No. 23-4331

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA PRITCHARD, as parent on behalf of minor C.P.; NOLLE PRITCHARD, as parent on behalf of minor C.P.; S.R.; R.L., as parent on behalf of minor S.L.; EMMETT JONES,

Plaintiffs-Appellees,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS,

Defendant-Appellant,

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:20-CV-06145-RJB

BRIEF OF CHRISTIAN EMPLOYERS ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Under Fed. R. App. P. 26.1, Christian Employers Alliance states that it has no parent corporation and does not issue stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Christian Employers Alliance ("CEA") is an alliance of Christian-owned businesses that seeks to protect religious freedom and help employees, businesses, and communities flourish. CEA members are Christ-centered organizations that believe every person bears God's image and that God purposefully created individuals as male or female. CEA members believe that risky medical treatments that try to make someone's body appear as the opposite sex are wrong and harmful. Many CEA members sponsor health insurance plans that do not cover these treatments. CEA seeks to protect its members' ability to do so here and urges the Court to reverse.

SUMMARY OF ARGUMENT

Businesses and administrators routinely decline to cover sex-specific procedures under their health insurance plans because of these procedures' risks rather than because of who requests them. But the ruling below jeopardizes that long-standing practice. The district court interpreted the Affordable Care Act's Section 1557 to *require* plans to cover *any* procedure that alters people's bodies to reflect their perceived identity—from puberty-blocking drugs to life-altering surgeries—even

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel were timely notified of this brief as required by Fed. R. App. P. 29, and all parties consented to its filing.

though 23 states and many European countries restrict such procedures.

The district court's order is not consistent with federal statutes, good science, or commonsense. Under the district court's logic, Section 1557 requires health insurance plans across America to cover every sex-specific medical procedure no matter how risky, harmful, or experimental.

The district court's interpretation was wrong for three reasons. First, even if Section 1557 covers gender identity, Section 1557 does not mandate covering unproven procedures just because they reference someone's sex. Employers can choose not to cover experimental procedures. Properly read, Section 1557 does not require all plans to cover every sex-specific medical procedure.

Second, Section 1557 does not cover gender identity. It prohibits discrimination "on the ground prohibited under … title IX of the Education Amendments of 1972." 42 U.S.C. § 18116(a). And Title IX forbids sex discrimination. 20 U.S.C. § 1681(a). No more, no less. While the district court interpreted Title IX (and thus Section 1557) to cover gender identity, citing *Bostock v. Clayton County,* 590 U.S. 644 (2020), the Court in *Bostock* said its decision was limited: employers may not consider sex when firing employees; *Bostock* did not prohibit noticing sex in other contexts where sex is relevant, such as sports and healthcare.

Third, the lower court ruling raises constitutional concerns. It would require religious entities to cover experimental procedures in their health insurance plans contrary to their religious beliefs and, in so doing, would exhibit hostility and non-neutrality toward religion. These constitutional concerns counsel against the district court's broad interpretation.

Those struggling with gender dysphoria deserve our compassion and thoughtful care. But that does not require rewriting federal statutes or rewiring our national healthcare system. The lower court decision should be reversed.

ARGUMENT

The lower court held that Blue Cross Blue Shield of Illinois violated Section 1557 by administering the Catholic Health Initiatives ("CHI") healthcare plan, which excluded coverage "for treatment, drugs, therapy, counseling services and supplies for, or leading to, gender reassignment surgery." Order on Cross Mots. for Summ. J. 3, 20, ECF No. 146. The lower court concluded that, under *Bostock*, "Section 1557 forbids sex discrimination based on transgender status" and that CHI's plan discriminates on that ground because (a) "the trigger for ... a denial of coverage was a diagnosis of 'gender dysphoria,'" (b) "[g]ender dysphoria cannot be understood without referencing sex or a synonym,"

and (c) a "person cannot suffer from gender dysphoria without identifying as transgender." *Id.* at 11–12.

The lower court then issued a class-wide injunction stopping Blue Cross "from administering or enforcing exclusions and any policies or practices that wholly exclude or limit coverage of [so-called] 'gender-affirming health care'" for any person, including minors.[2] Order on Pls.' Mot. for Classwide Relief 21, ECF No. 207. "Gender-[a]ffirming [h]ealth [c]are" includes "any health care service—physical, mental, or otherwise—administered or prescribed for the treatment of gender dysphoria; related diagnoses such as gender identity disorder, gender incongruence, or transsexualism; or gender transition." *Id.* at 19. This "includes but is not limited to" (1) "puberty delaying medication"; (2) "hormone replacement therapy"; (3) "'sex reassignment' surgery"; and (4) "other medical services" outlined in the World Professional Association for Transgender Health ("WPATH") Standards of Care. *Id.* at 19–20. The injunction's broad language covers procedures in categories #1-3 regardless of whether they comply with WPATH standards.

