tools. 81 Fed. Reg. at 64,767-68. As a whole, religious and other emergency shelter operators serve all who come through their doors. See, *e.g.*, Association of Gospel Rescue Missions, Comment on the Dep’t of Hous. & Urban Dev. Proposed Rule: FR-5863-P-01 Equal Access in Accordance With an Individual’s Gender Identity in Cmty. Planning & Dev. Programs (Jan. 19, 2016), <http://bit.ly/2iXuowc> (“To be clear, there is no rescue mission that is a member of AGRM that will not serve every person who comes to them in need of assistance, regardless of gender or gender identity.”). Yet to operate effectively, they need the freedom and flexibility to rely upon their ethical principles to meet the safety, privacy, and religious concerns of those they serve, including the concerns of transgender individuals.

But ruling that “sex” under Title IX includes “gender identity” will automatically extend that ruling through to the Runaway and Homeless Youth Act. It will also condone HUD’s decision to unilaterally apply that same definition to emergency shelters. This leaves religious operators of emergency shelters with no option but to abandon their own convictions or seek relief through the courts. Allowing Congress to first balance the competing interests at stake would give it opportunity to find better solutions that narrow the area of conflict.

C. Conflicts in conducting internal affairs

Construing “sex” to include “gender identity” will also subject religious organizations to a new category of employment discrimination lawsuits, impeding their ability to carry out their missions by hiring employees who not only share, but also comply with, their faith.

The Department of Justice recently abandoned its longstanding position that “Title VII’s prohibition of discrimination based on sex [in employment] did not cover discrimination based on transgender status or gender identity *per se*.” Mem. from the Att’y Gen. on Treatment of Transgender Employment Discrimination Claims Under Title VII, to United States Attorneys 1 (Dec. 15, 2014). The EEOC has likewise redefined “sex” to include “gender identity.” *Macy v. Holder*, Appeal No. 0120120821 (EEOC April 20, 2012). And although Title VII includes an exemption for religious organizations, the EEOC improperly construes it narrowly so that it “only allows religious organizations to prefer to employ individuals who share their religion.” EEOC Compliance Manual, Section 12.C.1 (July 22, 2008), <http://bit.ly/2ifbGzn>.

But many religious organizations require more from their employees, including that they abide by the organization’s code of conduct—which often includes standards of sexual conduct—and not just that they share the same denomination. Extending the definition of “sex” to include matters touching on the type of sexual conduct that religious teachings frequently touch on, creates inevitable conflict. Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment*

Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?, Oxford J. of L. and Religion, 2015, at 2 (noting that “sexual orientation” and “gender identity” non-discrimination requirements are “at odds with sexual morality as historically taught by the nation’s major religions”). Thus, a religious employer would argue that applying its code of conduct to employees is conduct exempt from Title VII as permissible “religious” discrimination, while the EEOC would argue that it is unlawful “sex” discrimination.

The best reading of the Title VII exemption supports the conclusion that religious organizations should be exempt when their employment decisions are made with a sincere religious motive. *Ibid.* But the EEOC takes the narrower position. And if this Court concludes—either by agency deference or direct interpretation—that the definition of “sex” includes “gender identity,” that will impact the definition under Title VII as well. Thus, a broad swath of religious organizations will find themselves in need of immediate legal relief just to continue their longstanding religious practices. Again, the Court should avoid such social conflict when the issue at hand is still percolating through the legislative process.

D. Conflicts under state laws

Finally, a ruling by this Court that federal laws which outlaw sex discrimination also prohibit discrimination on the basis of gender identity will have a significant impact on state law. This is because many states construe their laws in harmony with judicial interpretations of federal laws, while other states have determined that the construction of analogous federal

laws is highly persuasive authority as to the meaning of similar state court provisions.⁶ The Appendix lists examples of state laws which could be affected.

The ripple effect in state law, in turn, will likely have a significant impact on the scope of religious exceptions based on sex in those same state anti-discrimination laws. The net result would disrupt decades of efforts by citizens nationwide to use the political process to effectively balance sensitive interests. It also may prevent legislative experimentation to discover solutions to apparently intractable conflicts.

II. Administrative rulemaking is uniquely unresponsive to religious concerns.

As evidenced by their overreaching actions in recent years, administrative agencies are not equipped to balance important religious liberty concerns with other interests.

⁶ See, e.g., *Moody-Herrera v. Dep't of Nat. Res.*, 967 P.2d 79, 83 (Alaska 1998) (“In interpreting the [Alaska Human Rights Act], we have previously looked for guidance in the parallel body of federal employment discrimination law of Title VII * * * and the accompanying federal cases.”); *Harris v. City of Santa Monica*, 294 P.3d 49, 56 (Cal. 2013) (“[B]ecause of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes”) (citation omitted); *Dep't of Health Servs. v. Comm'n on Human Rights & Opportunities*, 503 A.2d 1151, 1157 (Conn. 1986) (“We have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute.”); *Bd. of Regents v. Weickgenannt*, 485 S.W.3d 299, 306 (Ky. 2016) (“Because of its similarity to federal civil-rights legislation, the [Kentucky Civil Rights Act] tracks federal case law for guidance on claims based on gender discrimination.”).

As an initial matter, the administrative process intentionally dodges the normal give-and-take of the political process. It was designed that way, largely to eliminate what was seen as the problem of having to accommodate minority interests. Woodrow Wilson, one of the early leading advocates for increased administrative authority, fretted that public opinion was “meddlesome” and that it was too hard to persuade “a voting majority of several million heads.” Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 Notre Dame L. Rev. 1919, 1946-47 (2015) (quoting Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 208-09 (1887)). To Wilson, the primary trouble came not in the *number* of heads but in the diverse *types*: democracy required persuading “the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of negroes.” *Id.* at 1947 (quoting Wilson, 2 Pol. Sci. Q. at 209). Unfortunately, his anti-democratic views have persisted through time. In 2011, a former Director of the Office of Management and Budget publicly advocated that the country “need[s] less democracy,” and that the “serious problems facing our country” could best be solved by making “our political institutions * * * less democratic.” Peter Orszag, *Too Much of a Good Thing*, New Republic (Sept. 14, 2011), <http://bit.ly/2i4m0Kq>.

The closest that federal agencies come to allowing affected constituencies a voice in rulemaking is the promise of at least thirty days of notice and comment for certain types of rules. But even this democracy-lite aspect of the administrative process is widely understood as often little more than a “charade.” David J.

Baron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 231 (2001). "No administrator in Washington" truly relies on notice-and-comment; it is rather "a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues." E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke L. J. 1490, 1492 (1992). The resulting reality is that "administrators [are] almost entirely insulated from the public" and unreached by the dialogue and debate that invigorates and guides the democratic process. Hamburger, 90 Notre Dame L. Rev. at 1940.

This exclusion of American citizens from the decision-making process "comes with a distinctively hard edge for many religious Americans." *Id.* at 1921. Agency officials simply are not "as sensitive to religious sensibilities as are representative lawmakers." *Ibid.* They are not only insulated from "political pressures," but also infused with a "self-conscious rationalism and scientism" making them "relatively indifferent * * * to religious concerns." *Ibid.*; see also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. Rev. 1465, 1487 n.57 (1999) (noting "agencies' tunnel vision" in weighing religious matters "alongside their more traditional concerns"). This contributes to an "insensitivity of governmental bureaucracy," which has been a "continual and disturbing source of imposition" upon religious Americans, especially "religious minorities." Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. Colo. L. Rev. 1021, 1025 (2005).

Forced to appeal to indifferent and unresponsive administrators, "individuals or groups whose religious

liberty is burdened by * * * administrative regulation” have significantly reduced “leverage * * * to induce government bureaucrats to accommodate religious practices.” W. Cole Durham, Jr. *et al.*, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions*, 1993 BYU L. Rev. 421, 450 (1993). This may have been of little moment a hundred years ago, but “in the modern bureaucratic state, where government regulation increasingly pervades all social space,” religious considerations are heavily disadvantaged, burdened by “a mass of administrative rules and guidelines,” and “often sacrificed to lower order bureaucratic values such as administrative efficiency.” *Ibid.* This Court perhaps best summarized—and rejected—agencies’ sometimes blinkered decision-making eleven years ago, noting the “classic rejoinder of bureaucrats throughout history” when asked for religious exemptions: “If I make an exception for you, I’ll have to make one for everybody, so no exceptions.” *Gonzales v. O Centro*, 546 U.S. 418, 436 (2006).