[2] The class injunction applies to "all individuals" who (1) have been, are, or will be participants or beneficiaries in a Blue Cross-administered ERISA self-funded "group health plan" that excludes "some or all Gender-Affirming Health Care services"; and (2) have been, are, or will be "denied pre-authorization or coverage of treatment solely based on [such] an exclusion." Order on Pls.' Mot. for Classwide Relief 19, ECF No. 207.

The injunction thus bars all institutions from sponsoring Blue Cross healthcare plans that exclude coverage of any procedure, including surgeries, for gender dysphoria or related diagnoses for any person, regardless of the treatment's risks or the institution's religious character. This broad injunction should be dissolved and the district court decision reversed because they contradict Section 1557's plain meaning.

I. Section 1557 does not require coverage of experimental medical procedures.

Even if Section 1557 covers gender identity (it does not, as explained below), refusing to cover risky, body-altering medical procedures is not sex or gender-identity discrimination under Section 1557.

A. Declining to include risky procedures does not facially discriminate based on sex or transgender status.

CHI's plan declines to include dangerous procedures used to make someone's body appear as the opposite sex, no matter who seeks the procedures. Put differently, CHI declines to cover certain procedures; it does not exclude coverage for members of one sex or those who identify as transgender. The plan thus "lacks any of the hallmarks of sex discrimination." *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023) (upholding state law banning these procedures for

minors).[3] "It does not prefer one sex over the other. It does not include one sex and exclude the other. It does not bestow benefits or burdens based on sex. And it does not apply one rule for males and another for females." *Id.* (cleaned up). Nor does the plan prefer or include persons based on gender identity. It "does not exclude anyone from [coverage] eligibility because of gender [or transgender status] but merely removes one physical condition—[gender dysphoria]—from [coverage]." *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

To be sure, the plan does not cover procedures that relate to gender dysphoria, and it takes into account the sex of the beneficiary. But that is not discrimination. Referencing sex is inevitable when discussing procedures for "transition[ing] from one gender to another." *L.W.*, 83 F.4th at 482. And mentioning sex or recognizing biology is not discrimination.

The Supreme Court made this point in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), when it upheld an abortion law that facially referenced "the pregnant woman" and thus upheld a

[3] Equal-protection cases provide guidance because equal-protection claims require establishing that the government treated "similarly situated" persons differently. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008). And under the lower court's *Bostock*-based reasoning, assessing a claim for gender-identity discrimination under Section 1557 requires showing that similarly situated persons were treated differently based on gender identity. *See Stucky v. Dep't of Educ.*, 283 F. App'x 503, 505 (9th Cir. 2008) ("Stucky succeeded in making a prima facie showing [under Title IX] by adducing evidence that she was treated differently than a similarly situated male music teacher."). Cases like *Dobbs* and *L.W.* also illustrate sex discrimination in the medical-procedures context.

"regulation of a medical procedure that only one sex can undergo." *Id.* at 236. "By the same token, the regulation of a course of treatment that only gender nonconforming individuals" undergo is not unlawful discrimination. *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1229–30 (11th Cir. 2023). Similarly, here, declining to include some procedures that may be specific to one sex or sought by those with gender dysphoria does not discriminate based on sex or gender identity.

Nor does it matter that those who identify as transgender primarily seek the non-covered procedures. To restrict coverage for gender dysphoria is not discrimination based on transgender status. *Id.* at 1229. Not all people who identify as transgender suffer from gender dysphoria. Nor do all people with gender dysphoria seek these body-altering treatments. At the same time, CHI's plan does not prevent people with gender dysphoria from receiving other treatments, such as counseling to help them resolve any discomfort with their sex.

The lower court nevertheless held that any refusal to cover these procedures constitutes sex discrimination. That theory contradicts *Dobbs* and requires every health-insurance plan to cover every sex-specific medical procedure—from sperm donation to egg retrieval.

The lower court's theory would also require insurance coverage for counseling that sought to *align* people's gender identity with their sex. After all, bans on such counseling must reference sex. Yet that result would be impossible to square with this Court's precedents allowing

states to ban such counseling. *See Tingley v. Ferguson*, 47 F.4th 1055, 1091 (9th Cir. 2022) (upholding counseling censorship law).

B. Declining to cover risky procedures is not proxy discrimination against people who identify as transgender.

The policies challenged in this case do not discriminate because they "treat similarly situated individuals evenhandedly." *L.W.*, 83 F.4th at 479; *see also Bostock*, 590 U.S. at 657 (finding that discrimination "would seem to mean treating [an] individual worse than others who are similarly situated").