This agency insensitivity to religious concerns will necessarily be exacerbated if the Court encourages or repeats the unilateral rulemaking at issue in this case.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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APPENDIX A

Summary of Relevant Religious Exceptions by State

Number of states with anti-discrimination statutes:	50
Number of states protecting against sex/gender discrimination:	50
Number of states protecting against gender identity discrimination:	18
Number of states with anti-discrimination statutes that contain religious exceptions based on sex/gender or gender identity:	39
Number of states with Religious Freedom Restoration Acts	22

**Selected Anti-Discrimination Statutory Provisions
and
Relevant Religious Exceptions by State¹**

<u>Statute</u>	<u>Protected Categories</u>	<u>Religious Exception</u>
ALABAMA*		
ALA. CODE §§ 24-8-4, 29-4-3 *ALA. CONST. ART. I, § 3.01 (1999)	<u>Sex:</u> Housing Government Employees	

¹ See Key on pages 45a-48a for explanation of numbers in “Religious Exception” column. States and citations marked with an asterisk denote heightened statutory or state constitutional protections for religious liberty akin to the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq. Bolded statues denote exemptions for religious entities or individuals.

ALASKA		
ALASKA STAT. §§ 18.56.096, 18.56.440, 18.80.210, 18.80.220, 18.80.230, 18.80.240, 18.80.250	<u>Sex:</u> Employment Education Athletics Housing Public Accommodation Extension of Credit	
ARIZONA*		
ARIZ. REV. STAT. ANN. §§ 20-632.01, 41-1421, 41-1442, 41-1462 , 41-1463, 41-1464, 41- 1491.14, 41- 1491.15, 41- 1491.20, 41- 1491.21, 42-3751 *ARIZ. REV. STAT. ANN. §§ 41-1493 TO 1439.02 (1999)	<u>Sex:</u> Insurance Practices Voting Public Accommodation Employment Housing Government Contracts	11

ARKANSAS*		
ARK. CODE ANN. §§ 4-87-104, 9-3-107, 11-4-601, 11-4-610, 6-18-1903, 6-64- 406, 11-11-225, 16- 123-107, 16-123- 204, 16-123-206, 16-123-310, 16-123- 311, 16-123-315, 16-123-316, 20-47- 220, 20-76-202, 21- 12-103 *ARK. CODE ANN. §§ 16-123-401 TO 407 (2015)	<u>Sex/Gender:</u> Employment Wages Education Housing Social Services Extension of Credit Public Accommodation State Residency	

CALIFORNIA		
<p>CAL. BUS. & PROF. CODE §§ 125.6, 798.20, 16721</p> <p>CAL. CIV. CODE §§ 51, 51.5, 51.6, 53, 782.5</p> <p>CAL. EDUC. CODE §§ 200, 220, 221, 221.5, 221.8, 230, 49023, 51500, 66270, 66271, 66281.7, 87400</p> <p>CAL. GOV'T CODE §§ 53080, 11135, 12920, 12921, 12922, 12926, 12926.2, 12940, 12943, 12944, 12945, 12949, 12955, 12995</p> <p>CAL HEALTH & SAFETY CODE §§ 1365.5, 1502.35, 1522.41, 1529.2, 8301, 33769, 50955, 51602</p>	<p><u>Sex/Gender & Gender Identity:</u></p> <p>Education Athletics Social Services Employment Wages Housing Insurance Practices Social Services Foster Care Government Contracts Public Accommodation Commerce Juvenile Detention Price Charged for Services Workplace Attire Burial</p>	<p>8, 12, 13</p> <p>Continued...</p>

CALIFORNIA		
CAL. INS. CODE §§ 10119.6, 10121.7, 10140, 10753.05, 10965.5		
CAL. LAB. CODE §§ 1197.5, 1199.5, 1777.6, 3095		
CAL. PUB. CONT. CODE §§ 2500, 6108, 10295.35		
CAL. WELF. & INST. CODE §§ 224.71, 9103.1, 16001.9, 16013		

COLORADO		
COLO. REV. STAT. §§ 5-3-210, 10-3-1104, 12-5-102, 12-12-114, 12-54-104, 12-54-301, 24-34-401 , 24-34-402, 24-34-502, 24-34-601	<u>Sex/Gender:</u> Extension of Credit Provision of Funeral Services/Cremation Foster Care Employment Housing Public Accommodation Insurance Practices Licensure	8, 9

CONNECTICUT*		
<p>CONN. GEN. STAT. §§ 4a-60, 4a-60a, 8-265c, 8-315, 10-15c, 10-153, 16-245r, 16-247r, 27-59, 31-75, 45a-726a, 46a-59, 46a-60, 46a-60a, 46a-64, 46a-64c, 46a-66, 46a-70, 46a-71--46a-76, 46a-81b, 46a-81d, 46a-81f--46a-81n, 46a-81p, 46a-81q, 46a-81aa, 52-571d, 81b</p> <p>*CONN. GEN. STAT. ANN. § 52-571b</p>	<p><u>Sex/Gender & Gender Identity:</u> Employment Housing Public Accommodation Government Contracts Professional Organizations State Agency Services State Benefits Extension of Credit Utilities Military Service Golf Country Club</p>	14, 15

DELAWARE		
<p>DEL. CODE ANN. TIT. VI, §§ 4504, 4603, 4604, 4605, 4606, 4607, 4619</p> <p>DEL CODE ANN. TIT. XVII, §§ 2304, 4124</p> <p>DEL. CODE ANN. TIT. XIX, §§ 711, 1007A</p> <p>DEL. CODE ANN. TIT. XXIX, § 6519A</p> <p>DEL. CODE ANN. TIT. XXV, §5116</p>	<p><u>Sex/Gender & Gender Identity:</u> Housing Public Accommodation Employment</p>	3

FLORIDA*		
<p>FLA. STAT. §§ 110.181, 286.011, 287.134, 420.9075, 446.51, 448.07, 542.34, 725.07, 760.08, 760.10, 760.23, 760.24, 760.25, 760.26, 760.60, 1000.05, 1012.855</p> <p>*FLA. STAT. ANN. §§ 761.01 TO 761.05</p>	<p><u>Sex/Gender:</u> Government Contracts Commerce Public Accommodation Employment Wages Housing State Employees' Charitable Campaign Club Membership Education Social Services Loans Extension of Credit Public Meetings and Records</p>	

GEORGIA		
<p>GA. CODE ANN. §§ 1- 2-7, 7-6-1, 8-3-202, 8-3-203, 8-3-204, 45- 19-29, 20-2-215, 34- 5-3, 45-19-30, 45-19- 31, 43-39A-18</p>	<p><u>Sex:</u> Employment Wages Athletics Extension of Credit Housing Foster Parents Public Office</p>	

HAWAII		
<p>HAW. REV. STAT. §§ 171-64, 246-12.2, 302A-461, 302A- 1001, 378-2, 378-2.3, 431:10A118.3, 432:1- 607.3, 432D-26.3, 489-3, 515-3, 515-4, 515-5, 515-6, 515-7, 515-16, 516-62, 612- 2</p>	<p><u>Gender & Gender Identity:</u> Public Accommodation Housing Use of Public Lands Golf Course Education and Recreation Athletics Using State Facilities or Funds Employment Wages Jury Service Insurance Practices</p>	<p>3</p>

IDAHO*		
IDAHO CODE ANN. §§ 16-2402, 18- 7301, 18-7303, 67- 5909, 67-5910 *IDAHO CODE ANN. §§ 73-401 TO -404	<u>Sex:</u> Employment Wages Public Accommodation Education Housing Employment and Health Services Real Estate	4, 9

ILLINOIS*		
<p>20 ILL. COMP. STAT. § 521/5</p> <p>105 ILL. COMP. STAT. §§ 5/10- 22.22e, 5/27a-4, 5/24-7</p> <p>205 ILL. COMP. STAT. § 635/3-8</p> <p>225 ILL. COMP. STAT. § 411/10-23</p> <p>305 ILL. COMP. STAT. § 5/11-11</p> <p>775 ILL. COMP. STAT. §§ 5/2-101, 5/2-102, 5/2-105, 5/3-102, 5/3-103, 5/3-105, 5/3-106, 5/4-102, 5/4-103, 5/5-101, 5/5-102, 10/1--10/7, 15/3, 15/5, 20/3</p> <p>*775 ILL. COMP. STAT. §§ 35/1 TO 99</p>	<p><u>Sex/Gender and Gender Identity:</u></p> <p>Employment Public Accommodation Housing Government Contracts Commerce Education Foster Care Burial State Benefits</p>	6, 17