Such policies target risky procedures, not transgender people. In other words, they are indication-specific: They do not cover risky procedures used to try to make someone's body appear as the opposite sex but cover the same procedures when used for non-risky purposes. Order on Cross Mots. for Summ. J. 3–4, ECF No. 146. The different purposes make the procedures different because the risks and benefits vary based on the purpose. For example, mastectomies to treat breast cancer carry different risks and benefits than mastectomies to make an otherwise healthy girl look like a boy. Because the risks and benefits of these treatments differ, the two patients are not similarly situated. Basing coverage on the condition treated, not the status of the person treated, is not discrimination.

Procedures used to make someone's body appear as the opposite sex—such as cross-sex hormones, puberty-blocking drugs, and surgical procedures—carry risks not posed when the same techniques treat other issues. Start with testosterone used to make females look more like men or estrogen used to make males look more like women. When used for those purposes, the hormones can cause infertility.[4] But testosterone is used in males to treat sexual-development problems.[5] And estrogen is given to females to treat infertility.[6] Testosterone and estrogen can also be used to treat congenital conditions like Kleinfelter Syndrome or Turner Syndrome. *L.W.*, 83 F.4th at 481. Covering these hormones to treat sexual-development problems, infertility, or congenital conditions but not covering them to make someone look more like the opposite sex is not treating similarly situated individuals differently. It protects everyone's health. "These distinct uses of testosterone and estrogen stem from different diagnoses and seek different results" based on different cost-benefit analyses. *Id.*

The same goes for body-altering surgeries. A mastectomy to make a woman look like a man differs from a mastectomy to remove cancer.

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[4] Jayne Leonard, *What causes high testosterone in women?*, Med. News Today (Jan. 12, 2023), https://perma.cc/BT38-L79X; Anna Smith Haghighi, *What to know about estrogen in men*, Med. News Today (Nov. 9, 2020), https://perma.cc/B358-S7UW.
[5] Maria Vogiatzi et al., *Testosterone Use in Adolescent Males*, 5 J. Endocrine Soc'y 1, 2 (2021), https://perma.cc/E3ZQ-4PZV.
[6] *Hormone Therapy and Fertility*, U. of Utah Health (Apr. 4, 2019), https://perma.cc/AQ48-UKTQ.

Covering the latter while not covering the former is not treating similarly situated persons differently; it is treating different conditions differently. Insurers "may reasonably conclude that a treatment is safe when used for one purpose but risky when used for another, especially when, as here, the treatment is being put to a relatively new use." *L.W.*, 83 F.4th at 480.

Puberty-blocking drugs also pose substantial risks, particularly when prescribed for gender dysphoria in minors. Children will be infertile if they begin puberty-blocking drugs at puberty's onset and then progress directly to cross-sex hormones[7]—as most children pursuing this protocol do.[8] Evidence is also emerging of other risks. One 2020 study found that rates of suicidal ideation, suicide attempts, and non-suicidal self-harm increased after minors began puberty blockers.[9] Respected scientists note that puberty blockers in minors "may prevent key aspects of [neurological] development during a sensitive period of

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[7] Shira Baram et al., *Fertility Preservation for Transgender Adolescents and Young Adults: A Systematic Review*, 25 Hum. Reprod. Update 694, 695 (2019), https://perma.cc/C2SG-GLNW; Kenny Rodriguez-Wallberg et al., *Reproductive Health in Transgender and Gender Diverse Individuals: A Narrative Review to Guide Clinical Care and International Guidelines*, 24 Int'l J. of Transgender Health 7, 8 (2023), https://perma.cc/4PJR-ZH9S.

[8] Hilary Cass, *The Cass Review, Independent review of gender identity services for children and young people: Final report* 176 (2024), https://perma.cc/5B27-EU66 ("Cass Final Review").

[9] Laura Kuper et al., *Body Dissatisfaction and Mental Health Outcomes of Youth on Gender-Affirming Hormone Therapy*, 145 Pediatrics 1, 8 (2020), https://perma.cc/VGQ5-YQ6W.

brain organization."[10] These drugs "could have significant impact on [minors'] ability to make complex risk-laden decisions, as well as possible longer-term neuropsychological consequences."[11] And puberty blockers prevent increases in bone mineral density that typically occur during puberty.[12] Just recently, leaked WPATH documents show its members acknowledging questions and concerns about puberty blockers.[13] Given these concerns, declining to cover such drugs is not discrimination based on transgender status; it is opting to spend resources on more proven treatments.