INDIANA*		
IND. CODE §§ 16-34-4-4, 22-2-2-4, 22-9-1-2, 22-9-1-3 , 22-9.5-5-1-4, 5-16-6-1, 16-23-1-21, 24-9-3-9, 20-24-2-2, 20-25.5-4-1, 22-9-1-10, 35-46-2-2 *IND. CODE §§ 34-13-9-0.7 TO 11 (2015)	<u>Sex:</u> Housing Education Employment Wages Public Accommodation Government Contracts Hospitals Commerce Jury Selection Abortion	6

IOWA		
IOWA CODE §§ 216.6 , 216.6A, 216.7 , 216.8, 216.8A, 216.9 , 216.10, 216.11, 216.11A, 216.12 , 216.12A, 537.3311, 607A.2 729.4	<u>Gender & Gender Identity:</u> Employment Public Accommodation Housing Education Jury Service	1, 2, 16

KANSAS*		
KAN. STAT. ANN. §§ 19-4319, 44-1001, 44-1002 , 44-1009, 44-1016, 44-1017, 40-3510, 44-106 *KAN. STAT. ANN. §§ 60-5301 TO 5305	<u>Sex:</u> Employment Housing Public Accommodation Insurance Practices Civil Service	8, 9

KENTUCKY*		
KY. REV. STAT. ANN. §§ 16.055, 16.191, 18A.140, 45.570, 304.12-085, 302.20- 340, 344.040, 344.060, 344.130 , 344.555 , 344.360, 344.370, 344.362, 344.55, 344.680 *KY. REV. STAT. ANN. § 446.350	<u>Sex:</u> Employment Housing Education Government Contracts Insurance Practices	6

LOUISIANA*		
LA. REV. STAT. ANN. §§ 23:302, 23:332, 37:2719, 38:2315, 49:146 , 51:2247, 51:2606, 51:2607, 9:3583, 17:407.40	<u>Sex:</u> Employment Public Accommodation Housing Extension of Credit Education	5, 6
*LA. REV. STAT. ANN. §§ 13:5231 TO 13:5242		

MAINE		
<p>5 ME. REV. STAT. §§ 784, 1825-L, 4553, 4571, 4572, 4573- A, 4581, 4581-A, 4591, 4592, 4595, 4601, 4602, 7051</p> <p>14 ME. REV. STAT. § 1202-A</p> <p>20-A ME. REV. STAT. §§ 2404, 2412</p> <p>29-A ME. REV. STAT. § 1674</p> <p>30-A ME. REV. STAT. § 3010</p>	<p><u>Sex/Gender and Gender Identity:</u></p> <p>Employment Housing Public Accommodation Education Government Contracts Transportation Network Extension of Credit</p>	7, 10

MARYLAND		
<p>MD. COMMERCIAL LAW CODE ANN. §§ 12-113, 12-305, 12- 503, 12-603, 12-704</p> <p>MD. COURTS & JUDICIAL PROCEEDINGS CODE ANN. § 8-102</p> <p>MD. EDUC. CODE ANN. §§ 6-104, 6- 503, 13-303, 23-605</p> <p>MD. HEALTH-GEN. CODE ANN. §§ 19-408, 19-710</p> <p>MD. HEALTH OCCUPATIONS CODE ANN. § 14-5F-10</p> <p>MD. INS. CODE ANN. §§ 27-208, 27-212, 27- 501, 27-502, 27-503, 27-910, 31-119</p> <p>MD. LABOR & EMPLOYMENT CODE ANN. § 3-304</p>	<p><u>Sex/Gender & Gender Identity:</u></p> <p>Employment Housing Public Accommodation Licensed Social Workers Government Contracts Extension of Credit Jury Service Education Health Care Facilities Physician Licensing Insurance Practices Public Utilities Commercial Property</p>	1

MARYLAND		
MD. PUB. UTILITIES CODE ANN. §§ 7-507, 17-402		
MD. STATE FIN. & PROCUREMENT CODE ANN. §§ 13-219, 19- 103, 19-114, 19-115		
MD. STATE GOV'T CODE ANN. §§ 20-302, 20-303, 20-304, 20- 401, 20-402, 20-501, 20-602, 20-604 , 20- 605 , 20-606, 20-610, 20-702, 20-704, 20- 705, 20-707		

MASSACHUSETTS		
MASS. ANN. LAWS CH. 272 §§ 92A, 98; 175 § 120F, 71§ 89, 151C § 2A MASS. ANN. LAWS CH. 151B §§ 1, 4	<u>Sex & Gender Identity:</u> Public Accommodation Employment Housing Extension of Credit Insurance Practices Education	3, 4

MICHIGAN		
MICH. COMP. LAWS ANN. §§ 37.2102, 37.2202, 27.2203, 37.2205, 37.2209, 37.2402, 37.2502, 390.933, 37.2302, 750.147A, 37.2403, 259.1A	<u>Sex/Gender:</u> Employment Housing Education Government Contracts Public Accommodations Extension of Credit Aviation	5, 18

MINNESOTA		
MINN. STAT. §§ 363A.02(1)(A), 363A.08, 363A.09, 363A.11, 363A.13, 363A.17, 363A.20(2), 363A.21, 363A.23, 363A.24, 363A.26 , 363A.16, 363A.12	<u>Sex & Gender Identity:</u> Employment Housing Public Accommodation Education Extension of Credit Public Services Business	1, 2, 10

MISSISSIPPI*		
MISS. CODE ANN. §§ 57-10-519, 57-71-19, 57-77-27, 43-33-723, 37-28-43, 25-9-149 *MISS. CODE ANN. § 11-61-1	<u>Sex:</u> Business Loans Housing Education Employment	

MISSOURI*		
MO. REV. STAT. §§ 43.050, 99.886, 108.470, 161.223, 173.1102, 213.010(7) , 213.040, 213.045, 213.050, 213.055, 213.065 , 213.070(3) , 443.863 *MO. ANN. STAT. §§ 1.302 TO 1.307	<u>Sex/Gender:</u> Employment Housing Public Accommodation Education Police Extension of Credit	8, 9

MONTANA		
MONT. CODE ANN. §§ 7-15-4207, 22-2- 306, 33-18-210, 33- 20-1313, 49-2-303, 49-1-102, 49-2-304, 49-2-305, 49-2-307, 49-2-308, 49-2-309, 49-2-306, 49-3-207, 49-3-205, 49-2-101	<u>Sex:</u> Employment Housing Public Accommodation Education Insurance Practices Extension of Credit Government Contracts Government Services Public Grants	8

NEBRASKA		
NEB. REV ST. §§ 20-124, 20-132, 20-134, 20-318, 48-1104, 48-1122, 44-1525(7)(E), 79-2,116, 55-134, 45-1056	<u>Sex:</u> Employment Housing Public Accommodation Government Contracts Insurance Practices Education Militia Extension of Credit	

NEVADA		
NEV. REV. STAT. §§ 118.075, 118.100, 207.300, 207.310, 388A.453, 396.530, 432.525, 439.994, 613.310(4), 613.320 , 613.330, 613.350, 645.321, 651.050(2), 651.070	<u>Sex/Gender & Gender Identity:</u> Employment Public Accommodation Housing Extension of Credit Education Government Services	1

NEW HAMPSHIRE		
N.H. REV. STAT. ANN. §§ 53-C:3-G, 354-A:2(VII) , 135- C:13, 354-A:6, 354- A:7, 354-A:8, 354- A:10, 354-A:16, 354- A:17, 354-A:18 , 376- A:15, 417:4, 420-C:5, 110-B:65, 187- A:16A, 188-F:3A	<u>Sex & Gender Identity:</u> Employment Housing Public Accommodation Transportation Network Insurance Practices Militia Education Cable Television Government Services	3, 4, 8, 9

NEW JERSEY		
N.J. REV. STAT. §§ 10:1-1, 10:1-2, 10:1- 3, 10:1-9, 10:1-10, 10:2-1, 10:5-4, 10:5- 5(l) & (n) , 10:5-12 , 10:5-12.5 , 10:5-33 , 18A: 36-20, 34:11- 56.2, 40A:11-13, 46:3-23	<u>Sex & Gender Identity:</u> Employment Housing Public Accommodation Government Contracts Education Public Office Burial Wages	3, 7, 9