Indeed, based on these risks, many countries and clinics that pioneered these procedures have re-evaluated them. In Sweden, the leading gender clinic recently stopped providing hormonal interventions to children under 16 and limited such interventions to formal research

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[10] Diane Chen et al., *Consensus Parameter: Research Methodologies to Evaluate Neurodevelopmental Effects of Pubertal Suppression in Transgender Youth*, 5 Transgender Health 246, 249 (2020), https://perma.cc/S6PK-AXRY.
[11] Cass Final Review at App. 6.
[12] *Evidence review: Gonadotrophin releasing hormone analogues for children and adolescents with gender dysphoria*, Nat'l Inst. for Health & Care Excellence ("NICE I") 26–31 (Oct. 14, 2020), https://perma.cc/93NB-BGAN; Hilary Cass, *The Cass Review, Independent review of gender identity services for children and young people: Interim report* 38 (2022), https://perma.cc/9CT5-J6NU ("Cass Interim Review"); Cass Final Review 178.
[13] Mia Hughes, *The WPATH Files*, Env't Progress 116–18 (2024), https://perma.cc/6RT5-27GK.

trials for children aged 16 to 18.[14] The Swedish National Board of Health endorsed this limitation.[15]

In Britain, a recent government-commissioned report independently reviewed the field and determined that the basis for these procedures turns on "remarkably weak evidence."[16] The report criticized WPATH—the group referenced in the injunction below—and its guidelines for "circularity," relying on "low quality" studies and failing to follow "international standards for guideline development."[17] All that "raises serious questions about the reliability of [WPATH's] current guidelines."[18] Even before this government-commissioned report, England's National Health Service had *banned* puberty blockers for kids outside of clinical trials, concluding that "there is not enough evidence to support the safety or clinical effectiveness of [puberty-suppressing hormones] to make the treatment routinely available at this time."[19]

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[14] *Policy Change Regarding Hormonal Treatment of Minors with Gender Dysphoria at Tema Barn – Astrid Lindgren Children's Hospital*, Karolinska Inst. (2021), https://perma.cc/DCA8-UGTG.
[15] *Summary of Key Recommendations from the Swedish National Board of Health and Welfare (Socialstyrelsen/NBHW)*, Soc'y for Evidence Based Gender Med. (Feb. 27, 2022), https://perma.cc/3QTT-QL3L.
[16] Cass Final Review 13; *accord* NICE I at 4; *Evidence review: Gender-affirming hormones for children and adolescents with gender dysphoria*, Nat'l Inst. for Health & Care Excellence 6 (Oct. 21, 2020), https://perma.cc/PKL6-C6P3.
[17] Cass Final Review 130–31.
[18] *Id.* at 130.
[19] *Clinical Policy: Puberty suppressing hormones (PSH) for children and young people who have gender incongruence/gender dysphoria*, Nat'l Health Serv. (Mar. 12, 2024), https://perma.cc/4GZT-2PK7.

The Finnish government has also restricted access to these procedures for minors. It stopped allowing surgical transition procedures altogether.[20] And, like England, it has limited puberty blockers and cross-sex hormones to centralized research clinics.[21]

Given these risks and unproven benefits, courts have upheld state laws regulating body-altering treatments as rational health and welfare regulations. *See, e.g.*, *Eknes*, 80 F.4th at 1227; *L.W.*, 83 F.4th at 491. Even the Department of Veterans Affairs decided not to "move forward with covering gender-affirmation surgery," pending "further analysis."[22]

In sum, the risks, especially for minors, that several experts, courts, and European countries have recognized give employers "common and respectable reasons" for not covering these procedures that "cannot possibly be considered such an irrational surrogate for opposition to" those who identify as transgender. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

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[20] *Medical treatment methods for dysphoria associated with variations in gender identity in minors – recommendation*, Council for Choices in Health Care in Fin. 2 (June 16, 2020), https://perma.cc/K52P-CKFF.
[21] *Id.*
[22] Rebecca Kheel, *VA Won't Cover Gender-Affirmation Surgery for Transgender Veterans Until It Reviews PACT Act Effects*, Military.com (Feb. 26, 2024), https://perma.cc/ZWC2-T2YN.

II. Section 1557 covers sex, not gender-identity discrimination.

A. Title IX does not prohibit gender-identity discrimination.

Even if refusing to cover risky procedures is gender-identity discrimination (it is not), that refusal would not violate Section 1557 because Section 1557 does not cover gender-identity discrimination.

1. Title IX prohibits sex discrimination; it does not require ignoring sex.

Section 1557 incorporates Title IX's prohibition of sex discrimination, which states that "[n]o person in the United States shall, on the basis of sex, ... be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). That prohibition does not require covered actors to ignore sex. To the contrary, Title IX's text, history, and implementing regulations show that Title IX allows and sometimes requires sex distinctions.

a. Title IX's plain text prohibits treating one sex worse than the other.

To interpret statutes, courts "begin with the text," *United States v. Randall*, 34 F.4th 867, 874 (9th Cir. 2022), and give "terms their ordinary meaning at the time Congress adopted them," *Niz-Chavez v. Garland*, 593 U.S. 155, 160 (2021). Courts must not "add to, remodel, update, or detract from old statutory terms" to fit their "own imaginations." *Bostock*, 590 U.S. at 654–55.

Start with "on the basis of sex." When Title IX was adopted in 1972, "sex" was commonly understood to refer to biological differences between males and females. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (noting "the overwhelming majority of dictionaries" in the 1970's defined "'sex' on the basis of biology and reproductive function"). Sex was considered an "immutable" trait, "determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Next, to "be subjected to discrimination," 20 U.S.C. § 1681(a), implies an unjust distinction, or "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit," *Webster's Third New International Dictionary* 648 (1966). Discrimination is thus the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 286 (2011) (cleaned up). So sex discrimination means more than treating males and females differently; it means subjecting someone to "differential" or "less favorable" treatment than similarly situated persons based on their biological status as male or female, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005), where "there is no justification for the difference in treatment," *CSX*, 562 U.S. at 287.

Title IX also regulates "discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.

§ 1681(a). So, what constitutes a reasonable distinction between men and women depends on whether the sexes are similarly situated in educational programs like classrooms, social organizations, extra-curricular activities, and athletics. *See Apache Stronghold v. United States*, 95 F.4th 608, 632 (9th Cir. 2024) (en banc) (per curiam) (interpreting RLUIPA's "substantial burden" language to reflect statute's specific land-use context).

Statutory text must also be "interpreted in its statutory and historical context and with appreciation for its importance to the [statute] as a whole." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001). The text "cannot be divorced from the circumstances existing at the time [the statute] was passed" or "from the evil which Congress sought to correct and prevent." *United States v. Champlin Refin. Co.*, 341 U.S. 290, 297 (1951).

Title IX's historical backdrop reveals Title IX's purpose: to promote opportunities for women; not to prohibit all sex distinctions. "Title IX was Congress's response to significant concerns about discrimination against women in education." *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999). "Title IX's remedial focus is [thus], quite properly, not on the overrepresented gender, but on the underrepresented gender; in this case, women." *Cohen v. Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996).

Put this all together and the plain meaning is straightforward: Title IX prohibits treating one sex worse than the other sex when it comes to the full and equal enjoyment of educational opportunities.

b. Title IX does not prohibit all sex distinctions.

Because men and women sometimes differ, not all sex distinctions constitute unlawful discrimination. Courts have thus allowed employers to use physical-fitness standards tailored for each sex, *see Bauer v. Lynch*, 812 F.3d 340, 350–51 (4th Cir. 2016), the Navy to use different standards for promoting male officers than for female officers, *see Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975), and states to regulate "medical procedure[s] that only one sex can undergo," *Dobbs*, 597 U.S. at 236, like procedures for testicular cancer, prostate cancer, breastfeeding, pregnancy, and cervical cancer, *see L.W.*, 83 F.4th at 482 (collecting examples).

Courts have further acknowledged that males and females are sometimes differently situated in education. For example, the Supreme Court recognized that, in educational programs, "a community made up exclusively of one sex is different from a community composed of both." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (cleaned up). So "[a]dmitting women to [the previously all-male Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements,

and to adjust aspects of the physical training programs." *Id.* at 550 n.19. This Court has similarly recognized that "actual [physical] differences between the sexes" show that men and women "are not similarly situated in certain circumstances" like sports "due to average physiological differences" between men and women. *Clark ex rel. Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1129–31 (9th Cir. 1982).

Because males and females are not always similarly situated in educational contexts, Title IX permits and sometimes requires sex distinctions. This differs starkly from Title VII's employment context. While Title IX addresses only sex discrimination with unique language and exceptions relevant only for sex, Title VII forbids employment discrimination based on several traits like race, sex, and religion equally, treating these traits the same. For an obvious reason: each of those traits is equally irrelevant for employment.

Unlike Title VII, Title IX allows some sex distinctions in education. It allows (1) "separate living facilities for the different sexes," 20 U.S.C. § 1686; (2) groups like fraternities, sororities, and "youth service organizations" traditionally "limited to persons of one sex," *id.* § 1681(a)(6); and (3) beauty-pageant scholarships "limited to individuals of one sex only," *id.* § 1681(a)(9). Title IX also carves out "father-son or mother-daughter activities." *Id.* § 1681(a)(8). And Title IX speaks about sex in binary terms: "if such activities are provided for students of *one*

sex, opportunities for reasonably comparable activities shall be provided for students of *the other sex*." *Id.* (emphasis added).

Title IX regulations similarly allow sex distinctions. These regulations allow for (1) sex-education classes designated by sex, 34 C.F.R. § 106.34(a)(3); (2) "separate toilet, locker room, and shower facilities on the basis of sex" so long as the facilities are comparable for each sex, *id.* § 106.33; and (3) schools to "sponsor separate [sports] teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport," *id.* § 106.41(b). The regulations also require schools to provide "equal athletic opportunity for members of both sexes," including equal opportunities in "the selection of sports and levels of competition" necessary to "effectively accommodate the interests and abilities of members of both sexes." *Id.* § 106.41(c).