NEW MEXICO*		
N.M. STAT. ANN. §§ 28-1-7, 28-1-9	<u>Sex & Gender Identity:</u> Employment Housing Public Accommodation	1, 2, 3
*N.M. STAT. ANN. §§ 28-22-1 TO -5		

NEW YORK		
NY EXEC. LAW §§ 296, 312	<u>Sex:</u> Education Employment Extension of Credit Government Contracts Housing Public Accommodation	4, 5
NY EDUC. LAW §§ 313, 6440		

NORTH CAROLINA		
N.C. GEN. STAT. ANN. §§ 41A-4, 143- 135.5	<u>Sex:</u> Housing Government Contracts	

NORTH DAKOTA		
N.D. CENT. CODE §§ 14-02.4–16, 14-02.5- 02—05, 14-02.507— 08, 23-17.3-05, 14- 02.4-17, 14-02.5-10	<u>Sex:</u> Employment Housing Licensing Public Accommodation Extension of Credit	2

OHIO		
OHIO REV. CODE ANN. §§ 4112.02, 3301.53, 340.12, 1751.18, 4765.18, 5104.09, 5126.07	<u>Sex:</u> Housing Employment Public Accommodation Social Services Government Contracts	

OKLAHOMA*		
OKLA. STAT. TIT. XXV, §§ 1302–1306, 1307, 1308 , 1402, 1452, 1506.9 OKLA. STAT. TIT. IIIA, § 301 *OKLA. STAT. ANN. TIT. 51, §§ 251 TO 258	<u>Sex/Gender:</u> Employment Housing Social Services Public Accommodation	4, 11

OREGON		
OR. REV. STAT. §§ 418.648, 443.739, 458.505, 659.850, 659A.006 , 659A.403, 659A.421, 659A.030, 744.382	<u>Sex:</u> Education Public Accommodation Employment Housing Extension of Credit Life Insurance Social Services	1, 2, 3, 4

PENNSYLVANIA*		
<p>43 PA. CONST. STAT. §§ 954, 955</p> <p>24 PA. CONST. STAT. §§ 5002, 5004</p> <p>35 PA. CONST. STAT. § 448.804, 40 PA. CONST. STAT. § 1171.5</p> <p>*71 PA. CONST. STAT. §§ 2401 TO 2407</p>	<p><u>Sex:</u></p> <p>Employment Housing Public Accommodation Education Insurance Practices</p>	<p>3, 4, 8</p>

RHODE ISLAND*		
R.I. GEN. LAWS §§ 11-24-2, 11-24-2.1, 28-5-7, 28-5.1-14, 34-37-1-4, 28-5-2, 28-5-6, 34-37-4.2, 34-37-4.3, 34-37-5.2 *R.I. GEN. LAWS §§ 42-80.1-1 TO -4	<u>Sex & Gender Identity:</u> Employment Housing Public Accommodation Education Extension of Credit Commerce Brokerage	3, 4

SOUTH CAROLINA*		
S.C. CODE ANN. §§ 1-13-80 , 31-21-40, 38-77-122, 38-77- 123, 44-69-80 *S.C. CODE ANN. §§ 1-32-10 TO -60	<u>Sex:</u> Employment Housing Insurance Practices Healthcare	4

SOUTH DAKOTA		
S.D. CODIFIED LAWS §§ 20-13-10, 20-13-11, 20-13-12, 20-13-13, 20-13-18 , 20-13-20, 20-13-21, 20-13-22 , 20-13-23, 20-13-24, 20-13-25, 58-33-13.1	<u>Sex:</u> Employment Housing Public Accommodation Education Insurance Practices Extension of Credit Public Services	4

TENNESSEE*		
TENN. CODE ANN. §§ 4-21-401, 4-21-501, 4-21-601, 4-3-1412, , 4-21-405 , 4-21-406 , 4-21-602	<u>Sex:</u> Employment Housing Public Accommodation Education	3, 4, 11
*TENN. CODE ANN. § 4-1-407		

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TEXAS*		
<p>TEX. PROP. CODE ANN. §§ 301.021, 301.042</p> <p>TEX. LAB. CODE ANN. §§ 21.051, 21.052, 21.053, 21.109</p> <p>*TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 TO 110.012</p>	<p><u>Sex:</u> Employment Housing</p>	<p>3, 4</p>