All these distinctions are critical to providing equal opportunities in areas that Title IX seeks to address, like sports. Indeed, "the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement" without sex-specific teams. *Cape v. Tenn. Secondary Sch. Athletic Ass'n*, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam).

But "[i]f 'sex' were ambiguous enough to include 'gender identity' … the various [Title IX] carveouts … would be rendered meaningless." *Adams*, 57 F.4th at 813. For example, those who identify as transgender

would be preferred because they "would be able to live in both living facilities associated with their biological sex and living facilities associated with their gender identity." *Id.* Title IX's exemptions only make sense if sex means biological sex.

2. *Bostock* does not dictate the interpretation of Title IX.

Because Title IX allows and sometimes requires sex distinctions, the lower court wrongly invoked *Bostock* to find that Section 1557 (through Title IX) forbids gender-identity discrimination.

Bostock dealt only with hiring and firing in employment under Title VII. In contrast, Title IX deals with educational opportunities. "[T]he school is not the workplace." *Adams*, 57 F.4th at 808. This Court has already so held by recognizing that certain "Title VII precedents .... are not relevant" in Title IX's educational context. *Neal*, 198 F.3d at 772 n.8.

Indeed, *Bostock*'s logic cannot work universally in Title IX (or Section 1557). Title VII forbids sex distinctions in employment because "sex is not relevant to the selection, evaluation, or compensation of employees." *Bostock*, 590 U.S. at 660 (cleaned up). But sex *is* relevant in many educational contexts like sports. *See Cohen*, 101 F.3d at 177 (athletics and employment "require[] a different analysis in order to determine the existence *vel non* of discrimination"). Because sex distinctions are valuable and sometimes necessary for equal educational

opportunities, Title IX does not prohibit all sex distinctions and *Bostock*'s logic does not apply.

Bostock itself recognized this, expressly limiting its holding to hiring and firing under Title VII. *See* 590 U.S. at 681 (noting that no "other federal or state laws that prohibit sex discrimination" were before the Court and the Court "ha[d] not had the benefit of adversarial testing about the meaning of their terms, and w[ould] not prejudge any such question"). Even under Title VII, *Bostock* declined to opine about "bathrooms, locker rooms, or anything else of the kind," where sex is relevant. *Id.* Other courts agree and correctly note that "the rule in *Bostock* extends no further than Title VII." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021); *accord Adams*, 57 F.4th at 808.

Applying *Bostock* beyond Title VII to Title IX, as the lower court did, simply does not work. *Bostock* held that Title VII forbids employers from considering sex (even in part) when they fire employees. Applying that reasoning to Title IX would mean Title IX forbids schools from considering sex (even in part) when they field sports teams. That would make every sex-designated sports team illegal under Title IX because "athletics programs *necessarily* allocate opportunities separately for male and female students." *Cohen*, 101 F.3d at 177 (emphasis in original); *see also Adams*, 57 F.4th at 817 (rejecting *Bostock*'s extension for this reason).

But sex-designated teams are necessary for equal educational opportunities because they accommodate the average physiological differences between men and women. This Court recognized these differences in *Neal* when it confirmed that Title VII "precedents are not relevant in the context of collegiate athletics." 198 F.3d at 772 n.8. "Unlike most employment settings," this Court explained, "athletic teams are gender segregated, and universities must decide beforehand how many athletic opportunities they will allocate to each sex." *Id.* "Because men are not 'qualified' for women's teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance." *Id.* The lower court's theory conflicts with this precedent.

3. *Bostock* cannot apply to Title IX and Section 1557 without a clear congressional statement.

Federalism concerns require a clear statement from Congress before courts can expand the scope of Title IX or Section 1557.

Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 679 (2023). Even in interpreting "expansive language," courts may "insist on a clear" statement before intruding on the state's traditional police powers. *Bond v. United States*, 572 U.S. 844, 860 (2014). Such powers include public education, *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972), and health and medicine, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905).

Moreover, "Title IX was enacted as an exercise of Congress' powers under the Spending Clause." *Jackson*, 544 U.S. at 181. So was Section 1557. 42 U.S.C. § 18116(a); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012). When the legislature acts under this authority, courts insist that "Congress speak with a clear voice." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). This gives federal-fund recipients notice of their obligations. *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022) (construing "the reach of Spending Clause conditions with an eye toward ensuring that the receiving entity of federal funds had notice that it will be liable") (cleaned up). The government cannot surprise recipients with "retroactive conditions" on accepting federal dollars, *Pennhurst*, 451 U.S. at 25 (cleaned up), nor impose "a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982).

These federalism concerns demand a clear statement here. Applying *Bostock*'s reasoning to Title IX and Section 1557 would infringe on core state responsibilities over health, medicine, and education and would burden employers who receive federal funds without notice. But Congress' "intention" to cover gender-identity discrimination under Title IX and Section 1557 is not "unmistakably clear in the language of the statute[s]." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)

(cleaned up). To the contrary, doing so goes against those statutes' text and purpose. *Supra* § I.A.1–2.

Bostock does not contradict the clear-statement requirement for Title IX. Title IX's "contractual framework distinguishes Title IX from Title VII" because Title IX conditions funds on compliance, while Title VII operates as "an outright prohibition." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). So, Title IX's validity does not rest on the government's "sovereign authority to enact binding laws," but on the recipient having "voluntarily and knowingly" accepted the contractual terms. *Cummings*, 596 U.S. at 219.

B. This Court's precedent permits a proper reading of Section 1557.

None of this Court's precedent forecloses a proper reading of Section 1557. Though *Doe v. Snyder* suggested that Section 1557 prohibits gender-identity discrimination, 28 F.4th 103, 113–14 (9th Cir. 2022), and *Grabowski v. Arizona Board of Regents* said that *Bostock* applies to Title IX, 69 F.4th 1110, 1116 (9th Cir. 2023), those comments were unnecessary to those cases' holdings. In *Snyder*, the plaintiff failed to show irreparable harm needed for a preliminary injunction. 28 F.4th at 113 (refusing to "reach the merits of Doe's constitutional and statutory challenges"). And in *Grabowski*, the "complaint fail[ed] to allege [the required] deprivation of [Plaintiff's] educational opportunity." 69 F.4th at 1114, 1118 (upholding dismissal of

discrimination claim and admitting that even if "discrimination on the basis of perceived sexual orientation is actionable under Title IX," that "does not resolve the issues before [the Court]"). The comments about *Bostock* were thus dicta. And while this Court follows "[w]ell-reasoned" dicta, *Creech v. Tewalt*, 84 F.4th 777, 788 (9th Cir. 2023), *Snyder* and *Grabowski*'s dicta were not well-reasoned. These cases did not give "due consideration of the alternative[ ]" arguments (outlined above) that *Bostock* does not apply to Title IX and that Section 1557 does not prohibit gender-identity discrimination. *United States v. Ingham*, 486 F.3d 1068, 1078 n.8 (9th Cir. 2007). And in neither case did the Court or the parties address Title IX's purpose, sex-distinctive language, regulations, clear-notice cannons, sports, or this Court's prior precedents interpreting Title IX and Title VII differently.

Snyder's and *Grabowski*'s dicta illustrate why this Court should read its "well-reasoned dicta" rule narrowly, or even disregard it. *See Ford v. Peery*, 9 F.4th 1086, 1095 (9th Cir. 2021) (Vandyke, J., dissenting from denial of reh'g en banc) (noting the rule's "serious difficulties"). When courts address unnecessary issues, they issue an unconstitutional "advisory opinion[ ]." *Nat'l Fed'n of the Blind v. United Airlines Inc.*, 813 F.3d 718, 746 (9th Cir. 2016) (Kleinfeld, J., concurring). Dicta also has a "subjective and amorphous nature." *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 796 (9th Cir. 2012) (Tashima, J., concurring); *see also Barapind v. Enomoto*, 400 F.3d 744, 759 (9th Cir. 2005) (per

curiam) (Rymer, J., concurring in part and dissenting in part) (calling views in dicta "no different from the same views expressed in a law review article; neither should be treated as a judicial act that is entitled to binding effect").

To compound these problems, "the line between well-reasoned dicta and not-well-reasoned dicta seems to lie largely in the eye of the beholder." *Peery*, 9 F.4th at 1087 n.2 (Vandyke, J., dissenting). And "the rule creates confusion: it is unclear what qualifies as 'well-reasoned,' and even the articulation of the rule itself has changed over time." *Id.* at 1095–96 (Vandyke, J., dissenting). To avoid these issues, this Court should read *Snyder*'s and *Grabowski*'s dicta for what it is: unreasoned and unpersuasive.[23]

III. This Court should reject the lower court's Section 1557 interpretation to avoid constitutional concerns.

The lower court's Section 1557 interpretation—which forces some religious employers to insure risky body-altering procedures that conflict with their faith—raises constitutional concerns that this Court should avoid. Under the constitutional-avoidance doctrine, if an act is subject to "competing plausible interpretations," *Clark v. Martinez*, 543 U.S. 371, 381 (2005), the statute must be construed "to avoid not only the conclusion that it is unconstitutional but also grave doubts upon

[23] *Grabowski*'s dicta also does not apply here because it evaluated a sexual-orientation discrimination claim in the sexual-harassment context, not a gender-identity claim in the insurance context. 69 F.4th at 1116–17.

that score," *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (cleaned up).