UTAH*		
<p>UTAH CODE ANN. §§ 13-7-1, 13-7-2, 13- 7-3, 34A-5-106, 57- 21-5, 51-21-6, 51- 21-7</p> <p>*UTAH CODE ANN. §§ 63L-5-101 TO - 403</p>	<p><u>Sex & Gender Identity:</u> Employment Public Accommodation Housing</p>	<p>1, 2, 3, 4, 8, 9</p>

VERMONT		
VT. STAT. ANN. TIT. XXI, § 495	<u>Sex & Gender Identity:</u> Employment Housing Public Accommodation	3
VT. STAT. ANN. TIT IX, §§ 4502, 4503, 4504, 2362, 2388, 2410		
VT. STAT. ANN. TIT. XIII, §§ 10403, 4724		

VIRGINIA*		
VA. CODE ANN. §§ 2.2-4201, 2.2-4311, 2.2-3901, 2.2-3903, 36-96.3, 36-96.2 , 36-96.4	<u>Sex:</u> Government Contracts Employment Housing	3
*VA. CODE ANN. §§ 57-1 TO 57-2.1		

WASHINGTON		
WASH. REV. CODE ANN. §§ 49.60.222, 49.60.180, 49.60.215, 49.60.030, 49.60.040	<u>Sex & Gender Identity:</u> Housing Employment Public Accommodation	5, 8

WEST VIRGINIA		
W. VA. CODE §§ 5- 11-9, 5-11A-8	<u>Sex:</u> Public Accommodation Employment Housing	3

WISCONSIN		
WIS. STAT. §§ 111.31, 111.321, 111.36, 106.50, 106.52	<u>Sex:</u> Housing Public Accommodation Employment	

WYOMING		
WYO. STAT. ANN. §§ 21-4-302, 21-4-303, 21-7-302, 27-9-105, 27-9-102 , 6-9-101, 40-26-103, 40-26- 108	<u>Sex:</u> Public Accommodation Employment Education Housing	8

Key:

1. Religious or denominational institution or organization exempt from employment discrimination laws concerning sexual orientation or gender identity.
2. Religious or denominational institution or organization exempt from housing discrimination laws concerning sexual orientation or gender identity.
3. Religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization exempt from housing discrimination laws where exemption would promote the religious or denominational principles for which it is established or maintained.
4. Religious or denominational institution or organization that is operated, supervised or controlled by or that is operated in connection with a religious or denominational organization exempt from employment discrimination laws, where exemption would promote the religious or denominational principles for which it is established or maintained.
5. Laws do not apply to education facility owned, controlled or operated by a bona fide religious corporation, association or society.

6. Religious educational institution may deny access to any area, accommodation, or facility based upon gender.
7. Religious corporation, association, or society may require that applicants and employees conform to its religious tenets.
8. “Employer” does not include certain religious or denominational institutions, entities, corporations, educational institutions, associations, and societies.
9. “Public accommodations” do not include a religious or nonprofit fraternal or social association or corporation, or any place that is principally used for religious purposes.
10. Religious or denominational organization exempt from education discrimination laws concerning sexual orientation or gender identity.
11. Religious corporation, association, educational institution or society exempt from employment discrimination laws concerning gender.
12. Religious educational institution exempt from education discrimination laws concerning sexual orientation, gender, or gender identity.
13. Religious organization exempt from providing insurance coverage for infertility treatment in a manner inconsistent with religious and ethical principles.

14. Religious corporation, entity, association, educational institution or society exempt from employment discrimination laws or laws barring gender identity discrimination in the context of matters of discipline, faith, internal organization or ecclesiastical rule, custom or law.
15. State, or state-licensed or state-approved, child-placing agency is exempt from sexual orientation nondiscrimination law when considering where to place a child for adoption or foster care based upon sexual orientation of the parents.
16. Religious institution exempt from sexual orientation or gender identity nondiscrimination laws in the context of public accommodations.
17. Religious cemetery may restrict its services to those of same religious faith or creed.
18. Nonprofit corporation whose members share the same religious characteristic exempt from law banning discrimination on the basis of gender and marital status for the extension of credit.