The lower court's Section 1557 interpretation raises constitutional concerns, particularly under the Free Exercise Clause.[24] For example, the lower court's theory would likely violate the Clause's religious-autonomy doctrine. That doctrine prevents the government from "undermin[ing] the independence of religious institutions in a way that the First Amendment does not tolerate," *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020), including by meddling "with an internal church decision that affects the faith and mission of the church itself," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 190 (2012).

The doctrine "guard[s] against a political interference with religious affairs," *id.* at 184 (cleaned up), barring the state from interjecting "secular interests" into purely internal church matters, *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969), or exerting "power to change … ancient faith and doctrine to" a "different doctrine" more to the government's taste, *Kedroff v. St. Nicholas Cathedral of Russian*

[24] Such concerns have led religious organizations to challenge coverage mandates like the lower court's injunction, including in this Court. *See, e.g.*, *Foothill Church v. Watanabe*, 854 F. App'x 174 (9th Cir. 2021); *Cedar Park Assembly of God of Kirkland v. Kreidler*, 860 F. App'x 542 (9th Cir. 2021); *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738 (9th Cir. 2020).

Orthodox Church in N. Am., 344 U.S. 94, 108 (1952). The doctrine broadly covers decisions involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

Here, the lower court's ruling interferes with the ability of churches and other religious organizations to provide employee benefits according to their religious beliefs. Before the lower court issued its injunction, churches and religious organizations like CHI could ensure the integrity of their teaching and practice by declining to facilitate dangerous body-altering procedures. Now CHI and similar organizations must choose between affordable health insurance coverage for their employees and their faith. Forcing these churches and religious institutions to cover these procedures while they preach that these procedures are religiously improper undermines their teaching and internal relationships with their employees. The government can no more compel coverage of these procedures than force churches to pay for abortions or assisted suicide.

Next, the lower court's ruling lacks neutrality and threatens to show hostility toward organizations' religious beliefs. It does so because it failed to incorporate Title IX's religious exemption into Section 1557, even though Section 1557 allows for this exemption.

Section 1557 prohibits discrimination "on the ground prohibited" in Title IX and three other federal statutes. The federal government has interpreted Section 1557 to incorporate *secular* exemptions from those three other statutes, but the government and now the lower court have not incorporated Title IX's *religious* exemptions in their interpretation of Section 1557. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016) ("The [HHS Rule that implements Section 1557] did not incorporate Title IX's religious or abortion exemption even though it incorporated the exemptions of the other three federal non-discrimination statutes.").[25]

This incorporation of secular, but not religious, exemptions into Section 1557 displays a lack of neutrality and general applicability that is contrary to the Free Exercise Clause. "[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). "[T]argeting is

[25] While the 2022 Section 1557 Rule no longer expressly incorporates exemptions from these statutes, it does not expressly reject these exemptions either. For Title IX, however, the Rule expressly refuses to incorporate the Title IX religious exemption: the new Rule intends "not to import any of the Title IX exceptions into the Section 1557 regulation" because "the best reading of Section 1557 is that it does not incorporate Title IX's religious exception or any of the other Title IX exceptions." Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47840 (Aug. 4, 2022). Under the best reading, then, the new Rule continues to incorporate the secular exemptions from the other statutes, just not Title IX's religious exemption.

not required for a government policy to violate the Free Exercise Clause. Instead, favoring comparable secular activity is sufficient." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 686 (9th Cir. 2023). The incorporation of secular, but not religious, exemptions into Section 1557 will likely result in comparable secular activities receiving favorable treatment compared to religious activities that receive no specific exemption.

The failure to address or incorporate Title IX's religious exemptions also displays religious hostility. Laws cannot be based "on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638 (2018). "[E]ven slight suspicion" that a law "stem[s] from animosity to religion or distrust of its practices" is enough to infringe the protections guaranteed by the Constitution. *Id.* at 638–39. Because the lower court failed to address or incorporate Title IX's religious exemption in its injunction, the injunction automatically becomes suspect when it applies to or affects religious entities. This result was not hard to anticipate. The plan below belonged to the *Catholic* Health Initiatives. The district court knew CHI had religious objections to covering these procedures that do not "align with the teachings and doctrine of the Catholic Church." 2-ER-205. But the district court did not even address, much less incorporate, the statutory mechanisms for protecting those concerns. By failing to tailor its injunction to address the statutory protections given to religious

organizations, the district court's injunction shows hostility toward CHI's religious beliefs. Better to avoid these knotty constitutional concerns by rejecting the district court's injunction—or to at least narrow it to the plaintiff or to only cover plans administered for entities without any religious objections to the named procedures.

CONCLUSION

The lower court's broad ruling contradicts Title IX's original and ordinary meaning, overextends Section 1557 with dire consequences for the healthcare system, and interferes with religious organizations' religious exercise. This Court should reject the lower court's interpretation of Section 1557 and reverse the decision below.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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I hereby certify that on April 19, 2024 I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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